

**A CRITICAL APPRAISAL OF AFRICA'S RESPONSE TO  
THE WORLD'S FIRST PERMANENT INTERNATIONAL  
CRIMINAL COURT**

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## **CHAPTER 1: INTRODUCTION: AIM, RATIONALE AND LITERATURE REVIEW**

The Statute of the International Criminal Court was adopted on 17 July 1998 by an overwhelming majority of the States attending the Rome Conference. Included in that body of like-minded nations was a large number of African delegations, and of 54 African States, 44 have signed and 31 - South Africa amongst them - have ratified the Statute. That is a significant proportion of the 114 states that have to date ratified worldwide.

In this dissertation I provide a critical appraisal of Africa's response to the International Criminal Court. The aims of this dissertation are both to investigate the response of African States to this new and rapidly developing field of international law and to assess the prospects for international criminal law within the region. My premise is that the African continent ought to view the International Criminal Court and its system of complementarity as a primary mechanism in the struggle against authoritarian regimes and a key component in the fight for human rights. As I show later in this dissertation, not all African institutions and certainly not all of Africa's leaders are enamoured of the Court. Accordingly, a large part of the dissertation is aimed at describing, understanding, and critiquing the African backlash against the ICC, particularly within the African Union. In the Court's first years of work it has become essential that African civil societies, regionally and locally, take steps to impress upon African governments the importance of joining the International Criminal Court regime. And once those governments joined the regime, it has been vital for civil society to cajole and encourage those governments to take steps to comply with their obligations under the Rome Statute. Accordingly, in the thesis I not only endeavour to analyse the African response to the ICC, but also to recommend various proposals by which the current impasse between the Court and the African Union might be remedied, or at least ameliorated.

Over the past years I have been privileged to both research and practise in the field of international criminal justice, with a particular focus on Africa. This PhD accordingly draws on a number of articles or chapters in books (all peer-reviewed) that I have published in the field. In addition, I have completed a further number of articles which are ready for submission for publication and which make up the remainder of the dissertation. In the course of the text I indicate which publications I am drawing on, and together with this PhD I will lodge hard copies of the articles and chapters that I have relied upon. The articles or chapters draw from my personal experience either as an advocate involved in African international criminal justice cases, or as a senior research associate at the Institute for Security Studies working on the International Crime in Africa Programme – and always with an academic inclination based on my associate professorship at the University of KwaZulu-Natal.

Currently all the Court's first cases are in respect of African situations. Three countries in the Great Lakes region of Africa (the Central African Republic, the Democratic Republic of Congo, and Uganda) were the first to refer "situations" in their respective territories to the ICC Prosecutor for investigations and possible

prosecutions.<sup>1</sup> Cote d'Ivoire, in West Africa, subsequently made history by becoming the first non-party to lodge a declaration accepting the ICC's jurisdiction.<sup>2</sup> Most recently, another East African nation, Kenya, indicated that it too wished to refer a situation to the Court (although, as I describe later, the ICC Prosecutor instead chose to seek authorization from the ICC's Pre-Trial Chamber for his first *proprio motu* (of his own accord) investigation of a situation).<sup>3</sup> Before Kenya, Sudan was the last and most controversial African situation to come within the Prosecutor's sights. Unlike the other African situations which had come to the Court by way of so-called "self-referrals", it was the UN Security Council, acting under its Chapter VII authority of the UN Charter, that referred the situation in Darfur, Sudan, to the ICC.

Africa is thus where international criminal justice is taking shape. The field of international criminal law is rapidly evolving on the African continent. While there is ample international literature on the International Criminal Court as an institution, there is a paucity of African-based scholarship on the work of the Court in this region. The scholarship that does exist is referred to by me in the various chapters that follow (in footnotes), but I humbly stress that many of the articles that I have published or are ready for submission by me (and which form the basis of the PhD) are in material respects the first additions to the literature. In that respect the dissertation draws on material that is "original" in both senses of the word.

The framework for how the various chapters contribute to the overall argument of the thesis is as follows.

After this introductory chapter (**chapter 1**) I begin in **chapter 2** with a discussion of the rise of the International Criminal Court, including a discussion of the core crimes under international criminal law, and I situate the Court within an African context by reference to the Court's jurisdiction and the question of immunities and amnesties before the ICC. I draw in this regard on my chapter published in South Africa's leading international law textbook, Dugard, *International Law: A South African Perspective*, 3<sup>rd</sup> edition, 2008.

In **chapter 3** I focus on a core concept of the International Criminal Court: complementarity. Complementarity is perhaps the key feature of the ICC regime. It is thus vitally important to appreciate its significance, and in so doing, to understand both the promises and problems of international criminal justice for Africa as exemplified by the International Criminal Court.

The International Criminal Court 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 complementarity principle is the

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<sup>1</sup> Payam Akhavan, "Self-Referrals Before the International Criminal Court: Are States the Villains or the Victims of Atrocities?" (2010) 21 *Criminal Law Forum* 1046; Mohamed M. El Zeidy, "Critical Thoughts on Article 59(2) of the ICC Statute" (2006) 4 *Journal of International Criminal Justice* 448; Claus Kress, "'Self-Referrals' and 'Waivers of Complementarity' Some Considerations in Law and Policy" (2004) 2 *Journal of International Criminal Justice* 944.

<sup>2</sup> Press Release, ICC, Registrar confirms that the Republic of Côte d'Ivoire has accepted the jurisdiction of the Court (15 February 2005).

<sup>3</sup> Press Release, ICC OTP, Kenyan High-Level Delegation meets ICC Prosecutor (3 July 2009); Situation in the Republic of Kenya, Case No. ICC-01/09-19, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya (31 March 2010).

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 ICC seeks to prosecute and who happen to be in one's jurisdiction. As I point out in later chapters, a central concern for African states has been the ICC's request for cooperation by African states parties to the Court to arrest President Omar al-Bashir of Sudan – wanted by the Court for genocide, war crimes and crimes against humanity. The complementarity principle has resonated in this respect for South Africa – which was requested to arrest al-Bashir when news broke that he would attend Jacob Zuma's inauguration as president in Pretoria in 2008.

To understand South Africa's legal position (and to make sense of its political prevarication on the al-Bashir saga), it is necessary to have a proper appreciation of South Africa's domestic legislation that has implemented the Rome Statute into South African law. I discuss this legislation and its implications in detail in **chapter 4** of the dissertation.

South Africa's progressive legislation aside, our country quickly found itself mired in the African Union's politics around the work of the ICC on the continent. After the Court's African focus became clear there was (in hindsight) a predictable backlash against the Court. That backlash is captured in statements to the effect that the ICC is a Western, or imperialistic initiative; that it is some form of colonial throwback; or the imposition of a developed world's form of justice on an unsuspecting and servile African people; and that the Court is unhealthily preoccupied with the African continent. It is of obvious concern then that the ICC has come under such vitriolic attack from within Africa and by scholars associated with Africa. What **chapter 5** proceeds to do is to consider the criticisms in turn. How valid are the attacks on the ICC? And what lessons (if any) might be drawn from the fact that these attacks have been made?

Part of the backlash described in chapter 5 includes a decision by the African Union (at a meeting to which South Africa was a party) that the members of the African Union be called upon not to cooperate with the ICC in respect of the arrest and surrender of President al-Bashir. There has also been a call by the African Union that the Security Council of the United Nations use its power under article 16 of the Rome Statute to defer the proceedings in respect of al-Bashir before the ICC (proceedings that arose from a prior decision by the Security Council to refer the Sudan crisis to the ICC). In light of the defiant response of the Sudanese government to the ICC and the ICC's action against Sudanese suspects, including President al-Bashir, these developments raise several questions regarding the Court's ability to enforce the referral. And given the African Union's strident criticism of the Security Council for failing to defer the case – an option under Article 16 of the Rome Statute, which allows for investigations and prosecutions to be suspended for 12-month periods – there is increasing attention being given to the question of the deferral power built into the Rome Statute. Accordingly, the issue of the Sudan referral and deferral is arguably one of the most significant events since the Court's inception and worthy of close analysis. I perform that analysis in **chapter 6**.

In the background in the preceding chapters (and increasingly now in the forefront of international political discourse around the ICC, certainly within the AU), is the fact that international criminal justice is subject to the uneven and imbalanced landscape of global politics. For Africa, a key concern in this regard is the relationship between the UN Security Council and the ICC, specifically the Council's powers of referral and deferral under the Rome Statute (Articles 13 and 16). The skewed institutional power of the Security Council creates an environment in which it

is more likely that action will be taken against accused from weaker states than those from powerful states, or those protected by powerful states. Thus the perception is that by referring the Darfur situation to the ICC but not acting in relation to, for instance, Israel, the Council, through certain influential members, is guilty of double-standards. The difficulty for the ICC – and in particular its efforts on the African continent – is that its work is increasingly criticised as an example of a Western institution unhealthily preoccupied with Africa. The power of the Council to refer matters to the Court with the concomitant power to decide on deferral of matters under article 16 of the Rome Statute remains a real issue. The controversial nature of the Council’s relationship with the ICC arises as we have seen from the inherent defects within the Council, defects which for a long time African and other states have complained about. But the controversy is heightened in respect of the ICC and Sudan, since Sudan is not a state party to the Court, yet non-state parties on the Council voted for the referral (and have the power to refuse deferral).

I consider these issues in the final chapter – **chapter 7** – and provide some recommendations going forward, and draw various conclusions for Africa and the African Union. I conclude the thesis by considering in detail the vital role that South Africa has to play in respect of the ongoing work of the Court to ensure that the Court – while criticised constructively when that is required – is championed as a vital component for the delivery of justice to African victims of mass atrocities.

I confirm that the thesis is comprised of a minimum of five inter-related articles. In total the thesis is now 74,000 words, including this introduction. At least three of those articles are already published under my name (“Complementarity and Africa: the promises and problems of international criminal justice” *African Security Review*, vol 17 part 4 2008; “South Africa’s Implementation of the ICC Statute – An African Example”, *Journal of International Criminal Justice*, 2007, vol 5, 460; “International Criminal Law”, in *SACJ*, 2010, Issue 2; “The Future of International Criminal Justice – Civil Society, Complementarity and the Case of South Africa”, *African Security Review*, vol 19, no 4, (2010)), and I have also included book chapters published in my name (“International Criminal Law, the International Criminal Court, and South Africa’s Implementation of the Rome Statute of the International Criminal Court Act”, in John Dugard, *International Law: A South African Perspective*, 3<sup>rd</sup> Edition, 2008, Juta Publishers; and “Confronting Myths about the International Criminal Court and its Work in Africa” in Chile Eboe-Osuji (ed) *Protecting Humanity: Essays in International Law and Policy in Honour of Navanethem Pillay*, 2010, Martinus Nijhoff Publishers).

In addition to those chapters (or portions of chapters) that are already published, I have included a final chapter (“The Law and Politics of Referrals and Deferrals under Articles 13 and 16 of the Rome Statute of the International Criminal Court”) which is ready to be submitted for publication to an international journal. I also point out for the sake of completeness that after this thesis had been finalised, I completed updates of the book chapter “International Criminal Law, the International Criminal Court, and South Africa’s Implementation of the Rome Statute of the International Criminal Court Act” for the forthcoming edition of John Dugard, *International Law: A South African Perspective*, 4<sup>th</sup> Edition, due for publication in early 2012.

## CHAPTER 2: THE RISE OF THE INTERNATIONAL CRIMINAL COURT AND ITS IMPLICATIONS FOR AFRICA<sup>4</sup>

### *The idea of an international criminal court*

The idea of a permanent international criminal court was on the international agenda for much of the last century.<sup>5</sup> After World War I unsuccessful attempts were made to bring the German Emperor to trial before an international tribunal<sup>6</sup> and, later, to try Turks responsible for the genocide of Armenians before a tribunal designated by the Allied Powers.<sup>7</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,<sup>8</sup> 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. The aggressive war conducted by Germany and the atrocities committed by its officials and soldiers during World War II provided the requisite impetus for the creation by Allied powers of an *ad hoc* international military tribunal at Nuremberg<sup>9</sup> (a similar tribunal was constituted in Tokyo<sup>10</sup> 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 World War II for crimes against the peace, war crimes and crimes against humanity was a natural culmination of the pre-war debate over an international criminal court. Inevitably, however, there was criticism of the fact that

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<sup>4</sup> Portions of this chapter were originally published as chapter 10, "International Criminal Courts, the International Criminal Court, and South Africa's Implementation of the Rome Statute" (2007) in John Dugard *International Law – A South African Perspective*.

<sup>5</sup> For an account of this history see B Ferencz *An International Criminal Court. A Step towards World Peace – A Documentary History and Analysis* (1980).

<sup>6</sup> Article 227 of the Treaty of Versailles (*UK Treaty Series No 1* (1919)) 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 United Kingdom, the United States, France, Italy and Japan. The attempt to bring the Emperor to trial was thwarted when he was granted asylum by the Netherlands.

<sup>7</sup> The unratified Treaty of Sevres of 1920 (*UK Treaty Series No 11* (1920)) 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 1923 the Treaty of Lausanne (*UK Treaty Series No 16* (1923), Part VIII) granted amnesty to these persons. See V N Adrian "Genocide as a Problem of National and International Law: The World War I Armenian Case and its Contemporary Legal Ramifications" (1989) 14 *Yale Journal of International Law* 221.

<sup>8</sup> Convention for the Creation of an International Criminal Court in M O Hudson *International Legislation* vol 7, no 500 (1941).

<sup>9</sup> See Telford Taylor *The Anatomy of the Nuremberg Trials* (1992). The judgment of the Nuremberg Tribunal is published in (1947) 41 *AJIL* 172.

<sup>10</sup> A C Brackman *The Other Nuremberg. The Untold Story of the Tokyo War Crimes Trials* (1989).

these tribunals were established by the victors to try the vanquished.<sup>11</sup> The United Nations 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.<sup>12</sup> The enthusiasm generated by Nuremberg and Tokyo for a permanent court in the immediate post war period was, however, abandoned during the Cold War. Even the consensus between East and West over apartheid failed to produce the court proposed to try apartheid's criminals in the late 1970s.<sup>13</sup>

By the 1980s a wide range of factors combined to strengthen 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 United Nations to renew its interest in a permanent international criminal court.

The idea of a permanent criminal court for the world was placed back on the international agenda through a proposal by Latin American States who envisaged such a court as their last resort to prosecute international drug-traffickers.<sup>14</sup> Thereafter the International Law Commission was directed by the UN General Assembly to consider the drafting of a statute of 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 ILC and forwarded to the General Assembly for consideration.<sup>15</sup> 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. 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 in the territory of the former Yugoslavia since 1991.<sup>16</sup> Then, in November

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<sup>11</sup> For an insightful overview of the criticisms of the Nuremberg trials, see R Overy, "The Nuremberg trials: international law in the making" (2003) in P Sands (ed), *From Nuremberg to The Hague – the Future of International Criminal Justice* 1.

<sup>12</sup> See W A Schabas *An Introduction to the International Criminal Court* (2004) 8.

<sup>13</sup> In 1979 the United Nations 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 M Cherif Bassiouni *A Draft International Criminal Code and Draft Statute for an International Criminal Tribunal* (1987) 10-11.

<sup>14</sup> See K Kittichaisaree *International Criminal Law* (2001) 27.

<sup>15</sup> See J Crawford "The ILC's Draft Statute for an International Criminal Tribunal" (1994) 88 *AJIL* 140; J Crawford "The ILC Adopts a Statute for an International Criminal Court" (1995) 89 *AJIL* 404.

<sup>16</sup> SC Resolution 808 of 22 February 1993 and SC Resolution 827 of 25 May 1993. For detailed accounts of the creation of the ICTY see M Cherif Bassiouni and P Manikas *The Law of the International Criminal Tribunal for the Former Yugoslavia* (1996) Chapters I-III. See too V Morris and M Scharf *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia: A Documentary History and Analysis* (1995).

1994, and acting on a request from Rwanda, the Security Council voted 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 the year 1994.<sup>17</sup> These two tribunals are still in operation (although they are both aiming to wind down operations in the foreseeable future). They are close relatives, sharing virtually identical statutes, as well as the same Prosecutor and Appeals Chamber. The first prosecutor, from 1994 to 1996, was Richard Goldstone of the South African Constitutional Court. The President of the Appeals Chamber for the Rwanda Tribunal, prior to her appointment as a judge of the International Criminal Court, was Judge Navi Pillay, another South African.

The Rwanda and Yugoslav Tribunals fuelled the widespread belief that a permanent international criminal court was desirable and practical. When delegates convened in Rome in 1998 to draft a statute for a permanent international criminal court, the Tribunals could provide a reassuring model of how such a court might function. In addition to the example which the Tribunals provided of working criminal justice, the innovative international criminal law jurisprudence that they had produced – such as the progressive view that crimes against humanity could be committed in peacetime,<sup>18</sup> and the finding that war crimes could be committed during an internal armed conflict<sup>19</sup> – fed into the debates at Rome and eventually came to be reflected in the Rome Statute.<sup>20</sup>

The Statute of the International Criminal Court was adopted on 17 July 1998 by an overwhelming majority of the States attending the Rome Conference. The conference was specifically organized to secure agreement on a treaty for the establishment of a permanent international criminal tribunal. After five weeks of intense negotiations, 120 countries voted to adopt the treaty. Only seven countries voted against it (including China, Israel, Iraq, and the United States) and twenty-one abstained. 139 states signed the treaty by the 31 December 2000 deadline. The treaty would come into force upon sixty 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 98 States have ratified it.<sup>21</sup> Of those 98 States a very significant proportion – twenty-seven – are African.<sup>22</sup> South

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<sup>17</sup> SC Resolution 955 of 8 November 1994. For detail see C Scheltema and W van der Wolf (eds) *The International Tribunal for Rwanda: Facts, Cases, Documents* (1999).

<sup>18</sup> At Nuremberg “crimes against humanity” were prosecuted as crimes associated with one of the other crimes within the Nuremberg Tribunal’s jurisdiction, namely, war crimes and crimes against peace. Since Nuremberg several variants of crimes against humanity developed, not all with a nexus with armed conflict (the most prominent example is genocide – the most egregious form of crime against humanity – which the Genocide Convention of 1948 defines as an offence which can be committed in times of peace and war). The requirement of a nexus with armed conflict was firmly done away with by the Yugoslavia Tribunal in its celebrated decision in *Prosecutor v Tadic* (Case No. IT-94-1-AR72), 2 October, 1995, (1997) 35 ILM 32. Article 7 of the Rome Statute codifies this evolution of crimes against humanity as being crimes committed either in times of peace or war.

<sup>19</sup> See *Tadic* above n 18. Interesting developments have also come out of the Rwanda Tribunal’s decisions. For instance, in the *Akayesu* matter (Judgment, ICTR Trial Chamber (2 September 1998), Case No. ICTR-96-4-T), the Rwanda Tribunal came to the enlightened conclusion that rape could constitute an act of genocide.

<sup>20</sup> W A Schabas *An Introduction to the International Criminal Court* (2004) 12.

<sup>21</sup> For latest ratification status see [www.iccnw.org](http://www.iccnw.org).

<sup>22</sup> For status of African ratification see [www.iccnw.org/countryinfo/RATIFICATIONSbyUNGroups.pdf](http://www.iccnw.org/countryinfo/RATIFICATIONSbyUNGroups.pdf).

Africa is a party to the Statute and has been a vocal endorser of the International Criminal Court. One significant absentee as a ratifier is the United States.<sup>23</sup> It is notable that within just four years the treaty achieved the 60 required ratifications, far sooner than was generally expected.

Along with the *ad hoc* international criminal tribunals for Rwanda and Yugoslavia, together with the more recently established Special Court for Sierra Leone,<sup>24</sup> the International Criminal Court stands as a working model of international criminal justice in terms of which an international criminal forum applies rules of international law, is staffed by independent prosecutors and judges, and holds persons individually responsible for crimes against humanity and war crimes, after allowing them a fair trial.

### ***The International Criminal Court***

The International Criminal Court is situated in The Hague, the capital of the Netherlands. The judges for the Court were sworn in on 11 March 2003 at the Court's inaugural session. Of the eighteen judges, three of the original set of judges were from Africa,<sup>25</sup> including Judge Navi Pillay who is South African.

Africa is high on the Court's agenda. As we shall see later, its first cases are all on the African continent.

The International Criminal Court is divided into an Appeals Division, a Trial Division and a Pre-Trial Chamber Division.<sup>26</sup> The Office of the Prosecutor (OTP) is responsible for receiving and examining referrals and substantiated information on alleged crimes, conducting investigations and conducting prosecutions before the Court.<sup>27</sup> The OTP is headed by the Prosecutor, who has full authority over the management and administration of the OTP.<sup>28</sup> 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

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<sup>23</sup> There is a vast literature critiquing the failure by the United States to join the Court. For selected reading, see M P Scharf "The United States and the International Criminal Court: The ICC's jurisdiction over nationals of non-party states: a critique of the US position" (2001) *Law and Contemporary Problems* 64; M du Plessis, "Seeking an *International International Criminal Court – Some Reflections on the United States opposition to the ICC*" (2002) 15 3 *SACJ* 301; W A Schabas, "United States hostility to the International Criminal Court: It's all about the Security Council" (2004) 15 4 *EJIL* 710.

<sup>24</sup> On 2 November 2002 the Special Court for Sierra Leone was established pursuant to Security Council Resolution 1315. This tribunal is the result of an agreement between the UN and Sierra Leone to try "those who bear the greatest responsibility" for crimes against humanity and disrupting the peace process. The Court is a hybrid, staffed by local and international personnel, and has an international prosecutor. Its temporal jurisdiction to prosecute international crimes under its Statute stretches back to crimes committed from 30 November 1996.

<sup>25</sup> Navanethem Pillay (South Africa), Akua Kuenyehia (Ghana), Fatoumata Dembele Diarra (Mali).

<sup>26</sup> Articles 34 and 39 of the Rome Statute.

<sup>27</sup> Article 42(1).

<sup>28</sup> Article 42(2).

who exercises his functions under the authority of the President of the Court.<sup>29</sup> 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.<sup>30</sup>

## *ICC 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.<sup>31</sup> Aggression also falls within the competence of the ICC but an acceptable definition of this crime has still to be added to the Statute.<sup>32</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.<sup>33</sup> 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 fifty-page document adopted in June 2000 by the Preparatory Commission for the International Criminal Court.<sup>34</sup>

### (a) Genocide

Genocide involves the intentional mass destruction of entire groups, or members of a group.<sup>35</sup> The first criminal prosecution of “genocide” took place at the International Military Tribunal at Nuremberg, although strictly speaking, the Germans were being tried for “crimes against humanity” under the Nuremberg Charter.<sup>36</sup> It took almost half a century with the establishment of the ICTY and ICTR before genocide came again to be prosecuted at the international level.<sup>37</sup>

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<sup>29</sup> Article 43.

<sup>30</sup> Article 112.

<sup>31</sup> Articles 5-8.

<sup>32</sup> Article 5(2). See further W A Schabas “The Unfinished Work of Defining Aggression: How Many Times Must The Cannonballs Fly, Before They are Forever Banned” in D McGoldrick, P Rowe and E Donnelly (eds), *The Permanent International Criminal Court – Legal and Policy Issues* (2004) 123. The definition has most recently been agreed upon at the First Review Conference of the International Criminal Court held in late May/early June 2010 in Kampala, Uganda.

<sup>33</sup> Article 123(1).

<sup>34</sup> See the Finalized Draft Text of the Elements of Crimes (PCNICC/2000/INF/3/Add.2).

<sup>35</sup> The crime of genocide has been committed throughout history, the pre-eminent example being the mass killing of Jews by the Nazis during World War II, and more recently the slaughter of Tutsis by Hutus in Rwanda. 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 R Lemkin, *Axis Rule in Occupied Europe* (1944) 79-95; R Lemkin, “Genocide as a Crime Under International Law” (1947) 41 *AJIL* 145.

<sup>36</sup> There was no reference to the crime of genocide in the Charter or the judgment of the tribunal, even though it did appear in the indictment and was referred to by the Prosecution from time to time.

<sup>37</sup> See K Kittichaisaree *International Criminal Law* (2001) 67. There was at least one *national* prosecution of genocide prior to the ICTY and ICTR’s existence; namely, the prosecution of *Eichmann*

Article 6 of the Rome Statute, following Article IV of the Genocide Convention, defines the various classes of action that constitute the crime of genocide:

- (i) killing members of a national or ethnic, racial, or religious group (meaning their “murder”, i.e., intentional, voluntary killing);<sup>38</sup>
- (ii) causing serious bodily or mental harm to members of the group (these terms “do not necessarily mean that the harm is permanent or irremediable”);<sup>39</sup>
- (iii) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction (including, inter alia, “subjecting a group of people to a subsistence diet, systematic expulsion from homes and the reduction of essential medical services below minimum requirement[s]”);<sup>40</sup>
- (iv) imposing measures intended to prevent birth within the group (such measures would consist of “sexual mutilation, the practice of sterilization, forced birth control [and the] separation of the sexes and prohibition of marriage”);<sup>41</sup> or
- (v) forcibly transferring children of the group to another group.

The victim of the crime of genocide is the group itself and not the individual.<sup>42</sup> The definition of genocide in the Rome Statute provides that genocide is any one of the enumerated acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such. The common criterion in the four types of groups protected under the Genocide Convention (national, ethnic, racial or religious) is that “membership in such groups would seem to be normally not challengeable by its members, who belong to it automatically, by birth, in a continuous and often irremediable manner”.<sup>43</sup> The “victim” group therefore does not extend to what might be called “political” and “social” groups. In respect of the Rome Statute, the drafters have evinced a clear intention to limit the groups to the four identified by the Genocide Convention. The idea of including a “cultural group” in the ICC Statute was rejected at the Rome Conference. The drafters were quick to point out that the Genocide Convention was aimed at preventing physical destruction of a group, not cultural destruction.<sup>44</sup>

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before the District Court of Jerusalem (1968). Eichmann was tried for crimes against the Jewish people, an offence under Israeli law which incorporated all the elements of the definition of genocide (see Antonio Cassese *International Criminal Law* (2003) 97).

<sup>38</sup> *Akayesu* ICTR, Trial Chamber, judgment of 2 Sept. 1998, Case No. ICTR 96-4-T paras. 500-501.

<sup>39</sup> *Akayesu* n 38 paras. 502-504.

<sup>40</sup> *Akayesu* n 38 paras. 505-506.

<sup>41</sup> *Akayesu* n 38 para. 507.

<sup>42</sup> K Kittichaisaree *International Criminal Law* (2001) at 69.

<sup>43</sup> *Akayesu* n 38 para. 511.

<sup>44</sup> The same view has been expressed by the ICTY Trial Chamber in its ruling in *Prosecutor v. Radislav Krstić* (ICTY Trial Chamber, decision of 2 August 2001, case no. IT-98-33-T). There it confirmed that “customary international law limits the definition of genocide to those acts seeking the physical or biological destruction of all or part of a group”, with the result that an “enterprise attacking only the cultural or sociological characteristics of a human group in order to annihilate these elements which give to that group its own identity distinct from the rest of the community would not fall under the definition of genocide” (para. 580). Genocide appears therefore to be limited to material destruction of a group, rather than the destruction of the national, linguistic, religious, cultural or other identity of that group. It is for this reason that the Australian courts have held that degradation of

Genocide is the most serious crime against humanity, as evidenced in the high threshold set for the mental element required for proof of genocide. In the *Jelisis* case the ICTY explained that “it is in fact the *mens rea* which gives genocide its speciality and distinguishes it from an ordinary crime and other crimes against international humanitarian law”.<sup>45</sup> Both customary and conventional definitions of genocide require a prosecutor to establish a form of aggravated criminal intention, or specific intent (*dolus specialis*), in addition to the criminal intent accompanying the underlying offence. The accused must commit the underlying offence with the intent to produce the result charged; that is, the intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such. Genocide is therefore a crime perpetrated against a “depersonalised” victim, and carried out for no other reason than that he or she is a member of a specific national, ethnic, racial or religious group.<sup>46</sup>

The intention must be to destroy a group “in whole or in part”. Genocide can thus be committed through the destruction of a large number of the group (a quantitative attempt at destruction) or the destruction of a limited number of the group who are targeted because of the potential impact of their destruction on the survival of the group as a whole (a qualitative attempt at destruction). An example of the latter would be the act of destroying young fertile women in a group who are of childbearing age. The element of specific intent in the context of genocide “may, in the absence of direct explicit evidence, be inferred from a number of facts and circumstances, such as the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of the atrocities committed, the systematic targeting of victims on account of their membership of a particular group, or the repetition of destructive and discriminatory acts”.<sup>47</sup> In *Akayesu* for example, the ICTR Trial Chamber found that the accused had the requisite *mens rea* to commit genocide, and had exhibited that aggravated criminal intention through, *inter alia*, the systematic rape of Tutsi women. According to the ICTR, the systematic rape of Tutsi women was part of the campaign to mobilise the Hutus against the Hutu, and the sexual violence was aimed at destroying the spirit, will to live, or will to procreate, of the Tutsi group.<sup>48</sup>

#### (b) Crimes against humanity

The term “crime against humanity” was first used in its contemporary sense to condemn the atrocities committed by the Turkish forces against their own Greek and

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Aboriginal people through confiscation of traditional lands cannot amount to genocide by the responsible ministers, since the confiscation was not aimed at material destruction of the group as such (see G Robertson *Crimes Against Humanity* (2000) at 230.

<sup>45</sup> *Jelisis (Appeal)*, ICTY Appeals Chamber, judgment of 5 July 2001, case no. IT-95-10-A para. 66.

<sup>46</sup> The specific intention of destroying all or part of the group must have been formed by the accused prior to the commission of the genocidal act. Put differently, the underlying genocidal act (killing, causing serious bodily or mental harm etc.) should be done to further the genocidal goal of ensuring the group’s destruction (see *Kayishema and Ruzindana*, ICTR Trial Chamber, Case No. 96-1-T, judgment of 21 May 1999, para. 91).

<sup>47</sup> *Jelisis (Appeal)*, ICTY Appeals Chamber, judgment of 5 July 2001, case no. IT-95-10-A, para. 47. See also the decision of the ICTR Appeals Chamber in *Kayishema and Ruzindana* Case No ICTR 95-1-A, Judgment (ICTR) Appeals Chamber 1 June 2001.

<sup>48</sup> *Akayesu* n 38 para. 732.

Armenian subjects during World War I in 1915. Although no prosecutions ultimately took place, the immediate response of the Allied powers to the massacres was for France, 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 civilization”.<sup>49</sup> At Nuremberg, the idea of a crime against humanity arose again. 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 “humaneness”, and thereby became the concern of the international community.<sup>50</sup>

At Nuremberg the notion of crimes against humanity was limited to those acts that occurred only during an international armed conflict.<sup>51</sup> Today in international criminal law the nexus between crimes against humanity and war has disappeared, and customary international law prohibits crimes against humanity whether they are committed in time of war or peace.<sup>52</sup>

Crimes against humanity are prohibited under Article 7 of the Rome Statute. The term “crimes against humanity” under the Statute covers actions that have a common set of features:<sup>53</sup>

- 1) The offences are particularly egregious in that they constitute a serious attack on human dignity or a grave degradation or humiliation of one or more human beings;
- 2) They are not isolated or sporadic events, but are acts that form part of governmental policy, or of a widespread or systematic practice of atrocities tolerated, condoned or acquiesced in by a government or *de facto* authority;
- 3) Their prohibition extends regardless of whether they are perpetrated in times of war or peace;
- 4) Under the Rome Statute (and the Statutes of the ICTY and the ICTR) the victims of the crimes are civilians or, in the case of crimes committed during

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<sup>49</sup> See above n 7.

<sup>50</sup> This use of the idea of crimes against humanity – to initiate prosecutions against individuals for atrocities committed within their own territories – led to a measure of discomfort for the Allied powers, who were concerned about the ramifications for their treatment of minorities within their own countries and colonies. As a result, the Nuremberg notion of “crime against humanity” had an important rider attached to it: a crime against humanity was committed if it was *associated or linked* with one of the other crimes under the Tribunal’s jurisdiction, being war crimes and crimes against the peace (aggression). What this meant is that there had to be a link between crimes against humanity and *international armed conflict*. In part that is why the Nuremberg trials are spoken of as “war crimes trials” – since the crimes against humanity there could only be tried if they were attendant to either a crime against peace or war crimes (see W A Schabas, *An Introduction to the International Criminal Court* (2004) 42.

<sup>51</sup> However, within weeks of the Nuremberg judgment the United Nations expressed its dissatisfaction with this limited scope of crimes against humanity when the General Assembly asserting in the Genocide Convention of 1948 that genocide (the most egregious form of crimes against humanity) could be committed during times of war *and* peace. On that and other developments that gradually led to the link between crimes against humanity and war being dropped, see A. Cassese “Crimes against Humanity” in A Cassese et al (eds) *The International Criminal Court: A Commentary*, vol I, (2002) 73.

<sup>52</sup> Cassese *ibid*. The most recent developments relate to the ICTR and ICTY. The establishment of the ICTR – to punish those guilty of crimes committed in an internal conflict – in itself reiterates the point that crimes against humanity do not have to be attendant to an international armed conflict. See too the ICTY Appeals Chamber in its decision in *Prosecutor v Tadic* (1997) 105 ILR 453 at para. 141.

<sup>53</sup> Cassese *supra* note 51 64.

armed conflict, persons who do not take part (or no longer take part) in armed hostilities.

The specific acts or classes of offences that make up crimes against humanity under the Rome Statute are those commonly associated with egregious abuses of human rights and include: murder;<sup>54</sup> extermination<sup>55</sup> (involving mass or large-scale killing<sup>56</sup>, or intentional infliction of conditions of life, *inter alia*, the deprivation of food and medicine, calculated to bring about the destruction of part of a population<sup>57</sup>); enslavement;<sup>58</sup> deportation or forcible transfer of population<sup>59</sup> (being the “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”<sup>60</sup>); imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;<sup>61</sup> torture<sup>62</sup> (being “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”<sup>63</sup>); sexual violence (which includes “rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity.”<sup>64</sup>); persecution<sup>65</sup> (being “the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity”<sup>66</sup>); enforced disappearance<sup>67</sup> (being “the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, 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.”<sup>68</sup>); the crime of apartheid<sup>69</sup> (which includes “inhumane acts of a character similar to [other crimes against humanity], committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups

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<sup>54</sup> Article 7(1)(a).

<sup>55</sup> Article 7(1)(b).

<sup>56</sup> In *Vasiljevic*, ICTY Trial Chamber, 29 November 2002, the Tribunal held that for criminal responsibility to attach for extermination the accused must have been responsible for a “large number of deaths”. See also D Mundis “Current Developments at the *ad hoc* International Criminal Tribunals” (2003) 1 *Journal of International Criminal Justice* 521.

<sup>57</sup> Article 7(2)(b).

<sup>58</sup> Article 7(1)(c).

<sup>59</sup> Article 7(1)(d).

<sup>60</sup> Article 7(2)(d).

<sup>61</sup> Article 7(1)(e).

<sup>62</sup> Article 7(1)(f).

<sup>63</sup> Article 7(2)(e).

<sup>64</sup> Article 7(1)(g).

<sup>65</sup> Article 7(1)(h).

<sup>66</sup> Article 7(2)(g).

<sup>67</sup> Article 7(1)(i).

<sup>68</sup> Article 7(2)(i).

<sup>69</sup> Article 7(1)(j).

and committed with the intention of maintaining the regime”;<sup>70</sup> and other inhumane acts,<sup>71</sup> which are acts “of a similar character to [other crimes against humanity] intentionally causing great suffering, or serious injury to body or to mental or physical health”.<sup>72</sup>

The Rome Statute sets various thresholds that elevate these classes of offences to the level of crimes against humanity. The first requirement is that the act complained of must be part of a widespread or systematic attack. Article 7(2) provides elucidation when it says that an attack is “a course of conduct involving the multiple commission of acts referred to in [Article 7(1)] against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.” The second requirement is that the attack must be directed against a *civilian population*. This distinguishes it from many war crimes which may be targeted at both civilians and combatants, and the requirement also distinguishes the Rome Statute from customary international law which allows that a crime against humanity may be committed against civilians and military personnel. Lastly, a crime against humanity cannot be committed unless a specific form of intention is present. Article 7(1) provides that a “crime against humanity” means any of the enumerated acts when committed as part of a widespread or systematic attack directed against any civilian population, “with knowledge of the attack”. This requirement amounts to a form of specific intent which sets another threshold that must be crossed before a particular offence can be regarded as a crime against humanity.<sup>73</sup>

### (c) War crimes

War crimes have an ancient lineage and historically belligerent States took it upon themselves to determine those acts committed in time of war for which they would try the combatants or civilians belonging to the enemy. 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>74</sup>

Generally speaking, war crimes are crimes committed in violation of international humanitarian law applicable during armed conflicts. The sources of

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<sup>70</sup> Article 7(2)(h).

<sup>71</sup> Article 7(1)(k).

<sup>72</sup> Article 7(1)(k).

<sup>73</sup> W A Schabas, *An Introduction to the International Criminal Court* (2004) 45. Clearly each of the underlying acts committed (in terms of the greater event: the attack) require their own form of intent. However, overall, these acts must be committed with a specific intention that is associated with the main event - the attack that gives the individual acts their “crime against humanity” character.

<sup>74</sup> 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 which produced mock trials which resulted in only 13 convictions out of 901 cases, and with insignificant sentences which ultimately were not executed. See G Abi-Saab “*The concept of ‘war crimes’*”, 102-103, in S Yee and W Teyea (eds) *International Law in the Post-Cold War Area* (2001) 102-103.

international humanitarian law are vast, and are broadly divided into two categories of substantive rules – “the law of The Hague”<sup>75</sup> and “the law of Geneva”<sup>76</sup> – and which constitute the rules concerning behaviour which is prohibited in the case of an armed conflict.

Drawing extensively from 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 which is prohibited in situations of armed conflict. Various preconditions for a war crimes prosecution are built into the Statute. First, in order to constitute a violation of Article 8 of the Rome Statute there must be a nexus between the criminal conduct and the armed conflict. War crimes may be committed during either international or internal armed conflicts<sup>77</sup> with States Parties to the Rome Statute having accepted that war crimes’ responsibility can be founded during times of civil war. Secondly, the Rome Statute directs the Court’s attention “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”.<sup>78</sup> This so-called “non-threshold threshold” built into Article 8 ensures that two jurisdictional triggers (1: that the war crime is committed as part of a plan or policy; and 2: 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. Thirdly, Article 30 of the Statute provides that criminal responsibility for a war crime requires intent and knowledge: intent in relation to the conduct, namely, that the person means to engage in the conduct, and knowledge in relation to the consequence, namely, that the person means to cause that consequence or is aware that it will occur in the ordinary course of events.

Drawing on the Geneva Conventions and international humanitarian law, the Statute adopts a four-part division to its elucidation of “war crimes” – the first two

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<sup>75</sup> 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. 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.

<sup>76</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 the civilians, the wounded, 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 rules. The Hague rules 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.

<sup>77</sup> *Tadic (Appeal) (Decision on the defence motion for Interlocutory Appeal on Jurisdiction)*, ICTY Appeals Chamber, decision of 2 October 1995, (case no. IT-94-1-AR72), paras. 96-136. Up until this decision the scope of international responsibility for war crimes was the subject of much confusion. The two major sources of humanitarian law – war crimes codified in the Geneva Conventions and their Protocols, and which addressed the protection of the victims of armed conflict from “grave breaches”, and war crimes as understood under The Hague Convention, which focused on the methods and materials of warfare – did not appear to extend international criminal responsibility to those who committed the prohibited acts during times of internal armed conflicts. In *Tadic* the ICTY Appeals Chamber stated that international criminal responsibility for war crimes included acts committed during internal armed conflict, that is, during times of civil war.

<sup>78</sup> Article 8(1).

divisions cover war crimes committed during an international armed conflict; the last two divisions cover war crimes committed during an internal armed conflict.

### **(i) War crimes in times of international armed conflict**

#### *Grave Breaches of the Geneva Conventions (Article 8 (2)(a))*

The Rome Statute provides in Article 8(2)(a) that any of the following acts (“grave breaches”) committed during an international armed conflict against persons or property protected under the provisions of the relevant Geneva Convention will amount to a war crime: wilful killing; torture or inhuman treatment, including biological experiments; wilfully causing great suffering, or serious injury to body or health; extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; compelling a prisoner of war or other protected person to serve in the forces of a hostile Power; wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trials; unlawful deportation or transfer or unlawful confinement; taking of hostages.

The persons protected by Article 8(2)(a) are combatants who are considered *hors de combat* because of injury, shipwreck or illness, or because they have been taken as prisoners of war, and civilians. The notion of ‘protected property’ is not defined in any of the Geneva Conventions but is generally regarded as property found in territories occupied by foreign forces. Such property, which would include medical units and establishments, medical transports, and hospital ships, amongst others, may not be destroyed except in cases of military necessity.<sup>79</sup>

#### *Other Serious Violations of the Laws and Customs Applicable in International Armed Conflict, Within the Established Framework of International Law (Article 8 (2)(b))*

Article 8(2)(b) sets out the second category of war crimes and which are limited to international armed conflict. The “serious violations of the laws and customs applicable in international armed conflict” are generally drawn from the law of The Hague. Unlike the focus of the grave breaches crimes under Article 8(2)(a), which aim to protect the innocent victims of war or those who are *hors de combat*, the focus of the crimes under Article 8(2)(b) is on the combatants themselves. These crimes are a continuation of ancient rules of chivalry reflecting a code of conduct amongst warriors.<sup>80</sup> As a general overview, article 8(2)(b) of the Rome Statute includes prohibitions on attacks against the civilian population,<sup>81</sup> attacks against civilian objects,<sup>82</sup> as well as attacks that violate the principle of proportionality<sup>83</sup> and attacks against undefended places.<sup>84</sup> Civilians are also protected against “misuse”, for

<sup>79</sup> K Kittichaisaree *International Criminal Law* (2001) 41.

<sup>80</sup> W A Schabas *An Introduction to the International Criminal Court* (2004) 60.

<sup>81</sup> Article 8(2)(b)(i).

<sup>82</sup> Article 8(2)(b)(ii).

<sup>83</sup> Article 8(2)(b)(iii), which prohibits an attack which 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.

<sup>84</sup> Article 8(2)(b)(v), such undefended places being defined as towns, villages, dwellings or buildings which are undefended and which are not military objectives.

instance, the use of civilians or protected persons as a means to render certain points or areas immune from military operations,<sup>85</sup> and 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>86</sup> 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.<sup>87</sup> The improper use of signs and perfidy is rendered a war crime,<sup>88</sup> and there is a prohibition on killing or wounding persons who are *hors de combat*.<sup>89</sup> Lastly, 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>90</sup>

Several of the provisions of Article 8(2)(b) deal with prohibited weapons (for example, poison or poisoned weapons,<sup>91</sup> poisonous gases and all analogous liquids, materials or devices,<sup>92</sup> and dumb-dumb bullets<sup>93</sup>) and render their use a war crime.

In addition to the provisions reflecting The Hague rules, there are some “*new crimes*” under paragraph (b) and which have now been codified by the drafters at Rome. They cover, for instance, the protection of humanitarian and peacekeeping missions<sup>94</sup> and prohibit environmental damage.<sup>95</sup> Another new war crime under the Statute is the conscription or enlistment of children under the age of fifteen into the national armed forces or to use them to participate actively in hostilities.<sup>96</sup> Another development relates 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>97</sup> enforced sterilization or any other form of sexual violence also constituting a grave

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<sup>85</sup> 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.

<sup>86</sup> 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”.

<sup>87</sup> Article 8(2)(b)(xiii).

<sup>88</sup> 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”.

<sup>89</sup> Article 8(2)(b)(vi).

<sup>90</sup> Article 8(2)(b)(xii), as read with Article 40 of Additional Protocol I of 1977.

<sup>91</sup> Article 8(2)(b)(xvii).

<sup>92</sup> Article 8(2)(b)(xviii).

<sup>93</sup> Article 8(2)(b)(xix).

<sup>94</sup> See 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 Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict.

<sup>95</sup> Article 8(2)(b)(iv).

<sup>96</sup> Article 8(2)(b)(xxvi).

<sup>97</sup> 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”.

breach of the Geneva Conventions.<sup>98</sup> While the terms “rape” and “enforced prostitution” already appear in the Fourth Geneva Convention and Protocol I of 1977, the outlawing of “sexual slavery”, “forced pregnancy”, and “enforced sterilization” are essentially new crimes.

## **(ii) War Crimes in Times of Non-International Armed Conflict**

### *Violations of Common Article 3 of the Geneva Conventions (Rome Statute Article 8(2)(c) and (d))*

The criminal acts proscribed by this section are the Common Article 3<sup>99</sup> crimes of violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; committing outrages upon personal dignity, in particular humiliating and degrading treatment; taking of hostages; and the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all judicial guarantees which are generally recognized as indispensable. The prohibited acts listed under article 8(2)(c) of the Rome Statute, like the “grave breaches” in article 8(2)(a), are acts which are committed against “protected persons”. Such “protected persons” are described in article 8(2)(c) as “persons taking no active part in the hostilities [civilians], including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause”.

These standards represent a “common denominator of core human rights”<sup>100</sup> that must be respected by those engaged in hostilities, whether they are engaged in an international or non-international armed conflict. While the prohibitions apply to armed conflicts “not of an international character” the ICC Statute provides that these protections do not extend “to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature”.<sup>101</sup> Internal disturbances and acts of terrorism which do not amount to an armed conflict are therefore not subject to the laws of armed conflict at all, although the State (but not the rebels) will be subject to the provisions of any human rights treaties to which the State is a party.<sup>102</sup>

### *Other Serious Violations of the Laws and Customs Applicable in Armed Conflicts Not of an International Nature (Rome Statute Article 8(2)(e))*

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<sup>98</sup> Article 8(2)(b)(xxii).

<sup>99</sup> Common Article 3 to the Geneva Conventions of 1949 proscribes the following acts, even when committed during non-international armed conflicts:

“(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples”.

<sup>100</sup> W A Schabas *An Introduction to the International Criminal Court* (2004) 65.

<sup>101</sup> Article 8(2)(d).

<sup>102</sup> See C Greenwood “International Humanitarian Law: 2 The Conduct of Hostilities” 19-20, paper presented at the *European Training in Higher International Criminal Science Lectures* held at the European University Institute, Florence, from 16 to 27 February 2004.

Protocol II of 1977 to the Geneva Conventions largely serves as the inspiration for the prohibitions contained in Article 8(2)(e) of the Rome Statute. The article prohibits attacks against the civilian population,<sup>103</sup> the “killing or wounding treacherously a combatant adversary”,<sup>104</sup> declaring that no quarter will be given,<sup>105</sup> or destroying or seizing the property of an adversary unless such destruction or seizure is imperatively demanded by the necessities of the conflict,<sup>106</sup> and “pillaging a town or place, even when taken by assault”.<sup>107</sup>

The following special protections are included under Article 8(2)(e): intentional attacks directed against buildings, materials, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law, are prohibited;<sup>108</sup> intentional attacks directed against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations is prohibited so long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;<sup>109</sup> and intentional attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected are prohibited, provided they are not military objectives.

In addition, the following provisions serve to protect against violations of human rights more generally. Article 8(2)(e)(xi) makes it a war crime to subject persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons. Article 8(2)(e)(vi) prohibits rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the Geneva Conventions, while Article 8(2)(e)(vii) outlaws conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities. Article 8(2)(e)(viii) makes it a war crime to order the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand.

The prohibitions contained in Article 8(2)(e) of the ICC Statute apply to armed conflicts not of an international character, but not “to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.”<sup>110</sup>

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<sup>103</sup> Article 8(2)(e)(i).

<sup>104</sup> Article 8(2)(e)(ix).

<sup>105</sup> Article 8(2)(e)(x).

<sup>106</sup> Article 8(2)(e)(xii).

<sup>107</sup> Article 8(2)(e)(v).

<sup>108</sup> Article 8(2)(e)(ii).

<sup>109</sup> Article 8(2)(e)(iii).

<sup>110</sup> See the limitation contained in Article 8(2)(f).

## *Jurisdiction*

The Rome Statute strictly defines the jurisdiction of the Court. Aside from only have 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, namely 1 July 2002.<sup>111</sup> 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.<sup>112</sup> 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.<sup>113</sup> 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* 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 in the territory of a State Party – the preconditions set out in terms of Article 12.<sup>114</sup>

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.<sup>115</sup> The referral power is a mechanism by which the Court is 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.<sup>116</sup> The Statute provides that the Council may only make such a referral by acting under Chapter VII of the United Nations 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

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<sup>111</sup> Article 11.

<sup>112</sup> Article 11(2).

<sup>113</sup> See Press Release of the Prosecutor of the International Criminal Court, No.: pids.008.2003-EN, 15 July 2003, available at <http://www.icc.int>. See also P Kirsch & D Robinson “Trigger mechanisms” (2002) in A Cassese et al (eds) *The Rome Statute of the International Criminal Court: A Commentary* 1 623-625.

<sup>114</sup> See Press Release of the Prosecutor of the International Criminal Court, No.: pids.008.2003-EN, 15 July 2003, available at <http://www.icc.int>. See also P Kirsch & D Robinson supra note 113 661–663.

<sup>115</sup> Article 1, 13(b).

<sup>116</sup> See P Kirsch & D Robinson supra note 113 634.

to the peace” exists the 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.<sup>117</sup> Having had regard to these factors, the Security Council in March 2005 referred the atrocities committed in the Darfur region of Sudan to the International Criminal Court for investigation.<sup>118</sup>

### *Admissibility*

The International Criminal 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 the Court is required to rule a case inadmissible when it is being appropriately dealt with by a national justice system.<sup>119</sup> 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.<sup>120</sup> The principle of complementarity ensures that the ICC operates as a system of international criminal justice which buttresses the national justice systems of States Parties. That principle will be discussed in greater detail in the next chapter.

What about amnesties that are accorded by a national state in lieu of prosecution? For centuries successor regimes have sought to secure peace through the pardoning of their enemies, and modern history is replete with examples where a regime has granted amnesty to officials of the previous regime who were guilty of torture and crimes against humanity, rather than prosecute them (e.g. Uruguay, Argentina and El Salvador). So too, there are examples of outgoing regimes which use their last days of political power to ensure that their members are granted an official “pardon” from prosecution before the new regime takes office (e.g. Chile). With the advent of truth commissions it has become possible to channel the grant of amnesty through the commission. So far only the South African TRC and the recent truth commission in East Timor have been accorded the power to grant amnesty.<sup>121</sup> As the South African experience demonstrates, the prospect of amnesty in exchange for truth is a good incentive to the guilty to provide detailed accounts of the acts they have committed.<sup>122</sup> In any event, the political reality for many transitional

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<sup>117</sup> See in general P Kirsch P & D Robinson supra note 113 630–631.

<sup>118</sup> See further below for a detailed discussion of the referral.

<sup>119</sup> Preamble, para. 10; art 17.

<sup>120</sup> See Article 17 of the Rome Statute.

<sup>121</sup> On the South African TRC’s amnesty process, see A McDonald “A right to truth, justice and a remedy for African victims of serious violations of international humanitarian law” (1999) 2 *Law, Democracy and Development* 139 164–170; P Hayner *Unspeakable Truths* (2002) 98 *et seq.* On the amnesty process in East Timor, see C Stahn, “Accommodating individual criminal responsibility and national reconciliation: The UN Truth Commission for East Timor” (2001) 95 *AJIL* 952 962–965.

<sup>122</sup> On the importance of the TRC as truth-finder, see *Azapo v President of the Republic of South Africa* 1996 (4) SA 671 (CC) at 681-685.

governments is that giving a truth commission the power of amnesty rather than criminally prosecuting past offenders is the only realistic and peaceful way in which an existing regime will be persuaded to relinquish power. Whatever the form of amnesty (whether it be granted by a truth commission or by the outgoing or ingoing government as a political act of reprieve), the question to be confronted is how such trumps to prosecution are to be dealt with by the ICC.

The Rome Statute is silent on amnesty, and commentators argue that this is because the Rome Statute was never drafted with the intention of allowing amnesty to trump the Court's jurisdiction.<sup>123</sup> Assuming therefore that the relevant jurisdictional requirements for an ICC prosecution are met, national amnesties granted by a truth commission or by governmental sleight of hand would not *per se* prevent action by the ICC.<sup>124</sup>

While amnesties do not in principle bar the ICC from exercising criminal jurisdiction over an individual who has been granted amnesty, the political reality is that in some instances it might be expedient or a requirement of justice not to push ahead with the prosecution of such a person. Article 53(2)(c) of the Rome Statute therefore provides the Prosecutor with a discretion to refuse prosecution at the instance of a State or the Security Council where, after investigation, he concludes that "a prosecution is not in the interests of justice, taking into account all circumstances". Of course, the type of amnesty at issue will play an important role in the Prosecutor's decision. No clear rules can be enunciated to distinguish between permissible and impermissible amnesties under international law, but it has been suggested that

"international recognition might be accorded where amnesty has been granted as part of a truth and reconciliation inquiry and each person granted amnesty has been obliged to make full disclosure of his or her criminal acts as a precondition of amnesty and the acts were politically motivated".<sup>125</sup>

The blanket amnesty in Chile passed by the Pinochet regime would thus not meet the required standard (in the *Pinochet* case<sup>126</sup> before the House of Lords it was not even argued by Pinochet's lawyers that his amnesty in Chile could constitute a bar to his extradition from Britain to Spain<sup>127</sup>), while the South African amnesties granted by a quasi-judicial amnesty committee functioning as part of a TRC process established by a democratically elected government, may well do so.<sup>128</sup> It is also important to note that the nature of certain offences precludes the grant of amnesty to their

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<sup>123</sup> J Dugard "Conflicts of Jurisdiction with Truth Commissions" in A Cassese et al (eds) *The Rome Statute of the International Criminal Court: A Commentary* 1 (2002) 700-701.

<sup>124</sup> And where a criminal prosecution is instituted by a State under its domestic incorporating legislation, amnesty does not have an extraterritorial effect and the prosecuting State is not required to recognize the amnesty granted to human rights offenders by another State. See J Dugard (note 123). 699.

<sup>125</sup> J Dugard *supra* note 123 700.

<sup>126</sup> *R v Bow Street Metropolitan Stipendiary Magistrate, ex Parte Pinochet Ugarte* (No. 3) (1999) 2 All ER 97 (HL).

<sup>127</sup> J Dugard (n 123) 699.

<sup>128</sup> *Ibid.* See too Rama Mani *Beyond Retribution: Seeking Justice in the Shadows of War* (2002) 112–113.

perpetrators.<sup>129</sup> It is still open to States to grant amnesty for international crimes without violating a rule of international law, but international lawyers are largely in agreement that States are not permitted to grant amnesty for the crimes of genocide, torture, and “grave breaches” under the Geneva Convention.<sup>130</sup> The Preamble of the Statute of the ICC, while binding only in respect of parties to it, confirms this trend when it declares that “it is the duty of every State to exercise criminal jurisdiction over those responsible for international crimes”.<sup>131</sup>

As a result, whatever form of amnesty the Prosecutor is forced to consider, it is clear that he will be more disposed towards those amnesties that have been limited in terms of the nature of the offence (at the very least it appears that amnesty afforded for the international crimes of torture and genocide will be disregarded), and which have been granted as part of a truth and reconciliation inquiry, in which amnesty recipients have been obliged to make full disclosure of their criminal acts as a precondition of amnesty and to prove that their acts were politically motivated.

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<sup>129</sup> There is a vast body of literature on the debate as to whether there is an international legal obligation (whether founded in customary or conventional law) obliging states to punish past crimes. See for example D Orentlicher “Settling accounts: The duty to prosecute human rights violations of a prior regime” (1991) 2537 *Yale Law Journal* 100; N Roht-Arriaza “State responsibility to investigate and prosecute grave human rights violations in international law” (1990) 78 2 *California Law Review* 449.

<sup>130</sup> Dugard supra note 123 699.

<sup>131</sup> It is noteworthy that this trend has been reflected in the mandate of East Timor’s recently created truth commission. While the mandate is clearly supportive of individualized amnesty in exchange for truth, the commission may grant “no immunity” to persons who have committed a “serious criminal offence”, which includes the international crimes of genocide, crimes against humanity, war crimes, torture as well as the domestic crimes of murder and sexual offences, as defined by the Indonesian Criminal Code. In 1999 pro-Indonesian militia, supported by Indonesian security forces, used violence, threats and intimidation in an attempt to coerce the East Timorese population to support continued integration in Indonesia in the UN-organised 1999 referendum on independence of the island. In apparent revenge for the overwhelming vote in favour of independence, an estimated one thousand supporters of independence were killed and hundreds of thousands fled their homes or were forcibly expelled to Indonesia. After these events the United Nations took control of East Timor and through its United Nations Transitional Administration in East Timor established the Commission for Reception, Truth and Reconciliation in East Timor. See C Stahn op cit 952–953.

## CHAPTER 3: COMPLEMENTARITY AND AFRICA: THE PROMISES AND PROBLEMS OF INTERNATIONAL CRIMINAL JUSTICE<sup>132</sup>

### *Introduction*

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 Court, through the Prosecutor, had received over 650 complaints. It is important to consider these complaints. As you will see they reveal a disturbing lack of understanding about the Court and the Court's functioning. Fifty of the complaints contained allegations of acts committed before 1 July 2002. This is problematic. As one commentator has noted: the Court is not the means to scrutinize acts committed during the Vietnam war, or in Cambodia, or to settle scores with Napoleon. That is 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 which 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 that do not fall within the Court's remit. 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 which the drafters of the Statute expressly left until a future date, most probably some time after 2009. Two communications referred to the Israeli-Palestinian conflict. The difficulty here 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 1732 communications from over 103 countries, and that a staggering 80% of those communications were found to be “manifestly outside [the Court's] jurisdiction after initial review”.<sup>133</sup>

I could go on. The point is that a range of organisations and individuals that submitted the first complaints to the Prosecutor seem to have fundamentally misunderstood the ICC; to have placed a false hope in the Court as a means to provide them justice. The truth is that the Court's jurisdiction is limited temporally in that it can only exercise jurisdiction post 1 July 2002, and its jurisdiction is limited substantively in that 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

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<sup>132</sup> This chapter was previously published as “Complementarity and Africa: the promises and problems of international criminal justice” (2008) 17(4) *African Security Review* pages 154 to 170.

<sup>133</sup> See Updated on Communications received by the Office of the Prosecutor of the ICC, dated 10 February 2006 (see [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))

complaints about the crime of aggression. Furthermore, the Court's jurisdiction is limited geographically. For state 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 much publicised 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 have been 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 so long as Zimbabwe remains a non-member of the ICC regime. However, and here's a twist, if a case is referred to the Court by the Security Council – as was done in respect of the atrocities in Sudan – then the Court can exercise jurisdiction even though Sudan 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 ICC Statute or not.

### ***Complementarity***

That brings me to the topic that is at issue in this paper: complementarity. Complementarity is perhaps the key feature of the ICC regime. It is thus 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 International Criminal Court.

The International Criminal Court 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 complementarity 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 ICC seeks to prosecute and who happen to be in one's jurisdiction.

The general nature of national implementation obligations assumed by States which elect to become party to the *Rome Statute* are wide-ranging.<sup>134</sup> The *Rome Statute* notes that effective prosecution is that which is ensured by taking measures at the national level and by international cooperation. Because of its special nature, States Party 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.

As we have already seen, the ICC does not exercise universal jurisdiction. The ICC's jurisdiction is only triggered where the crime occurred on the territory of a State

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<sup>134</sup> See generally William Schabas *An Introduction to the International Criminal Court* (2001); see also Ben Brandon & Max du Plessis (eds.) *The Prosecution of International Crimes: A Practical Guide to Prosecuting ICC Crimes in Commonwealth States* (2005).

accepting the Court's jurisdiction (territorial jurisdiction) or the accused is a national of such a State (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-party State. The consequence is that many States which become party to the *Rome Statute* might not have previously provided for criminal jurisdiction on the active national 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.

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

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, States Party 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.

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 which 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. 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 (OTP) during the investigation or prosecution period<sup>135</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, amongst 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 States accept that there are no grounds for refusing ICC requests for arrest and surrender.<sup>136</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.

While the Rome Statute envisages a duty to cooperate with the Court in relation to investigation and prosecution, it should be remembered that the principle of complementarity is premised on the expectation that domestic states that are willing and able should be prosecuting these crimes themselves. The principle of “complementarity” ensures that the International Criminal 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 International Criminal Court is then seized with jurisdiction.<sup>137</sup> To enforce this principle of complementarity, Article 18 of the Rome Statute requires that the Prosecutor of the International Criminal Court 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 International Criminal Court,<sup>138</sup> and cannot begin an investigation on his own initiative without first receiving the approval of a Chamber of three judges.<sup>139</sup> 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 International Criminal Court would then be obliged to suspend its investigation.<sup>140</sup> If the alleged

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<sup>135</sup> The extent of cooperation required of States Party is evident from the fact that the Office of the Prosecutor (OTP) has a very wide mandate to “extend the investigation to cover all facts” and investigate circumstances generally “in order to discover the truth”: article 54(1)(a) of the *Rome Statute*.

<sup>136</sup> See article 89 – although article 97 provides for consultation where there are certain practical difficulties.

<sup>137</sup> Article 17(1) of the Rome Statute.

<sup>138</sup> Article 18(1) of the Rome Statute.

<sup>139</sup> Article 15 of the Rome Statute.

<sup>140</sup> Article 18(2) of the Rome Statute.

perpetrator's state investigates the matter and then refuses to initiate a prosecution, the International Criminal Court may only proceed if it concludes that that decision of the state not to prosecute was motivated purely by a desire to shield the individual concerned.<sup>141</sup> 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 promise*

Complementarity is therefore an essential component of the International Criminal Court's structure and a means by which national justice systems are accorded an opportunity to prosecute international crimes domestically. Indeed, taken to its full extent, complementarity has the potential to signal the beginning of the end of the International Criminal Court. The International Criminal Court is one component of a regime – a network of states that have undertaken to do the ICC's work for it; to act, if you will, 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.”<sup>142</sup>

Because of the ICC's system of complementarity we can therefore expect national criminal justice to play an important role of doing the ICC's work by providing “exemplary punishments” which 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, 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.”<sup>143</sup>

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>144</sup>

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141 Article 17(2)(a) of the Rome Statute

142 Bert Roling “Aspects of Criminal Responsibility for Violations of Laws of War” in Antonio Cassese (ed) *The New Humanitarian Law of Armed Conflict* (1979) 206.

143 “Not the Court of First Resort”, December 21, 2003, *The Washington Post*.

144 Quoted in McGoldrick et al *The Permanent International Criminal Court: Legal and Policy Issues* (2004) 477.

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 international crimes.

## *Some problems*

### Introduction

The reality is that while a “zero case” scenario is something to aim for, cases have found their way to the ICC in The Hague. Already the ICC Prosecutor has the crimes committed in three states parties – the DRC, 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 have been issued by the Court, on 8 July 2005, for leaders of the Lord's Resistance Army; in relation to Sudan, arrest warrants have been 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 the Central African Republic, investigations are ongoing.

It is in respect of the situation in the DRC that the Court has made the most progress. The Prosecutor of the Court initiated investigations in the Democratic Republic of the Congo 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 des patriotes Congolais [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 FRPI, to the International Criminal Court. He is currently charged as a co-perpetrator of the crimes committed allegedly during the joint FNI and FRPI attack on the village of Bogoro on or around 24 February 2003. And most recently, Mathieu Ngudjolo Chui became the third person in the custody of the ICC. Mathieu Ngudjolo Chui, a Congolese national and alleged former leader of the National integrationist Front and currently a Colonel in the National Army of the Government of the Democratic Republic of the Congo [Forces armées de la RDC/ Armed Forces of the DRC], was arrested on 6 February 2008 by the Congolese authorities and transferred to the International Criminal Court. 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 the Democratic Republic of the Congo since July 2002.

### 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.

The first point is to confront a contradiction. We have seen that the Court will have jurisdiction only when a state party is unwilling or unable to do the job itself. So, let's assume that the Prosecutor has decided that State X is unwilling or unable to prosecute, such that the ICC might now be seized with jurisdiction in terms of the complementarity scheme. In order for the Court to be seized with 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 at the mercy, if you will, of 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 is unable or unwilling to assist him in the first place!

This is a hard reality that the Prosecutor is currently experiencing. Take 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 an important finding. As one will appreciate, the complementarity principle built into the ICC Statute might be relied on by the Sudanese government (even as a non-party State) to argue that it is willing and able to prosecute the offenders. Should it in fact be willing and able, then the ICC may have to acquiesce in the prosecution of offenders so as to allow the Sudanese authorities to do the job. 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. Certainly the caustic response of the Sudanese government to the Security Council resolution referring the matter to the ICC suggests that the prosecutor will 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<sup>145</sup> and President El-Bashir reportedly swore “thrice in the name of Almighty Allah that [he] shall never hand any Sudanese national to a foreign court.”<sup>146</sup> Similarly, Sudan's UN ambassador, Elfatih Mohammed Erwa, said: “Justice here is a great good used in the service of evil”.<sup>147</sup> The Sudanese Government insisted it would not allow any Sudanese national to be tried before a foreign court.<sup>148</sup> Khartoum went so far as to

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145 “Sudan says UN Darfur move ‘violation’ of sovereignty” (2005) 3 April *Agence France Presse*.

146 “Sudan stages “million-man” march against UN war crimes trial” (2005) 5 April *Agence France Presse*.

147 “UN backs Darfur war crimes move” *BBC News*, available at <http://news.bbc.co.uk/2/hi/africa/4399487.stm> (accessed 5 April 2005).

148 See further *Report of the Chairperson of the Commission on the Situation in the Darfur Region of the Sudan* to the African Union Peace and Security Council (2005) PSC/PR/2(XXVIII) at para. 87 and Seth Appiah-Mensah “AU's critical assignment in Darfur” (2005) 14(2) *African Security Review* 10.

instigate public demonstrations objecting to the referral, and the International Criminal Court was denounced, somewhat ironically, as an “American Court”.<sup>149</sup> So, clean as the Security Council referral may have been in a technical sense, the prosecutor has anything but a clean or easy complementarity job on his hands.

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 the Sudan, and Ali Muhammad Ali Abd-Al-Rahman (Ali Kushayb), a leader of the Militia/Janjaweed. But the Court’s website speaks volumes when it records that in relation to these two individuals: “No hearings scheduled at this time”.<sup>150</sup>

Thus, although the Security Council referral is a significant step in the in history of the Court, the road that lies ahead is by no means easy. The challenge for the Court is immense. It has had the Security Council refer a matter to it (an incredibly high-profile situation which even the US – through Colin Powell – has described as “genocide”), yet it has no means of truly enforcing the mandate of the referral and has to rely on the Sudanese government’s cooperation to properly investigate and prosecute the offences.

The Court has thus found itself faced with the very difficult task of trying to enforce its decisions against a recalcitrant state.<sup>151</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-party states to the ICC as the referral extends the Court’s jurisdiction beyond the parameters of the Rome Treaty 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 ICC 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”.<sup>152</sup>

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149 “Sudanese students demonstrate against UN Darfur resolution” (2005) 2 April *Agence France Presse* and “Sudanese march against UN war crimes resolution” (2005) 5 April *Reuters*.

<sup>150</sup> See <http://www.icc-cpi.int/cases/Darfur.html> (accessed 12 February 2008).

<sup>151</sup> 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 full story by Reuters “Sudan gives adviser role to militia leader” via the *International Herald Tribune*, January 21, 2008, cited in *War Crimes Prosecution Watch* 3(12) February 4, 2008.

<sup>152</sup> See Dan Sarooshi “The Peace and Justice Paradox: The International Criminal Court and the UN Security Council” in Dominic McGoldrick et al (eds), *The Permanent International Criminal Court: Legal and Policy Issues* (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 will not be able to prosecute the persons in respect of which 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.<sup>153</sup> This is obviously correct, and demonstrates the precariousness of the Prosecutor's position. It is ultimately up to the members of the United Nations Security 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.

#### Unable to be willing or willingly unable?: the problem of capacity and priority

But it is not only outright recalcitrance that will emasculate the International Criminal Court. As a recent study by the Institute for Security Studies demonstrates,<sup>154</sup> there are a myriad of issues that undermine the promise of international criminal justice through the ICC's complementarity regime.

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 was concerned with the significance of national-level measures to 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, 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

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<sup>153</sup> See "Sudan has failed to cooperate with International Criminal Court, prosecutor says" *UN News Centre*, December 5, 2007.

<sup>154</sup> Max du Plessis and Jolyon Ford (eds) *Unable or Unwilling? Case Studies on Domestic Implementation of the ICC Statute in Selected African Countries* (ISS Monograph Series, Institute for Security Studies, Pretoria 2008) 95.

of Law perspective and adequately accommodate human rights safeguards, so that principles are upheld and prosecutions are not jeopardised by deficient investigations.

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

The findings of the monograph illustrate the remaining and apparently enduring problems of giving effect to complementarity within 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 had ratified the *Rome Statute* but thereafter failed to put in place national-level measures to implement *Rome Statute* obligations.

The reasons for delay in implementation were in large measure shared amongst the five states studied. Not only did the study reveal the status and peculiarities of individual countries' responses to ratification of the *Rome Statute*, it also allowed for the drawing of certain comparative insights.<sup>155</sup>

The consultations revealed the following features, misconceptions, misgivings or concerns as common barriers to implementation or common reasons for delay in the process of implementation of the *Rome Statute* in some African countries (as will be readily appreciated, these factors and difficulties can operate so as to compound one other). First, there was 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 was a discernible **capacity shortfall** in some of the countries studied: an over-stretched and thinly-staffed justice system, and a lack of sufficient numbers of

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<sup>155</sup> 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.

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.

That then highlights a third, and related finding, namely the clear indication in most of the reports that these countries have entertained **other priorities**, and having national laws to implement the Statute was 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, which appear to have absorbed a good deal of political energy. This need not have prevented implementation, but has certainly not aided it.

A fourth difficulty revealed by the reports is a number of **political misgivings** apparently held about implementation, and a sense that the local political risk of implementation (or the regional criticism that might come from some future surrendering 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 that these issues be dealt with in some other way, or that international prosecutions are seen as a “Western preoccupation”.

There is a fifth and commonly expressed reason for delay in implementation which 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, in those countries which have a draft in place. 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 might be described as the ‘Charles Taylor phenomenon’ (the perception that immunities are never water-tight 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,

regularly giving the issue of ICC implementation profile or publicity or forward momentum. There have been some NGO-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 counter-terrorism and organised crime measures moved 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 that 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 be before 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 might preclude discussing “international crimes” for reasons of local politics (e.g. Kenya), or real concerns about the impact on local peace processes of taking forward legislation (e.g. Uganda).<sup>156</sup>

## ***Conclusions and suggestions***

Africa has already demonstrated a clear commitment to the ideals and objectives of the ICC: more than half of all African states (33) have ratified the *Rome Statute*, and many have taken proactive steps to ensure effective implementation of its provisions.

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<sup>156</sup> 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.

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, we have already seen all too painfully how the Court will struggle to ensure assistance and cooperation from states that are unwilling or unable to do the job themselves.

In my view, the existence of these problems points us back to the promise of complementarity. The more we 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 to note that the Institute for Security Studies has moved towards capacity-building at a senior level as an increasing component of its engagement on security issues. The monograph assessment of responses to ratification of the *Rome Statute* by some African States comprises one element of the ISS Project devoted to examining measures for strengthening the Rule of Law in Africa by developing national capacity for responding, lawfully and within the context of international law and human rights, to international crimes and criminals (“the International Criminal Justice Project”). This International Criminal Justice Project is one component of the ISS’s recently inaugurated ICAP project – International Crimes in Africa Programme.

An underlying premise of the ICAP programme and the International Criminal Justice Project in particular is that a key element of long-term post-conflict peacebuilding 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 peacebuilding 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 which 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, for most African countries, the 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 European Union 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 African Union request to prosecute Habré “on behalf of Africa.” The EU delegation, headed by Bruno Cathala, the Registrar of the International Criminal Court, 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>157</sup>

Of significance is that the African Union 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 International Criminal Court. 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, the 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 29 countries having ratified the Rome Statute (which gives effect to the ICC), and is a continent where international justice is in the making.

Ensuring the success of the ICC is important for peacebuilding 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 oftentimes prior) issue is political support for the idea of international criminal justice and for the International Criminal Court’s complementarity scheme. In that regard, it is vital that African states ratify the Rome

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<sup>157</sup> Senegal has said that the investigation and trial will cost 28 million euros, and last week said that it would spend over 1.5 million euros (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 “EU to Aid Senegal in Preparing Hissène Habré’s Trial”, *Human Rights First*, 19 January 2008.

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 29 of Africa's 53 states have ratified, a large portion of the continent still falls outside the ICC's mandate. And even for those that have ratified, 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 International Criminal Court, 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 – in particular through the complementarity regime – 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 which 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 African Union – 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 peacebuilding, 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, regional organizations and civil society to draw on African experience to ensure an African-based and -focused initiative for contributing towards peacebuilding 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 African Union. 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.

## CHAPTER 4: THE INTERNATIONAL CRIMINAL COURT AND SOUTH AFRICA<sup>158</sup>

### *Introduction*

On 17 July 1998 South Africa signed and ratified the Rome Statute of the International Criminal Court (“Rome Statute”), thereby becoming the 23<sup>rd</sup> State Party. To domesticate the obligations in the Rome Statute, South Africa passed the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 (“ICC Act”).<sup>159</sup> The passing of the Act was momentous: prior to the ICC Act, South Africa had no municipal legislation on the subject of war crimes or crimes against humanity, and no domestic prosecutions of international crimes had taken place in South Africa.<sup>160</sup> It is also significant because it is the first implementation legislation by an African State Party.

That South Africa is in a relationship with the ICC is a result of the particular “complementarity” scheme set in place under the Rome Statute (discussed in the previous chapter). While the ICC is the world’s first permanent international criminal

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<sup>158</sup> This chapter was previously published as Max du Plessis, “South Africa’s Implementation of the ICC Statute – An African Example” (2007) 5 *Journal of International Criminal Justice* 460. I have also drawn from an occasional paper published for the Institute for Security Studies which is cited as Max du Plessis, “South Africa’s International Criminal Court Act: countering genocide, war crimes and crimes against humanity”, *Institute for Security Studies Occasional Paper*, November 2008.

<sup>159</sup> The Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002. The full text of the Act is available at <http://www.info.gov.za/acts/2002/a27-02/>. The ICC Act came into force on 16 August 2002. For further information on the Act see M du Plessis “Bringing the International Criminal Court Home: The Implementation of the Rome Statute of the International Criminal Court Act” (2003) 16 *South African Journal of Criminal Justice* 1.

<sup>160</sup> Although customary international law forms part of South African law, a South African court confronted with the prosecution of a person accused of an international crime would have been hard-pressed to convict, since the principle of *nullum crimen sine lege* would probably have constituted a bar to any such prosecution (see John Dugard, *International Law: A South African Perspective*, 2<sup>nd</sup> ed (2000) 142). The same principle would most likely have also put paid to prosecutions under the Geneva Conventions of 1949. South Africa has not incorporated the Geneva Conventions into municipal law nor, prior to the ICC Act, enacted legislation to punish grave breaches. It would therefore have been unlikely for a South African court to try a person for a grave breach of the Conventions in the absence of domestic legislation penalising such conduct (ibid). This proposition was recently challenged before the South African Constitutional Court in the matter of *S v Basson* CCT 30/03 decided on 9 September 2005 (dealing, inter alia, with whether Wouter Basson, an apartheid agent, had committed war crimes or crimes against humanity against apartheid opponents in the 1980s in South West Africa (now Namibia)). The difficulty in the case was that while South Africa was a party to the Geneva Conventions at the time the offences were allegedly committed, the Conventions had not been incorporated into domestic law, hence giving rise to a possible retrospectivity problem in respect of a prosecution of Basson by the State. The Constitutional Court chose not to deal with the question, holding that (at fn 147): “For the purposes of this case it is not necessary to enter into controversies surrounding the existence of universal jurisdiction for crimes against humanity and war crimes, and a concomitant duty to prosecute. We have not found it necessary to consider whether customary international law could be used either as the basis in itself for a prosecution under the common law, or, alternatively, as an aid to the interpretation of section 18(2)(a) of the Riotous Assemblies Act.”

tribunal, it is not expected to be the primary means by which jurisdiction is asserted over international crimes. Indeed, the Court is designed to be a backstop; to act in what its Statute's preamble describes as a "complementary" relationship with domestic states that are party to the Rome Statute. The principle of "complementarity" ensures that the ICC 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 International Criminal Court is then seized with jurisdiction.

To date there are only three African states parties to the Rome Statute that have taken steps to domesticate the Rome Statute's obligations: South Africa, Senegal and Kenya. This chapter focuses on South Africa's efforts. South Africa was the first State in Africa to incorporate the ICC Statute into its domestic law, and the ICC Act is a very progressive example of implementing legislation – allowing for the potential prosecution of international crimes, wherever and by whomsoever they may be committed (see section 4(3)(c) of the ICC Act which extends jurisdiction to a person who, "after the commission of the crime, is present in the territory of the Republic" and which thus provides South African courts with *universal* jurisdiction).

International criminal law is no longer something "out there". It has been brought home by the ICC Act, and has the potential (as we shall see later) to come to be increasingly used before South Africa's courts.

Under the ICC Act, a structure is created for national prosecution of crimes in the Rome Statute. The Act takes seriously the "complementary" obligation on South African courts to domestically investigate and prosecute the ICC offences of crimes against humanity, war crimes and genocide. The preamble, for instance, speaks of South Africa's commitment to bring "...persons who commit such atrocities to justice ... in a court of law of the Republic in terms of its domestic law where possible". And section 3 of the Act defines as one of its objects the enabling,

"as far as possible and in accordance with the principle of complementarity..., the national prosecuting authority of the Republic to adjudicate in cases brought against any person accused of having committed a crime in the Republic and beyond the borders of the Republic in certain circumstances".

The Preamble provides the context to the enactment of the ICC Act:

"MINDFUL that-

\* throughout the history of human-kind, millions of children, women and men have suffered as a result of atrocities which constitute the crimes of genocide, crimes against humanity, war crimes and the crime of aggression in terms of international law;

\* the Republic of South Africa, with its own history of atrocities, has, since 1994, become an integral and accepted member of the community of nations;

\* the Republic of South Africa is committed to-

\* bringing persons who commit such atrocities to justice, either in a court of law of the Republic in terms of its domestic laws where possible, pursuant to its international obligations to do so when the Republic became party to the Rome Statute of the International Criminal Court, or in the event of the national prosecuting authority of the Republic declining or being unable to do so, in line with the principle of complementarity as contemplated in the Statute, in the International Criminal Court, created by and functioning in terms of the said Statute; and

\* carrying out its other obligations in terms of the said Statute...”

The preamble records that South Africa has an international obligation under the Rome Statute, to bring the perpetrators of crimes against humanity to justice, in a South African court under our domestic law where possible.

The Act makes it clear that it favours the prosecution of international crimes, if needs be by domestic prosecution in South Africa. The Act seeks to achieve, inter alia, the following aims:

- The first object of the Act recorded in section 3(a) is to create a framework to ensure that the Rome Statute is effectively implemented in South Africa;
- The second object of the Act recorded in section 3(b), is to ensure that anything done in terms of the ICC Act, conforms with South Africa’s obligations under the Rome Statute, including its obligation to prosecute the perpetrators of crimes against humanity referred to above;
- Another object of the Act recorded in s 3(d), is to enable South Africa’s National Prosecuting Authority to prosecute and the High Courts to adjudicate in cases against people accused of having committed crimes against humanity, both inside South Africa and beyond its borders.

Although any prosecution under the ICC Act may only be brought with the consent of the National Director of Public Prosecutions (NDPP), he is obliged in terms of section 5(3), when he considers whether to institute such a prosecution, to:

“give recognition to the obligation that the Republic, in the first instance and in line with the principle of complementarity as contemplated in article 1 of the Statute, has jurisdiction and the responsibility to prosecute persons accused of having committed a crime”.

Like the Rome Statute, the ICC Act does not reach back into the past. The Act provides expressly that “[n]o prosecution may be instituted against a person accused of having committed a crime if the crime in question is alleged to have been committed before the commencement of the Statute”.<sup>161</sup> In addition to ensuring that

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<sup>161</sup> Section 5(2) of the ICC Act.

South Africa is now well placed to conduct its own domestic prosecutions, the Act provides for a comprehensive scheme of cooperation between South African authorities and the International Criminal Court.

## *Jurisdiction*

### Introduction

The ICC Act puts in place a variety of jurisdictional bases by which a South African Court might be seized with the prosecution of a person alleged to be guilty of genocide, crimes against humanity and war crimes. Section 4(1) of the ICC Act creates jurisdiction for a South African court over ICC crimes by providing that “[d]espite anything to the contrary in any other law of the Republic, any person who commits [an ICC] crime, is guilty of an offence and liable on conviction to a fine or imprisonment”. Section 4(3) of the Act goes further and provides for extra-territorial jurisdiction. In terms of that section the jurisdiction of a South African court will be triggered when a person commits an ICC crime outside the territory of the Republic and:

- (a) that person is a South African citizen; or
- (b) that person is not a South African citizen but is ordinarily resident in the Republic; or
- (c) that person, after the commission of the crime, is present in the territory of the Republic; or
- (d) that person has committed the said crime against a South African citizen or against a person who is ordinarily resident in the Republic.

When a person commits a core crime outside the territory of the Republic in one of these four circumstances, then section 4(3) deems that crime to have been committed in the territory of the Republic.

Worthy of comment is trigger (c) of the ICC Act which extends jurisdiction to a person who, “after the commission of the crime, is present in the territory of the Republic”. There is no mention here of the person’s nationality or residency, and one must assume, given that trigger (a) and (b) already provide jurisdiction in respect of crimes committed abroad by South African nationals and residents, that trigger (c) is referring to individuals who commit a core crime and who do not have a close and substantial connection with South Africa at the time of offence.<sup>162</sup>

The jurisdiction in trigger (c) is thus grounded in the idea of *universal* jurisdiction; that is, jurisdiction which exists for all states in respect of certain crimes which attract universal jurisdiction by their egregious nature, and consequently over the perpetrators of such crimes on the basis that they are common enemies of

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<sup>162</sup> The UK’s implementing legislation, for example, provides more clearly that, aside from the traditional bases of jurisdiction (territoriality and nationality), the UK courts will have jurisdiction over a person who “commits acts outside the United Kingdom at a time when he is not a United Kingdom national, a United Kingdom resident or a person subject to UK service jurisdiction and who subsequently becomes resident in the United Kingdom” (see section 68(1) of the United Kingdom’s International Criminal Court Act 2001).

mankind. This basis of jurisdiction is a progressive and potentially far-reaching aspect of South Africa's ICC Act, but one which is not without precedent in international law: genocide, crimes against humanity, and war crimes are the most serious crimes of concern to the international community as a whole, and as such, are often regarded as giving rise to "universal jurisdiction".<sup>163</sup> It is also worth stressing that the exercise of universal jurisdiction per trigger (c) is dependent on the person being "present in the territory of the Republic" after the commission of the crime.

### The ICC Act as an example of conditional universal jurisdiction

Domestic crimes, as is the tradition, are largely the responsibility and concern of domestic legal systems. However, certain crimes, through their egregiousness, take on a characteristic which "internationalises" them.

The internationalisation of certain crimes provides the potential to all States of the world (in addition to the State on whose territory the crime was committed) to investigate and prosecute the offender under their domestic legal systems and before their domestic courts.<sup>164</sup> This entitlement goes under the heading of what international lawyers understand as the principle of "universal jurisdiction": the competency to act against the offender, regardless of where the crime was committed and regardless of the nationality of the criminal. While there is ongoing debate about the scope and limits of the potential exercise of universal jurisdiction under international law, Professor Cassese – previously President of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia – provides an authoritative view in holding that universal jurisdiction cannot sensibly be an absolute right of jurisdictional competence (such that any and every State is empowered to investigate and prosecute the occurrence of an international crime). Rather, while all States are potentially empowered to act against international criminals, under the current state of international law "universality may be asserted subject to the condition that the alleged offender be on the territory of the prosecuting State".<sup>165</sup>

What the ICC Act does is to provide South Africa an opportunity – on the established basis of universal jurisdiction – to prosecute ICC crimes by its courts acting as an international surrogate for the International Criminal Court. It will be recalled that the ICC Act secures for a South African court jurisdiction over ICC crimes committed by a person outside South Africa where, in the wording of the section, "that person,

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<sup>163</sup> See for example A Cassese et al (eds) "The Rome Statute of the International Criminal Court: A Commentary" (2002) vol II, 1862. Of importance in this respect is that the ICC Act in criminalising genocide, crimes against humanity and war crimes under South African law has adopted word for word the text of the Rome Statute in articles 6, 7 and 8. Arguably this mirroring of the Rome Statute will serve to justify South Africa's extension of universal jurisdiction over offenders that commit their crimes outside South Africa on the basis that the Rome Statute is itself reflective of broad international consensus on the most egregious crimes of concern to all humanity and which by their egregiousness attract universal jurisdiction.

<sup>164</sup> The State concerned must of course have taken steps under its domestic law to empower its officials and Courts to act upon this potential.

<sup>165</sup> A Cassese "Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction" (2003) 1 *Journal of International Criminal Justice* 592.

after the commission of the crime, *is present in the territory of the Republic*” [my emphasis] (section 4(3)(c)).

The phrase “present in the territory of the Republic” is intended to denote a limitation on what international lawyers describe as “absolute universal jurisdiction”; that is, jurisdiction over offences committed abroad by foreigners, the exercise of which is not made subordinate to the presence of the suspect or accused on the territory. Accordingly, the ICC Act adopts a form of “conditional universal jurisdiction” (which is instead contingent upon the presence of the suspect in the forum state), and which is consistent with the view expressed above by Antonio Cassese.

Preliminary steps initiating the criminal process, conducting an investigation, issuing an indictment or requesting extradition, when the accused is not present

The classic formulation of universal jurisdiction is well described by Abi-Saab (2003), a respected international lawyer, who explains the origins of the concept in relation to the international crime of piracy.

“Piracy is a criminal act that takes place in a space where there is no overall territorial sovereign. A state captures the pirate on the high seas or in its national waters. It may have no other connecting factor with the acts of piracy or the pirate (not being the state of nationality of the pirate or of the flag of attacked ships or of the victims) except for being the place of capture, the *forum deprehensionis*. But the criminal acts are considered as injurious to the community at large, in view of the paramountcy of the perceived common interest in the security of maritime communications since the age of discoveries. In these circumstances, the state of capture is authorized, in spite of the absence of any of the traditional connecting factors, to prosecute the pirate, because it would not be acting in its own name *uti singulus* (which requires a special interest), but in the name of the community”.<sup>166</sup>

It is thus the act of capture, in the *forum deprehensionis*, that provides the state with the competence under international criminal law to prosecute the offender. The ICC Act in section 4(3)(c) reflects this position under international law when it provides that a South African court will have jurisdiction over a crime against humanity committed by a person outside South Africa where “that person, after the commission of the crime, is present in the territory of the Republic”.

The question that remains is this: what about the steps anterior to prosecution, which occur in the investigation phase? International law does not require states to ensure that the accused is present in order to initiate universal jurisdiction proceedings. As Judges Higgins, Kooijmans and Buergenthal stated in their joint separate opinion in

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<sup>166</sup> G. Abi-Saab “The Proper Role of Universal Jurisdiction” (2003) 1(3) *Journal of International Criminal Justice* 599-600.

the International Court of Justice decision in *Democratic Republic of Congo v. Belgium* (2002):<sup>167</sup>

“[i]f the underlying purpose of designating certain acts as international crimes is to authorize a wide jurisdiction to be asserted over persons committing them, there is no rule of international law...which makes illegal co-operative overt acts designed to secure their presence within a State wishing to exercise jurisdiction” (par 58).

The due process right to be present during trial is distinct from the law defining the legitimate exercise of jurisdiction, which does not require presence when proceedings first commence.

In this regard the Princeton Principles of Universal Jurisdiction state that a judicial body may try accused persons on the basis of universal jurisdiction, “provided the person is present before such judicial body”.<sup>168</sup> That language “does not prevent a state from initiating the criminal process, conducting an investigation, issuing an indictment or requesting extradition, when the accused is not present”.<sup>169</sup>

There are reasons of practice and logic which affirm that a suspect does not have to be physically present in the *forum deprehensionis* for an investigation to be initiated and for an arrest warrant to issue in anticipation of his or her physical arrival.

*First:* if the entire investigation is subject to having established the presence of the accused, then logically there is a great risk that no prosecution would ever be undertaken. As one commentator points out:

“Whether or not expressed, the condition of presence must be presumed for the purposes of the “search”, during the course of which it will be verified. Otherwise it is a vicious circle: in order to know whether X is in hiding on our territory, it is necessary to search for him; but in order to search for him, it is necessary to have already discovered (by enlightenment or intuition) that he is present”.<sup>170</sup>

*Second:* because it is based on the location of the suspect and not on other circumstances of the case, a strict presence requirement is a “blunt instrument”, imposing an imperfect limit on the exercise of universal jurisdiction and creating practical disadvantages by restricting the power to open an investigation to the point at which it can be proven that a suspect is within the territory of the state exercising

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<sup>167</sup> Democratic Republic of Congo v. Belgium [2002]. Case concerning the arrest warrant of 11 April 2000 [online]. I.C.J. Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal. Available at <http://www.icj-cij.org/icjwww/idocket/iCOBE/iCOBEframe.htm> (accessed 7 October 2008).

<sup>168</sup> Program in Law and Public Affairs Princeton University 2001, *The Princeton Principles on universal jurisdiction*, page 32. Available at [http://www.princeton.edu/lapa/unive\\_jur.pdf](http://www.princeton.edu/lapa/unive_jur.pdf) (accessed 13 October 2008).

<sup>169</sup> Ibid.

<sup>170</sup> Lambois, cited at page 8 in FIDH Report of March 2006, “Implementing the Principle of Universal Jurisdiction in France”. Available at [http://www.fidh.org/IMG/pdf/universal\\_juris.pdf](http://www.fidh.org/IMG/pdf/universal_juris.pdf) (accessed 14 October 2008).

universal jurisdiction. Human Rights Watch in its 2006 Report *Universal Jurisdiction in Europe: The State of the Art*, provides the following illustrative example of the negative effects of a strict presence requirement as precursor to investigation:

“[I]n October 2005, Danish authorities received a complaint concerning a Chinese official who was scheduled to attend a conference in Copenhagen. The complaint was received in advance of the suspect’s entry into Denmark, but the strict presence requirement in Danish legislation meant that Danish authorities could not legally open an investigation into the complaint before the suspect arrived. In effect, Danish investigators had only five days—the duration of the conference—to investigate the complaint and apply for an arrest warrant. When the Chinese official left Denmark after five days, the investigation had to be discontinued”.<sup>171</sup>

For these reasons, it is open to and preferable for the NPA under the ICC Act to commence proceedings and issue warrants of arrest prior to the presence of the accused in South African territory.

The United Kingdom experience is of particular importance in this regard since it too has adopted a policy of “*anticipated presence*” as the prerequisite to initiating an investigation against individuals suspected of international crimes. For instance, Major-General (retired) Doron Almog refused to disembark from his flight at Heathrow airport after he had learned that he was facing arrest by British police after a decision on 10 September 2005 by Chief London Magistrate Timothy Workman to issue a warrant for his arrest on suspicion of committing a grave breach of the Fourth Geneva Convention 1949 which is a criminal offence in the UK under the Geneva Conventions Act 1957. (The alleged offence was committed as part of Israel’s occupation of the Occupied Palestinian Territory).

This unprecedented arrest warrant against a senior Israeli soldier was issued after years of failed efforts to obtain justice through the Israeli judicial system. Because of the failure of the Israeli judiciary to combat impunity, an NGO acting for victims in Gaza, built a file of evidence with the help of Hickman & Rose Solicitors to pursue a case against him (and others) in the UK in accordance with the legal principle of universal jurisdiction over war crimes.

The Court decision legally obliged the Anti-Terrorist and War Crimes Unit of the Metropolitan Police to arrest Doron Almog, which they tried to do.<sup>172</sup> The arrest warrant was made subject to stringent bail conditions.

The decision to apply to the court for an arrest warrant was taken against the background of a series of meetings with the War Crimes Unit of the Metropolitan Police. Hickman & Rose, on behalf of the NGO and the clients in these cases, provided the police with a considerable volume of evidence in relation to this suspect. The police were unable to take a decision about the arrest or prosecution of the

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<sup>171</sup> Human Rights Watch 2006, *Universal Jurisdiction in Europe: The State of the Art*, Human Rights Watch Report, 18(5D) at 28.

<sup>172</sup> They were unsuccessful: he caught the next flight back to Israel and evaded capture.

suspect before his planned visit to Birmingham on Sunday, 11 September. Consequently, acting on behalf of the victims, Hickman & Rose and the NGO pursued the suspect through the judicial system, in the hope that he could be arrested before fleeing the UK. It was on the strength of their efforts that the arrest warrant was issued by the Chief London Magistrate Timothy Workman.

A legal threshold of “anticipated presence” as the precondition for opening an investigation would be a means by which South Africa would avoid the logical and practical difficulties identified above.<sup>173</sup> And, more vitally, an “*anticipated presence*” precondition would facilitate the use of the ICC Act in the manner that Parliament intended, and would ensure compliance by South Africa with its obligations under the Rome Statute.

For States like South Africa that are party to the Rome Statute, the concept of universal jurisdiction is given added specificity within the context of the complementarity obligation assumed under the provisions of the Statute. The ICC Act is the means by which South Africa gives effect to its international obligations as a party to the Rome Statute. In that respect, the preamble of the Rome Statute (1998) stipulates that “... it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes” (Preamble). An “anticipated presence” threshold as a prelude to investigation would facilitate the exercise by South Africa of its criminal jurisdiction over those responsible for international crimes, whereas – for the logical and practical reasons set out above – a strict threshold requirement would hamper such action.

In terms of section 233 of the Constitution, when interpreting the ICC Act a court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law. Given that under international law there is no requirement that states ensure that the suspect is present in order to initiate universal jurisdiction proceedings, a reasonable interpretation of the ICC Act is one which adopts an “*anticipated presence*” requirement as a precursor to the initiation of an investigation.

An unreasonable interpretation would be one that puts in place hurdles to the exercise of universal jurisdiction which are not required under international law.

The adoption of the “anticipated presence” requirement would accordingly facilitate South Africa’s compliance with its obligations under the Rome Statute to act against international criminals. It would also give effect to the intention of Parliament as reflected in the ICC Act; that is, to ensure that domestic prosecutions of international criminals take place within South Africa.

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<sup>173</sup> This threshold is incorporated in a new provision of the German Code of Criminal Procedure, para. 153f (cited in G Werle, *Principles of International Criminal Law* (2005)), which makes obligatory an investigation into a suspected perpetrator of international crimes where the suspect is present in Germany or the suspect’s presence is anticipated (see also “Universal Jurisdiction in Europe: The State of the Art”, *Human Rights Watch Report*, 18(5D)). So too, the United Kingdom Police may open an investigation regardless of the whereabouts of the accused. However, for an arrest warrant to be issued and for the suspect to be charged, the accused must either be present or his or her presence anticipated (Human Rights Watch 2006).

## *The Prosecution of ICC Crimes on South African Soil*

### Introduction

The ICC Act gives effect to the complementarity scheme by creating the structure necessary for national prosecutions under the ICC Statute. The procedure for the institution of prosecutions in South African courts is set out in section 5 of the Act. As we shall see this procedure involves different governmental departments and officials.

### Applicable Substantive Law

One of the advantages of the Rome Statute is that it brings together in one place a codified statement of the elements which make up the crimes of genocide, war crimes, and crimes against humanity. The drafters of the ICC Act, aware of this benefit of codification, incorporated the Rome Statute's definitions of the core crimes directly into South African law through a schedule appended to the Act.<sup>174</sup> In this regard Part 1 of Schedule 1 to the ICC Act follows the wording of article 6 of the Rome Statute in relation to genocide, Part 2 of the Schedule mirrors article 7 of the Statute in respect of crimes against humanity, and Part 3 does the same for war crimes as set out in article 8 of the Rome Statute. It is clear that these crimes now form part of South African law through the Act. One of the objects of the Act is "to provide for the crime of genocide, crimes against humanity and war crimes,"<sup>175</sup> and s 4(1) of the Act provides that "[d]espite anything to the contrary in any other law in the Republic, any person who commits a crime [defined as genocide, crimes against humanity and war crimes], is guilty of an offence".<sup>176</sup>

While the Act usefully incorporates the definitions of these crimes into South African domestic law, neither the ICC Act nor Schedule 1 refers specifically to article 9 of the Rome Statute on Elements of Crimes.<sup>177</sup> There is nothing, however, which prevents a

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<sup>174</sup> What facilitated this decision was the fact that South Africa did not have existing statutory law defining and proscribing the core crimes of genocide, crimes against humanity and war crimes.

<sup>175</sup> See section 3(c) of the ICC Act.

<sup>176</sup> Note also in regard to assistance in the prosecution of offences against the administration of justice, the ICC Act in section 36 provides that any person who contravenes a provision of Article 70 of the Statute:

“(a) in the Republic; (b) outside the territory of the Republic and who – (i) is a South African citizen; (ii) is not a South African citizen but is ordinarily resident in the Republic; (iii) after the commission of the offence, is present in the territory of the Republic, is guilty of an offence and liable to a fine or imprisonment for a period not exceeding five years, or to both a fine and such imprisonment”.

<sup>177</sup> For the purposes of interpreting and applying the definitions of crimes found in articles 6, 7 and 8 of the Rome Statute, article 9 of the statute provides that reference must also be made to the Elements of Crimes, a fifty-page document adopted in June 2000 by the Preparatory Commission for the International Criminal Court. See the Finalized Draft Text of the Elements of Crimes (PCNICC/2000/INF/3/Add.2).

South African court from having regard to the Elements of Crimes were it to be involved in the domestic prosecution of an ICC offence. However, in the interests of clarity and completeness it would serve South Africa to follow the example of other States Parties<sup>178</sup> and incorporate by regulation the Elements of Crimes.<sup>179</sup>

The drafters of the ICC Act have also not seen fit to replicate the general principles of criminal law set out in articles 22-33 of the Rome Statute. That said, it is clear that these general principles will find application in any domestic trial under the ICC Act. For one thing, an accused will be entitled to the ordinary defences and protections that are guaranteed under South Africa's progressive Constitution.<sup>180</sup> The ICC Act provides that a South African Court, charged with the prosecution of a person allegedly responsible for a core crime, shall apply "the Constitution and the law".<sup>181</sup> The South African Bill of Rights in section 35 sets out a range of rights for arrested, detained and accused persons. These protections will obviously need to be afforded to any person who is being tried under the ICC Act. And while the drafters of the ICC Act have not chosen to expressly adopt Part 3 of the Rome Statute on general principles of liability and defences, section 2 of the ICC Act provides that applicable law for any South African court hearing any matter arising under the Act includes "conventional international law, and in particular the [Rome] Statute".<sup>182</sup> Accordingly, the general principles of international criminal law applicable to the prosecution of genocide, war crimes and crimes against humanity (including the available defences contained in the Rome Statute such as superior orders) ought to find application before a South African court.

### The Priority Crimes Litigation Unit

In order that South Africa's obligations under the ICC Act may be fulfilled, a Priority Crimes Litigation Unit (PCLU) has been established within the NPA, and which is headed by a Special Director of Public Prosecutions appointed in terms of section 13(1)(c) of the National Prosecuting Authority Act. Section 13(1)(c) provides that the President "may appoint one or more Directors of Public Prosecutions (hereinafter referred to as Special Directors) to exercise certain powers, carry out certain duties and perform certain functions conferred or imposed on or assigned to him or her by the President by proclamation in the Gazette".

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<sup>178</sup> For example, the Secretary of State in England has by regulation made the Elements of Crimes applicable to proceedings in a service court within the United Kingdom. See *The International Criminal Court Act 2001 (Elements of Crimes) Regulations 2001*, available at <http://www.hmso.gov.uk/si/si2001/20012505.htm>.

<sup>179</sup> In terms of section 38 of the ICC Act, the Minister of Justice may make regulations regarding the ICC Act. In terms of section 1(xx) of the Act such regulations would be included as part of the Act.

<sup>180</sup> The Constitution of the Republic of South Africa Act 108 of 1996 (hereinafter "the Constitution"). Chapter II of the Constitution contains a Bill of Rights.

<sup>181</sup> Section 2, ICC Act.

<sup>182</sup> See section 2(a).

The Special Director's appointment was confirmed in terms of Government Gazette No 24876 of 23 May 2003.<sup>183</sup> The Special Director was given two powers: First: to "head the Priority Crimes Litigation Unit"; and Second: to "manage and direct the investigation and prosecution of crimes contemplated in the Implementation of the Rome Statute of the International Criminal Court Act 2002 (Act No. 27 of 2002) ...".

The Unit is thus specifically tasked with dealing with the ICC crimes set out in the ICC Act, and the Special Director that heads the PCLU is empowered to "manage and direct the investigation" of such crimes. In practice this means that requests by individuals or civil society groups for investigation and prosecution under the ICC Act should be directed to the PCLU.

### The NDDP's involvement

On the assumption that the PCLU takes up the investigation and issues a warrant of arrest (*in camera* or otherwise) and the suspect or suspects are arrested, the matter will then move to the prosecution stage.

The ICC Act stipulates that "[n]o prosecution may be instituted against a person accused of having committed a [core] crime without the consent of the National Director [of Public Prosecutions]".<sup>184</sup>

The National Director must, when reaching a decision about a prosecution, recognise South Africa's obligation in the first instance, under the principle of complementarity in the Rome Statute, to exercise jurisdiction over and to prosecute persons accused of having committed an ICC crime.<sup>185</sup> The ICC Act requires the NDPP's consent before a "prosecution may be instituted against a person accused of having committed a crime" (emphasis added).

However, no such consent is required under the Act before a person is charged or arrested for such an offence, or an investigation opened.<sup>186</sup> Had such consent been

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<sup>183</sup> Proclamation No 43 of 2003.

<sup>184</sup> Section 5(1).

<sup>185</sup> Section 5(3).

<sup>186</sup> An analogous situation prevails in other Commonwealth countries that have implemented the Rome Statute of the International Criminal Court into their domestic law. In New Zealand, for instance, a person may be charged and arrested without the consent of the Attorney-General to a prosecution, but the consent of the Attorney-General is required for a prosecution. Section 13 (Attorney-General's consent to prosecutions required) states:

"(1) Proceedings for an offence against section 9 or section 10 or section 11 may not be instituted in any New Zealand court without the consent of the Attorney-General.

(2) Despite subsection (1), a person charged with an offence against section 9 or section 10 or section 11 may be arrested, or a warrant for his or her arrest may be issued and executed, and the person may be remanded in custody or on bail, even though the consent of the Attorney-General to the institution of a prosecution for the offence has not been obtained, but no further proceedings can be taken until that consent has been obtained."

required the drafters of the ICC Act could just as well have stipulated that no “proceedings” may be instituted without the NDPP’s consent. They chose not to, and instead have limited the requirement of consent to the “[i]nstitution of prosecutions in South African courts”. The preliminary decision of the NPA to investigate and/or issue a warrant of arrest would not be subject to the consent of the NDPP, although the eventual decision to initiate a prosecution of the arrested individual under the ICC Act would require his consent.

The expectation under the Act, flowing from South Africa’s obligations under the complementarity scheme, is that a prosecution will take place within the Republic. Accordingly, if the National Director declines to prosecute a person under the Act, the Director-General for Justice and Constitutional Development must be provided with the full reasons for that decision.<sup>187</sup> It is difficult to predict what reasons might be relied on by the National Director to decline a prosecution. The most the ICC Act does is to say in section 5(2) that “[n]o prosecution may be instituted against a person accused of having committed a crime if the crime in question is alleged to have been committed before the commencement of the Statute”. In addition to this ground, it is unclear whether the drafters of the Act had in mind the types of reasons set out in the Rome Statute by which a State might refuse to assist the ICC with an investigation or prosecution, namely, the interests of national security, or conflict with a pre-existing international law obligation. One thing is clear however. That is that any decision by the National Director to refuse to institute a prosecution before a South African court is one that will have to be carefully considered, not least of all since an unjustified refusal will lead to international responsibility for South Africa for its failure to comply with its obligations under the Rome Statute. In this connection, it is noteworthy that the ICC Act reminds the National Director that, “when reaching a decision on whether to institute a prosecution contemplated in this section”, he or she must “give recognition to the obligation that the Republic, in the first instance and in line with the principle of complementarity as contemplated in Article 1 of the [Rome] Statute, has jurisdiction and responsibility to prosecute persons accused of having committed a crime”. If the National Director refuses to institute a prosecution, he or she is then obliged to forward the decision, together with reasons, to the Registrar of the International Criminal Court in The Hague.<sup>188</sup>

#### Factors to be considered in the exercise of prosecutorial discretion under the ICC Act

As we have seen under the ICC Act the PCLU and NDPP exercise prosecutorial discretion in relation to ICC crimes. Aside from the question of evidence that has been presented to the PCLU and NDPP, there are important factors which play (or ought to play) a role in the process by which the PCLU and the NDPP decide on whether to institute an investigation or prosecution under the ICC Act and which significantly curtail the discretion of the PCLU and NDPP to refuse to initiate an investigation and/or prosecution.

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<sup>187</sup> Section 5(5).

<sup>188</sup> Ibid.

*First:* the decision to investigate/prosecute must take account of the aims of the ICC Act. The primary aim of the Act is to secure prosecution of individuals alleged to be guilty of crimes against humanity, war crimes and genocide. The Preamble to the ICC Act records that the obligation imposed on South Africa authorities under the Act is to

“[bring] persons who commit such atrocities to justice, either in a court of law of the Republic in terms of its domestic laws where possible, pursuant to its international obligations to do so when the Republic became party to the Rome Statute of the International Criminal Court”.

Section 3 (Objects of the Act) stipulates that one of the Act’s objects is

“to enable, as far as possible and in accordance with the principle of complementarity ... the national prosecuting authority of the Republic to prosecute and the High Courts of the Republic to adjudicate in cases brought against any person accused of having committed a crime in the Republic and beyond the borders of the Republic in certain circumstances”.<sup>189</sup>

Second: a decision by the National Director must take account of the fact that

“[i]f the National Director, for any reason, declines to prosecute a person under this section, he or she must provide the Central Authority [the Director-General: Justice and Constitutional Development] with the full reasons for his or her decision and the Central Authority must forward that decision, together with the reasons, to the Registrar of the Court”.

*Third:* the decision must comply with the NPA Prosecution Policy (as amended on 1 December 2005). The Preamble to the Policy states that “[p]rosecutors are the gatekeepers of the criminal law. They represent the public interest in the criminal justice process”. The Policy then provides as follows in salient part:

“The Prosecuting Authority has the power and responsibility to institute and conduct criminal proceedings on behalf of the State and to carry out any necessary functions incidental thereto.”<sup>190</sup>

“The Prosecution Policy must be tabled in Parliament and is binding on the Prosecution Authority. The National Prosecuting Authority Act also requires<sup>191</sup> that the United Nations Guidelines on the Role of Prosecutors should be observed”.<sup>192</sup>

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<sup>189</sup> Section 3(d).

<sup>190</sup> Paragraph 1, NPA Prosecution Policy.

<sup>191</sup> See National Prosecuting Authority Act s 22(4)(f).

<sup>192</sup> Ibid. The UN Guidelines (adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990) stipulates that “[t]he Guidelines set forth below, which have been formulated to assist Member States in their tasks of securing and promoting the effectiveness, impartiality and fairness of prosecutors in criminal proceedings, should be respected and taken into account by Governments within the framework of their national legislation and practice, and should be brought to the attention of prosecutors, as well as other persons, such as judges, lawyers, members of the executive and the legislature and the public in

The UN Guidelines on the Role of Prosecutors<sup>193</sup> provide as follows in paragraph 15:

“15. Prosecutors shall give due attention to the prosecution of crimes committed by public officials, particularly ... grave violations of human rights and other crimes recognized by international law and, where authorized by law or consistent with local practice, the investigation of such offences.”

Of obvious importance in this regard is that the State has chosen to create a Priority Crimes Litigation Unit *in order* that the crimes under the ICC Act are prioritised and prosecuted by a specialist and dedicated body of prosecutors and investigators.

The Prosecution Policy furthermore provides that prosecutions should ordinarily follow unless “public interest demands otherwise”.<sup>194</sup>

In terms of the Policy, when considering whether or not it will be in the public interest to prosecute, prosecutors should consider all relevant factors, including:

**“The nature and seriousness of the offence**

- The seriousness of the offence, taking into account the effect of the crime on the victim, the manner in which it was committed, the motivation for the act and the relationship between the accused and the victim.
- The nature of the offence, its prevalence and recurrence, and its effect on public order and morale.
- The economic impact of the offence on the community, its threat to people or damage to public property, and its effect on the peace of mind and sense of security of the public.<sup>195</sup>

The fact that ICC crimes are by definition the most serious of all crimes, and given their effect on peace and security, it seems that an investigation or prosecution of ICC crimes under the ICC Act should ordinarily follow and that there must be compelling reasons of public interest to forestall or prevent such action by the prosecuting arm of government.

In deciding on what is in the public interest an overriding consideration ought to be the gravity of crimes such as genocide, crimes against humanity and war crimes, their universal condemnation and the international community’s commitment to repressing them.

In this respect it is useful to recall what the Constitutional Court said in *S v Basson* 2005 (12) BCLR 1192 (CC):

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general. The present Guidelines have been formulated principally with public prosecutors in mind, but they apply equally, as appropriate, to prosecutors appointed on an ad hoc basis”.

<sup>193</sup> Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

<sup>194</sup> Paragraph 4(c), NPA Prosecution Policy.

<sup>195</sup> Paragraph 4(c), NPA Prosecution Policy.

“[184] As was pointed out at Nuremburg, crimes against international law are committed by people, not by abstract entities, so that only by punishing individuals who commit such crimes can the provisions of international law be enforced. Given the nature of the charges, the SCA should have given appropriate weight and attention to these considerations, even in the absence of any argument on these issues by the state. Given the extreme gravity of the charges and the powerful national and international need to have these issues properly adjudicated, particularly in the light of the international consensus on the normative desirability of prosecuting war criminals, only the most compelling reasons would have justified the SCA in exercising its discretion to refuse to rule on the charges.” [my emphasis]

Similarly, South Africa’s interest in not becoming a “*safe haven*” for perpetrators of such crimes should form part of the overall “*public interest*” in prosecuting such crimes.

#### Once consent has been given

As mentioned earlier, the ICC Act stipulates that “[n]o prosecution may be instituted against a person accused of having committed a [core] crime without the consent of the National Director [of Public Prosecutions]”. On the assumption that such consent is provided, the matter will proceed to Court and the PCLU will adopt responsibility for the prosecution of the matter.

Given the importance of a prosecution involving allegations against an accused of having perpetrated genocide, crimes against humanity or war crimes, it is clear that a specialized Court would need to be designated. The Act provides that after the National Director has consented to a prosecution, an appropriate High Court must be designated for that purpose. Such designation must be provided in writing by the “Cabinet member responsible for the administration of justice ... in consultation with the Chief Justice of South Africa and after consultation with the National Director”.<sup>196</sup> The ICC Act does not provide any specific trial procedure or punishment regime for domestic courts. All that the ICC Act provides is for the designation of “an appropriate High Court in which to conduct a prosecution against any person accused of having committed [an ICC] crime”.<sup>197</sup> Presumably the usual trial procedure for a criminal trial in the High Court will be followed and the High Court will be empowered to issue any of the sentences which it would ordinarily be entitled to impose in terms of its domestic criminal sentencing jurisdiction. Such punishments would include life imprisonment, imprisonment, a fine, and correctional supervision. The death penalty is not an option: capital punishment was declared unconstitutional by the Constitutional Court in 1995 in *S v Makwanyane*.<sup>198</sup>

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<sup>196</sup> Section 5(4).

<sup>197</sup> Section 5(5).

<sup>198</sup> 1995 (3) SA 391 (CC).

## *Cooperation with the ICC*

Beyond empowering South African officials to domestically engage in the prosecution of ICC crimes, the ICC Act sets in place a comprehensive cooperative scheme for South Africa vis-à-vis the ICC.

### Arrest and Surrender

In respect of surrender and provisional arrest, the ICC Act is premised on the understanding that the International Criminal Court will in most circumstances have to rely on the intercession of national jurisdictions to gain custody of suspects. As a result the ICC Act envisages two types of arrest: one in terms of an existing warrant issued by the ICC, and another in terms of a warrant issued by South Africa's National Director of Prosecutions (NDPP). In both scenarios the warrant (whether endorsed or issued) must be in the form and executed in a manner as near as possible to that which exists in respect of warrants of arrest under existing South African law.<sup>199</sup>

Dealing with the first scenario (an arrest in terms of an existing warrant issued by the ICC), in terms of section 8 of the ICC Act, when South Africa receives a request from the ICC for the arrest and surrender of a person for whom the ICC has issued a warrant of arrest, it must refer the request to the Director-General of Justice and Constitutional Development with the necessary documentation to satisfy a local court that there are sufficient grounds for the surrender of the person to The Hague.<sup>200</sup> The Director-General must then forward the request (along with the necessary documentation) to a magistrate who must endorse the ICC's warrant of arrest for execution in any part of the Republic.<sup>201</sup>

Section 9 details the second scenario (an arrest in terms of a warrant issued by the National Director of Prosecutions). In this situation the Director-General of Justice and Constitutional Development is mandated to receive a request from the ICC for the provisional arrest of a person who is suspected or accused of having committed a core crime, or has been convicted by the ICC. The Director-General is then obliged under the ICC Act to immediately forward the request to the National Director of Public Prosecutions, who must then apply for the warrant before a magistrate.<sup>202</sup>

After being arrested pursuant to a warrant (whether that warrant was issued by the ICC or by the NDPP), the arrestee is to be brought "before a magistrate in whose area of jurisdiction he or she has been arrested or detained", "within 48 hours after that person's arrest or on the date specified in the warrant for his or her further

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<sup>199</sup> Section 9(3).

<sup>200</sup> Section 8(1).

<sup>201</sup> Section 8(2).

<sup>202</sup> Section 9(1).

detention.”<sup>203</sup> The person is to be brought before a magistrate so that the presiding magistrate may establish in terms of section 10(1)(a) to (c) of the ICC Act whether:

- (a) the warrant applies to the person in question;
- (b) the person has been arrested in accordance with the procedures laid down by the ICC Act;
- (c) the rights of the person have been respected.

Having laid their hands on the arrestee, the South African authorities then become engaged in the “surrender” of an arrestee to the International Criminal Court – his or her “delivery” to The Hague. To make a committal order, with a view to the surrender of an arrestee to the International Criminal Court, the magistrate has to be satisfied of three things only. First, the magistrate must be satisfied that the person before court is the individual named in the warrant.<sup>204</sup> Second, that the person has been arrested in accordance with the procedures set down by domestic law.<sup>205</sup> And third, that the arrestee’s rights, as contemplated in the Bill of Rights, have been respected, if, and to the extent to which, they are or may be applicable.<sup>206</sup> The nature of these three requirements makes it clear that surrender to the ICC is different to extradition in international law. There is no mention of the double criminality rule which has become so central to extradition proceedings. And unlike many extradition proceedings, there is no requirement in the ICC Act that a *prima facie* case be shown against the suspect. Section 10(5) of the ICC Act provides as the primary test that, if, after considering the evidence adduced at the inquiry the magistrate is satisfied that the three requirements outlined above are met, then the magistrate “must issue an order committing that person to prison pending his or her surrender to the Court.” Of course, the magistrate also has to be satisfied that the International Criminal Court has a genuine interest in the surrender of the arrestee, and to this end section 10(5)) stipulates that in addition to the three requirements being met, the magistrate must be content that the person concerned may be surrendered to the Court: (a) for prosecution for the alleged crime; (b) for the imposition of a sentence by the Court for the crime in respect of which the person has been convicted, or (c) to serve a sentence already imposed by the Court.<sup>207</sup> There is little indication in the Act what level of proof must be proffered by the prosecution in respect of these additional requirements, such as, whether the court must inquire whether there is evidence to justify his trial for the offence he is alleged to have committed.<sup>208</sup> Presumably any of these three factual

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<sup>203</sup> Section 10(1).

<sup>204</sup> Section 10(1)(a).

<sup>205</sup> Section 10(1)(b).

<sup>206</sup> Section 10(1)(c).

<sup>207</sup> One must assume that the listing of these conditions is in the disjunctive.

<sup>208</sup> By contrast the United Kingdom’s ICC Act, for example, makes it clear that a court, when making an order for surrender, “is not concerned to enquire” whether the warrant was duly issued by the ICC or, where the person to be surrendered is “alleged to have committed an ICC crime, whether there is evidence to justify his trial for the offence he is alleged to have committed” (see s 5(5) of the International Criminal Court Act 2001; see too the commentary on the Act by Robert Cryer “Implementation of the International Criminal Court Statute in England and Wales” (2002) 51 *ICLQ* 733 at 736). A further problem is that s 10(5) of the ICC Act speaks of the magistrate’s power to issue an order of committal to prison, but does not refer to “an order to be surrendered”. No other section of the Act refers to an order to be surrendered to the ICC. This may give rise to problems, since

conditions will have been proved by the terms of the International Criminal Court's request, either for the endorsement of its own warrant of arrest within South Africa (in terms of s 8 of the ICC Act), or for South Africa to issue a provisional warrant of arrest pursuant to the Court's request (in terms of s 9 of the ICC Act) such that these additional requirements may be regarded as being satisfied on the strength of the "material supporting the request" for surrender provided by the International Criminal Court.<sup>209</sup>

Any person against whom an order of committal to prison has been made under section 10(5) of the ICC Act has a right of appeal to a High Court which right must be exercised within seven days after the date of the order.<sup>210</sup> The appeal will focus on "whether one or more of the requirements referred to in [section 10(1)(a) to (c)] have been complied with"; that is, whether the warrant applies to the person in question; the person has been arrested in accordance with the procedures laid down by the ICC Act, and; the rights of the person have been respected.

Should a conflict arise between South Africa and the ICC regarding arrest and surrender, then in terms of section 10(2) of the ICC Act the magistrate may at any time during the inquiry "postpone that inquiry for purposes of consultation between the relevant authorities of the Republic and the Court as contemplated in Article 97 of the Statute."

#### Cooperation Regarding ICC-initiated Investigations and Prosecutions

Article 93 of the Rome Statute requires States Parties to assist the ICC by cooperating in relation to investigations and prosecutions. By way of response, Part 2 of the ICC Act sets out a variety of circumstances in which the "relevant competent authorities in the Republic" must "cooperate with, and render assistance to, the Court in relation to investigations and prosecutions". There are many areas of co-operation (detailed in section 14 of the Act), such as the questioning of suspects, the identification and whereabouts of persons or items, the taking of evidence (including expert opinions), inspections *in loco* (including the exhumation and examination of grave sites) and execution of searches and seizures, to name but a few.<sup>211</sup> The areas of co-operation must be undertaken in terms of the relevant law applicable to investigations in South

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technically the ICC Act does not contain a provision for any competent authority, whether a court or the executive branch of government, to issue an order of surrender. The problem needs to be addressed as soon as possible. See further Anton Katz "An Act of Transformation – The incorporation of the Rome Statute of the ICC into national law in South Africa" (2003) 12 *African Security Review* 25.

<sup>209</sup> Article 89 of the Rome Statute, which deals with surrender of persons to the Court, provides that the "Court may transmit a request for the arrest and surrender of a person, together with the material supporting the request" to a State Party, so this material would be before the magistrate. Prior to this, to obtain a warrant of arrest from the ICC the Prosecutor would have had to convince a Pre-Trial Chamber of the Court (consisting of three judges) that there were "reasonable grounds to believe" the suspect had committed an ICC offence.

<sup>210</sup> Section 10(8)(b).

<sup>211</sup> The full list of areas of cooperation is set out in section 14 (a)-(l), and is modelled on article 93 of the Rome Statute.

Africa, as well as the applicable rules in the ICC Statute,<sup>212</sup> and with the ultimate aim of assisting the ICC.

Certain acts of co-operation are subject to comprehensive regulation in the ICC Act, and others are not. Particularly in those cases where the ICC Act provides no guidance, the relevant South African law and the provisions of the ICC Statute will need to be consulted. For example in the context of questioning suspects, the ICC Act stipulates in section 14 (c) no more than that the competent South African authorities must assist with “the questioning of any person being investigated or prosecuted”. South African authorities will therefore have to turn to the ICC Statute and South African law for guidance. In this context there is little difference between the domestic law and the treaty’s provisions, both of which take their cue from international human rights law. Equally, the Constitution in section 35 and the Rome Statute in article 55 guarantee certain rights to a person under investigation, such as the right against self-incrimination, the right to remain silent, and the right to legal assistance.

Those means of co-operation that are subject to detailed regulation under the ICC Act include the examination of witnesses,<sup>213</sup> the transfer of a prisoner to the ICC for the purposes of giving evidence or to assist in an investigation,<sup>214</sup> the service of process and documents,<sup>215</sup> and acts of entry, search and seizure.<sup>216</sup>

Particularly interesting are the provisions relating to forfeiture or confiscation orders. The Director General of Justice and Constitutional Development may receive a request from the ICC for assistance in enforcing “restraint orders” as well as “confiscation orders” in the Republic. A “restraint order” is defined in the ICC Act as an “order by the ICC in respect of a crime or an offence within the jurisdiction of the Court, aimed at restraining any person from dealing with any property.” This term – “restraint order” – is not found in the Rome Statute, but presumably refers to the provisional measure of assistance which the South African authorities are to provide to the Court under section 14 (k) of the ICC Act. Section 14 (k) is expressly modelled on article 93 of the Rome Statute, as article 93 (I)(k) provides for the “identification,

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<sup>212</sup> Section 14 reads that the “relevant competent authorities in the Republic must, *subject to the domestic law of the Republic and the Statute*, cooperate with, and render assistance to, the Court...”. (Emphasis added). The Constitution, where applicable, will no doubt provide the background standards against which the relevant “cooperation” is undertaken. So, for example, when it comes to searches and seizures in terms of section 14 (h), read with section 30 of the ICC Act, the relevant provisions of the Act will need to be read in conjunction with sections 10, 12(1)(a)-(d), 12(2)(b), 14, 21, 35(5) and 36(1) of the Constitution.

<sup>213</sup> See sections 15, 16, 17, 18 and 19 of the ICC Act. The sections outline the procedure for the examination of witnesses before a magistrate, the rights and privileges of the witness, the offences which a witness might commit, and the procedure by which the attendance of a witness might be secured in proceedings before the International Criminal Court.

<sup>214</sup> See section 20 of the ICC Act.

<sup>215</sup> See section 21 of the ICC Act.

<sup>216</sup> See section 30 of the ICC Act. This section is in many respects similar to those provisions of the Criminal Procedure Act 51 of 1977 in relation to search and seizure (sections 19 to 36), but with modifications to reflect the fact that the request for co-operation has been made by the ICC for the purposes of its investigation, and not to assist South Africa in criminal investigations unrelated to the ICC.

tracing and freezing or seizure of proceeds, property ... [etc] for the purposes of eventual forfeiture”. As such, a restraint order would seem to cover the scenario under the Rome Statute where the Court orders provisional measures with the aim of securing eventual forfeiture. A “confiscation order” – defined in the ICC Act as an “order issued by the Court aimed at recovering the proceeds of any crime or an offence within the jurisdiction of the Court or the value of such proceeds” – appears, by contrast, to relate to a final measure of punishment. In terms of article 77 of the Rome Statute, one of the penalties that the ICC may impose, in addition to imprisonment, is the “forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of *bona fide* third parties.” Article 109(1) of the Rome Statute in turn imposes obligations upon States Parties to enforce such forfeiture orders.

Under the ICC Act, when the Director-General of Justice and Constitutional Development receives a request from the ICC for assistance in enforcing one of these “orders” in the Republic, he is expected to lodge with the Registrar of the High Court in whose jurisdiction the property is situated or present a certified copy of that order.<sup>217</sup> Once a restraint order has been “registered” by the relevant Registrar, the ICC Act provides that the order has the effect of a restraint order made by that High Court under the Prevention of Organised Crime Act.<sup>218</sup> Where a confiscation order has been “registered”, the order has the effect of a civil judgment of the court at which it has been registered.<sup>219</sup>

### Cooperating to Impose ICC Sentences

The Rome Statute stresses that “States Parties should share the responsibility for enforcing sentences of imprisonment, in accordance with principles of equitable distribution”.<sup>220</sup> The International Criminal Court will have no prison, and states are therefore expected to volunteer their services, indicating their willingness to allow convicted prisoners to serve the sentence within their domestic penal institutions.<sup>221</sup>

After sentencing an offender, the ICC will, in terms of article 103(1)(a) of the Rome Statute, designate the state where the term is to be served. In so doing the Court must

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<sup>217</sup> See section 22(1) for “restraint orders” and section 27(1) for “confiscation orders”. In the case of “confiscation orders”, however, the request from the ICC for assistance in executing a confiscation order must first be submitted to the Minister of Justice for approval before the request may be lodged with the clerk or the Registrar, as the case may be, of a court in the Republic having jurisdiction (see section 27(1) for detail).

In both cases, the Director-General of Justice must be satisfied of certain requirements, such as that the order is not subject to review or appeal.

<sup>218</sup> Act 121 of 1998. See section 23 of the ICC Act.

<sup>219</sup> See section 28(1) of the ICC Act.

<sup>220</sup> See article 103(3)(a) of the Rome Statute as well as Rule 201 of the Rules of Procedure and Evidence.

<sup>221</sup> See further W A Schabas *An Introduction to the International Criminal Court* (2004) 170. If no State offers its prison services, the host State of the ICC – the Netherlands – will perform the task (see article 103(4) of the Rome Statute).

take into account the views of the sentenced prisoner, his or her nationality, and “widely accepted international treaty standards governing the treatment of prisoners”.<sup>222</sup> In addition, conditions of detention must be neither more nor less favourable than those available to prisoners convicted of similar offences in the state where the sentence is to be enforced.<sup>223</sup>

In order to give effect to this enforcement scheme, the ICC Act provides that the Minister of Correctional Services must consult with the Cabinet and seek the approval of Parliament with the aim of informing the ICC whether South Africa can be placed on the list of states willing to accept sentenced persons.<sup>224</sup> If the Republic is placed on the list of states and is designated as a state in which an offender is to serve a prison sentence, then such person must be committed to prison in South Africa.<sup>225</sup> The provisions of the Correctional Services Act 1998<sup>226</sup> and South African domestic law then apply to that individual. However, the sentence of imprisonment may only be modified at the request of the International Criminal Court, after an appeal by the prisoner to, or review by, the Court in terms of the Rome Statute.<sup>227</sup>

It is commendable that the ICC Act requires the government to indicate its availability to assist in enforcing the ICC sentences. It is not clear however that South Africa will be placed on the list of states available for enforcement duty. The Rome Statute makes it clear that there can be “no question of sending a prisoner to a State with prison conditions that do not meet international standards.”<sup>228</sup> This is a particular problem for South Africa, given the poor state of its prisons.<sup>229</sup>

“In addition to imprisonment” the Rome Statute enables the ICC to impose a fine.<sup>230</sup> On top of this, the ICC is empowered to address the issue of reparations to victims, and may “make an order directly against any convicted person” specifying reparation.<sup>231</sup> Such an order will no doubt often take the form of monetary compensation. The ICC Act makes provision for the execution of such fines and compensation orders within the Republic.<sup>232</sup> Such orders must be “registered” with a

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<sup>222</sup> Article 103(3).

<sup>223</sup> Article 106(2).

<sup>224</sup> Section 31.

<sup>225</sup> Section 32.

<sup>226</sup> Act 111 of 1998.

<sup>227</sup> Section 32(4)(b). This provision is a reflection of the prescription in article 110(2) of the Rome Statute whereby the ICC “alone shall have the right to decide any reduction of sentence”.

<sup>228</sup> Schabas *supra* note 221 75.

<sup>229</sup> The Judicial Inspectorate of Prisons reported at the end of 2000 that prisons were severely overcrowded, with some at 200 per cent occupancy rate, and that a third of the prison population who were awaiting trial were detained under inhumane conditions and in breach of national law and international standards. See Amnesty International Country Report, South Africa – 2002 (available at <http://web.amnesty.org/web/ar2002.nsf/afr/south+africa!Open>). See further J Steinberg *Prison Overcrowding and the Constitutional Right to Adequate Accommodation in South Africa* CSVR Monograph January 2005.

<sup>230</sup> Article 77(2)(a).

<sup>231</sup> Article 75(2).

<sup>232</sup> Sections 25 and 26.

court in the Republic having jurisdiction.<sup>233</sup> Once the order has been registered, that sentence or order “has the effect of a civil judgment of the court at which it has been registered”, and the Director General of Justice and Constitutional Development must pay over to the ICC any amount realized in the execution of the sentence or the order, minus any expenses incurred by the Republic of South Africa in the execution thereof.<sup>234</sup>

## *Immunities*

The question of official immunities might arise in two contexts under the ICC Act. The first context involves the domestic prosecution in a South African Court of a foreign official whose high standing accords him immunity under international law. The second context involves cooperation by South Africa with the ICC in respect of the surrender of a high-standing foreign official who claims immunity under international law as a bar to that surrender.

While the ICC Act provides South African Courts with potential jurisdiction over persons who may have committed ICC crimes, the issue of immunity from jurisdiction for high ranking officials remains contentious. The controversy arises because of the heated debate under international law around the extent to which serving heads of state and other senior government officials can justifiably claim immunity, on the basis of their official status, from proceedings brought against them for allegedly committing international crimes.

Before the ICC matters are relatively clear. Article 27 of the Rome Statute provides that the “official capacity as a head of state or government, a member of a government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute.” The position of international law immunities before national courts is however less obvious. For instance, in the groundbreaking *Pinochet* cases the House of Lords accepted that serving international functionaries (such as current heads of state) retain absolute immunities *rationae personae* (ie, personal immunity on account of their status), irrespective of the nature of the crime alleged, unless waived by the sending state. Their Lordships denied immunity to Pinochet in his capacity as a *former* head of state. However, their Lordships made it clear that if he had still been an acting head of state, this immunity in international law would have continued to subsist.<sup>235</sup> The International Court of Justice has affirmed this immunity in its decision in *Democratic Republic of Congo v Belgium*.<sup>236</sup> With regard to the provisions precluding

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<sup>233</sup> Sections 25(2) and (3).

<sup>234</sup> Section 26.

<sup>235</sup> For instance, Lord Nicholls in the first *Pinochet* case held that “...there can be no doubt that if Senator Pinochet had still been the head of the Chilean state, he would have been entitled to immunity” (see *R v Bow St Magistrate, ex parte Pinochet Ugarte*, [1998] 4 All ER (Pinochet 1) at 938). Lord Millett in the third *Pinochet* case said that “Senator Pinochet is not a serving head of state. If he were, he could not be extradited. It would be an intolerable affront to the Republic of Chile to arrest him or detain him” (see *R v Bow St Magistrate, Ex p. Pinochet (No.3)* [1999] 2 WLR 824 at 905 H).

<sup>236</sup> *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* 2002 ICJ Reports 3.

immunity found in the constitutive instruments of a myriad of international criminal tribunals (the most recent being the Rome Statute of the ICC), the Court expressly held that this exception to customary international law was not applicable to national courts.<sup>237</sup> This case law therefore suggests that the diplomatic or head of state immunity of an accused prevents national courts from dealing with allegations of international crimes unless that immunity has been waived, or the senior official has left office. This lack of clarity is particularly problematic in light of the fact that national courts of States Parties to the Rome Statute are expected to act in a “complementary” arrangement with the International Criminal Court, prosecuting individuals for ICC crimes and deferring to the ICC only where the national State is unwilling or unable to perform its prosecutorial role.

South Africa has attempted to cut its way past this controversy by providing in section 4(2)(a) of the ICC Act that notwithstanding “any other law to the contrary, including customary and conventional international law, the fact that a person ... is or was a head of State or government, a member of a government or parliament, an elected representative or a government official ... is neither – (i) a defence to a crime; nor (ii) a ground for any possible reduction of sentence once a person has been convicted of a crime”. In terms of the Act, South African courts, acting under the complementarity scheme, are accorded the same power to “trump” the immunities which usually attach to officials of government as the International Criminal Court is by virtue of article 27 of the Rome Statute.

As John Dugard and Garth Abraham have pointed out, section 4(2)(a) of the ICC Act represents a choice by the legislature to wisely not follow the “unfortunate” *Arrest Warrant* decision “of which it must have been aware”.<sup>238</sup> Support for an argument that s 4(2)(a) of the ICC Act does indeed scrap immunity, notwithstanding the contrary position under customary international law, comes from no less a source than the Constitution. Section 232 of the Constitution provides that “[c]ustomary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament”.

That being said, it is difficult to predict what a court will decide. There is foreign precedent to suggest that a South African court dealing with section 4(2)(a) of the ICC Act and faced with a claim of head of state immunity might find that the section does not do away with *personal* head of state immunity. In *Sharon and others*<sup>239</sup> the Belgian Court de Cassation considered the Belgian equivalent of South Africa’s ICC Act. That legislation provides in article 5(3) that whatever the official capacity of persons accused of crimes enumerated in that law, they are not precluded from prosecution. One of the arguments advanced in support of the applicability of article 5(3) in relation to Mr Ariel Sharon, the serving Israeli Head of State, was that article 5(3) was in conformity with Article 27 of the Rome Statute. The Court rejected this argument, finding that Article 27 of the Rome Statute does not affect or prevent the

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<sup>237</sup> Para. 58.

<sup>238</sup> See J Dugard and G Abraham “Public International Law” (2002) 140 *Annual Survey of South African Law* 166.

<sup>239</sup> See decision of 26 June 2002, available at <http://www.sabrashatila.be/documents/arrest020226.pdf>.pp.22 (accessed 5 May 2007).

application of the customary rules of absolute immunity.<sup>240</sup> According to the Court, because the customary international law rule of absolute personal immunity for a head of state was applicable (and binding), article 5(3) of the Belgian law had to be taken to refer to *another* customary international law rule that prevents persons accused of international crimes from invoking their official capacity as a reason for not being held criminally responsible.<sup>241</sup>

Similarly, a South African court, faced with a claim for immunity from a serving head of state, and in light of the prevailing international and foreign case law which serve to indicate binding customary international law, might be inclined to uphold the personal immunity of a head of state notwithstanding the provisions of section 4(2)(a) of the ICC Act. The argument might run that, merely because the national court is exercising jurisdiction in terms of the Rome Statute does not change its status as a national court, and arguably the customary international law barrier to it prosecuting individuals enjoying immunity remains in place. In addition, and in evident tension with section 232 of the Constitution in this respect, is section 233. It provides that “[w]hen interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law”.

Whatever the outcome of this debate, certain aspects regarding immunity appear to be beyond doubt. *First* is that even if section 4(2)(a) does not do away with personal immunities of incumbent senior officials before a South African court, it might nonetheless be read as referring to some *other* customary international law rule that strips an official of immunity when he or she has committed an international crime. That immunity is immunity *ratione materiae*<sup>242</sup> – the functional immunity which attaches to any State official for acts performed on behalf of the State. The import of section 4(2)(a) of the ICC Act would thus be to give effect to the exception to immunity *ratione materiae*. Accordingly, while a high ranking official like a Head of State might remain clothed with a personal immunity whilst in office, such a high ranking official, and all other officials below him or her, will find that after leaving office the functional immunity which may have attached to their official functions and actions is lifted in respect of international crimes and private acts. Under section 4(2)(a) such an individual may be prosecuted for international crimes he has committed and the official capacity held while performing the act offers no shield. *Secondly*, even if section 4(2)(a) is made to yield to customary international law upholding immunity for senior officials, that is not to say that the high-ranking individual who attracts personal immunity by virtue of being an *incumbent* head of state or foreign minister, and

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<sup>240</sup> See A Cassese “The Belgium Court of Cassation v. the International Court of Justice: the *Sharon and others* Case” (2003) 1 *Journal of International Criminal Justice*, 439, and A Cassese “When May Senior State Officials be Tried for International Crimes?” (2002) 13 *European Journal of International Law* 853, 870 *et seq.*

<sup>241</sup> Cassese *supra* note 240 443. The other customary international rules in question would be those relating to immunity *ratione material*, but which were not applicable in the case at issue. The possibility thus remains that functional immunities might legitimately have been removed article 5(3) of the Belgian law, and similarly, under the South African ICC Act – see the discussion immediately below.

<sup>242</sup> See Cassese *International Criminal Law* (2001) 444.

who is arrested whilst in South Africa for an international crime, must necessarily be set free. Under the complementarity scheme it will be expected of a State Party to the Rome Statute that finds itself unable to exercise jurisdiction (because, for instance, such prosecution is in respect of a foreign State's Head of State) to send the accused to the International Criminal Court for prosecution.<sup>243</sup> Article 98(1) of the Rome Statute entails that States parties to the Statute have a duty of cooperation with the court requiring such States to arrest and surrender to the Court persons charged with an ICC crime. And where South Africa chooses to surrender a high standing official to the ICC the ICC Act makes clear that whatever immunity might have otherwise attached to the official, that immunity does not constitute a bar to the surrender of the person to the ICC.<sup>244</sup>

It appears, however, that such obligation would only be incumbent upon South Africa as a State Party where the Head of State charged before its Court is head of government of a State that is also a party to the Rome Statute. That is because both States, as parties to the Rome Statute, have accepted that the constitutive instrument of the International Criminal Court has scrapped immunities for Heads of State and other government officials through article 27.

What is the position where the accused person is the head of a government of a State *not party* to the Statute, as would be the case with President Mugabe,<sup>245</sup> for example? The answer appears to lie in article 98(1) of the Rome Statute, which provides that:

“The [International Criminal] Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.”

Thus if one accepts that under international law personal immunity attaches to incumbent senior cabinet officials such as Heads of State, then not only would any prosecution of a current head of state of a country which is not party to the Rome Statute by South Africa under its ICC Act be possibly inconsistent with its (South

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<sup>243</sup> The state's "inability" to prosecute the head of state because of the shield of personal immunity would thus trigger the ICC's jurisdiction. See P Gaeta "Official Capacity and Immunities" (2002) in Cassese et al (eds) *The Rome Statute of the International Criminal Court: A Commentary vol. 1* 994 and 997-1000. The ICC, acting within the complementarity scheme with domestic states, can only step into the fray when domestic states are either "unwilling" or "unable" to act. See article 17 read with article 1 of the Rome Statute.

<sup>244</sup> Section 10(9) of the ICC Act (read with section 4(2)(a) and (b)) provides that the fact that the person to be surrendered "is or was a head of state or government, a member of a government or parliament, an elected representative or a government official; or ... being a member of a security service or armed force, was under a legal obligation to obey a manifestly unlawful order of a government or superior" does not constitute a ground for refusing to issue an order committing that person to prison pending his or her surrender to the ICC.

<sup>245</sup> I mention President Mugabe of Zimbabwe since there have been calls in South Africa for his prosecution under the ICC Act. Zimbabwe is not a party to the Rome Statute. For further detail see M du Plessis and A Coutsooudis, "Serious Human Rights Violations in Zimbabwe: Of International Crimes, Immunities, and the Possibility of Prosecutions" (2005) 21(3) *South African Journal on Human Rights* 337.

Africa's) obligations under customary international law, but the International Criminal Court would also be prevented from requesting the surrender of that person, which may in fact mean that proceedings against such a person are effectively precluded.<sup>246</sup> The only exception to this situation would be a waiver of the immunity by the third State.<sup>247</sup>

## ***Conclusion***

South Africa has shown itself to be an avid supporter of the International Criminal Court and the ICC Act formalises that support. South Africa's ratification of the Rome Statute, followed by the passing of the ICC Act, demonstrates that the country is responding to the world public's demand for a stand on genocide, crimes against humanity, and war crimes. That response is important. The International Criminal Court is part of a continuum, a process that was catalysed in Nuremburg, and which strives for a world where the worst criminals are dealt with as "international" offenders. Africa as a continent is home to many of these criminals, and the International Criminal Court's first docket is testimony to the serious crimes that are committed daily in African States. South Africa's role as an African leader in its support of the ICC is therefore important, and its ICC Act might hopefully serve as a useful example for other African States Parties in their efforts to domestically give effect to their obligations under the Rome Statute.

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<sup>246</sup> Since trial *in absentia* are not allowed by the Rome Statute, in order to prosecute the ICC must rely on States for assistance and the surrender of individuals, yet in respect of those individuals enjoying personal immunity article 98(1) of the Rome Statute would prevent the ICC from making such requests; see Gaeta supra note 243 992.

<sup>247</sup> Gaeta supra note 243 993-994, argues that article 98 should be interpreted to mean that a request for the waiver of immunity will only be required if the State (whose national enjoys immunity) is not a party to the Rome Statute.

## CHAPTER 5: THE COURT BEGINS ITS WORK – AN AFRICAN AFFAIR, AND MYTHS TO BE CONFRONTED<sup>248</sup>

### *Introduction*

In this chapter an attempt is made to grapple with certain myths that have recently been propagated by a number of individuals, including government officials, political leaders, and civil society members regarding the world's first permanent international criminal tribunal – the International Criminal Court (the ICC). These distortions, misconceptions and errors relate to or arise from the ICC's work in Africa.

The ICC has sparked immense interest since it opened its doors in 2002. As one noted commentator puts it: “Whether or not one is supportive of the International Criminal Court, any knowledgeable specialist has to admit that in the history of public international law it is a truly extraordinary phenomenon”.<sup>249</sup> It may just be “the most important institutional innovation since the founding of the United Nations”.<sup>250</sup>

A measure of the Court's rise is the number of States that have joined the ICC. Since the Court's statute entered into force on 1 July 2002, it has been signed by 139 States and ratified by 108. Of those 108 states parties, 31 – a significant proportion – are African. Africa is also the largest regional grouping on the Assembly of States Parties; three judges on the Court are from the African regional grouping, including the First Vice President; and the Deputy Prosecutor of the ICC is African.

Africa is thus well represented on the ICC. This siding with an institution designed to deal a blow to the perpetrators of international crimes continues a trend begun in the early 1990s. For example, Rwanda requested the United Nations Security Council to establish the Rwanda Tribunal (ICTR), although they differed on various issues, notably the death penalty and the location of the tribunal.<sup>251</sup> The President of the Appeals Chamber for the Rwanda Tribunal, prior to her appointment as a judge of the ICC, was Judge Navi Pillay.<sup>252</sup> And Sierra Leone appealed to the United Nations to

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<sup>248</sup> This is an expanded and updated version of a book chapter published in Chile Eboe-Osuji (ed) *Protecting Humanity: Essays in International Law and Policy in Honour of Navanethem Pillay* (2010). Parts of the chapter also appeared in an occasional paper published by the Institute for Security Studies entitled “Confronting the myths: the International Criminal Court and its work in Africa”, paper 173, November 2008.

<sup>249</sup> William Schabas *An Introduction to the International Criminal Court*, 3<sup>rd</sup> ed (2007) xi.

<sup>250</sup> Ibid, citing Robert C Johansen, “A Turning Point in International Relations? Establishing a Permanent International Criminal Court” (1997) 13 Report No 1, 1 (Joan B Kroc Institute for International Peace Studies, 1997).

<sup>251</sup> SC Resolution 955 of 8 November 1994. For detail see C Scheltema and W van der Wolf (eds) *The International Tribunal for Rwanda: Facts, Cases, Documents* (1999).

<sup>252</sup> Judge Pillay's impressive work at the ICTR, particularly in the field of sexual violence and the groundbreaking decision of the ICTR in *Akayesu*, have been noted elsewhere. In relation to the importance of female judges at the ICC drawing on the experience of Judge Pillay's involvement in

help deal with impunity in that country. That request gave the world the Special Court for Sierra Leone.<sup>253</sup>

Africa is therefore a continent that is no stranger to the emerging international criminal justice initiatives that have marked the end of the Cold War. However, more recently there is reason to believe that the initial support among African States for international criminal justice more generally and for the ICC in particular has begun to wane. Take the ICTR by way of example. Rwanda's President Kagame has complained that the ICTR is moving too slowly and is grossly inefficient. Kagame's views of international criminal justice have become even frostier after calls by a French judge for President Paul Kagame to be investigated by the ICTR for the killing of his predecessor, which is widely regarded as the act that sparked the genocide.<sup>254</sup> The French have been joined by the Spanish when in early 2008 a Spanish magistrate said he also had evidence implicating Rwanda's current president Paul Kagame in international crimes but cannot charge him because as a sitting president Kagame has immunity.<sup>255</sup> Both cases are examples of domestic investigators probing the commission of international crimes by relying on so-called "universal jurisdiction". The response to them from Kagame not surprisingly has been to severely criticize the "arrogant" assertion of universal jurisdiction by European states.

The ICC too has come under attack. Notwithstanding that it was Kagame that called on the UN to create the ICTR to prosecute Rwandan genocidaires, his original support for international criminal justice has evaporated. His tone is bristling: he is of the view that the ICC has been created to deal only with African countries and that "Rwanda cannot be part of that colonialism, slavery and imperialism".<sup>256</sup> And, as we shall see, he is not alone in his criticism of international criminal justice, at the centre of which is the ICC.

The anti-ICC voices have reached a crescendo in response to the decision in early July 2008 by the ICC Prosecutor to request an arrest warrant for President Omar al-

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*Akayesu*, see Cherie Booth and Max du Plessis "The International Criminal Court and Victims of Sexual Violence" (2005) 18(3) *South African Journal of Criminal Justice* 241.

<sup>253</sup> In January 2002 the Special Court for Sierra Leone was established as a result of an agreement between the UN and Sierra Leone to try "those who bear the greatest responsibility" for crimes against humanity and disrupting the peace process. The Court is a hybrid, staffed by local and international personnel, and has an international prosecutor. See Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Freetown, 16 January 2002.

<sup>254</sup> See BBC News 30 January 2007, "Rwanda leader defiant on killing claim", available at <http://news.bbc.co.uk/2/hi/africa/6312579.stm> (accessed on 11 October 2008). See also Daniel Wallis, "Rwanda Genocide Court Poses Questions on Justice", Reuters, 7 August 2008, available at <http://www.globalpolicy.org/intljustice/tribunals/rwanda/2008/0807poses.htm> (accessed 12 October 2008).

<sup>255</sup> See USA Today, "Spanish judge charges Rwanda's military with genocide", 6 February 2008, available at [http://www.usatoday.com/news/world/2008-02-06-spain-rwanda\\_N.htm](http://www.usatoday.com/news/world/2008-02-06-spain-rwanda_N.htm) (accessed 12 October 2008).

<sup>256</sup> See Nicole Fritz "Black-white debate does no justice to a nuanced case", *Business Day*, 13 August 2008. See also The Nation (Nairobi) "Rwanda: Kagame Tells Why He is Against ICC Charging Bashir", 3 August 2008, available at <http://allafrica.com/stories/200808120157.html> (accessed 12 October 2008).

Bashir of Sudan, on account of his alleged involvement in genocide and crimes against humanity, and the confirmation of that request (in respect of at least war crimes and crimes against humanity) by the ICC pre-trial chamber on 4 March 2009. But the underlying attacks on the ICC, of which Kagame's forms part, have been coming long before July 2008. They are captured in statements to the effect that the ICC is a Western, or imperialistic initiative; that it is some form of colonial throwback; or the imposition of a developed world's form of justice on an unsuspecting and servile African people; and that the Court is unhealthily preoccupied with the African continent.

### *Of unfairness, myths, and new (old) world orders*

The founding document of the ICC is the Rome Statute, which was adopted after the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of a Permanent International Criminal Court in Rome on 17 July 1998. The Rome Conference was specifically aimed at attracting States and Non-Governmental Organisations so that they might debate and adopt a statute which would form the basis for the world's first permanent international criminal tribunal.

The various allegations made against the ICC include the following principal complaints.

- First, there is the suggestion that the ICC is a creation of western powers.<sup>257</sup>
- Second, and related to the first allegation, is the argument that the ICC is a tool designed to target Africans, be they leaders or foot-soldiers.

The argument finds support in the recent statement by the Chairperson of the AU Commission – Jean Ping – who reportedly expressed Africa's disappointment with the ICC in noting that rather than pursuing justice around the world – including in cases such as Columbia, Sri Lanka and Iraq<sup>258</sup> – the ICC was focusing only on Africa and was undermining rather than assisting African efforts to solve its problems. The BBC has quoted Ping as complaining that it was “unfair” that all those indicted by the ICC so far were African. While purporting to confirm that “[the AU] is not against international justice”, he has apparently lamented that “[i]t seems that Africa has become a laboratory to test the new international law.”<sup>259</sup>

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<sup>257</sup> See for example Mohau Pheku, “It seems the West's war crimes tribunals are reserved for Africans”, *Sunday Times*, 27 July 2008. See also BBC Monitoring, “Sudanese Leader Calls International Court ‘Tool of Imperialist Forces’” [State-owned] *Suna News Agency*, 20 August 2008.

<sup>258</sup> As we shall see further below, in fact the Prosecutor of the ICC has indicated that his Office is conducting analysis of several situations outside Africa – Columbia and Georgia amongst others have been or are under analysis. And we shall see too that the Prosecutor has considered prosecution of crimes committed in Iraq, but declined to investigate and gave detailed reasons for that decision.

<sup>259</sup> See BBC News, 27 September 2008, “Vow to pursue Sudan over ‘crimes’”, available at <http://news.bbc.co.uk/2/hi/africa/7639046.stm> (accessed 10 October 2008).

- Third, and articulated most recently by a renowned African scholar, Mahmood Mamdani, is the more sophisticated (but also related) notion that the ICC is part of some new “international humanitarian order” in which there is (to Mamdani) the worrying emphasis “on big powers as enforcers of justice internationally”.<sup>260</sup>

Part of his thesis is that the ICC is a component of this new order, an order which “draws on the history of modern Western colonialism”, and that the ICC shares an aim of “mutual accommodation” with the world’s only superpower: a fact which to Mamdani “is clear if we take into account the four countries where the ICC has launched its investigations: Sudan, Uganda, Central African Republic and Congo”, given that all of these “are places where the United States has no major objection to the course chartered by ICC investigations”.<sup>261</sup> Mamdani concludes this line of reasoning by stating: “Its name notwithstanding, the ICC is rapidly turning into a Western court to try African crimes against humanity. It has targeted governments that are US adversaries and ignored actions the United States doesn’t oppose, like those of Uganda and Rwanda in eastern Congo, effectively conferring impunity on them”.

To similar effect but in more strident language are the claims by Rwanda’s Kagame portraying the ICC as a new form of “imperialism” that seeks to “undermine people from poor and African countries, and other powerless countries in terms of economic development and politics”.<sup>262</sup>

The danger with each of these arguments is that they will find traction – not surprisingly – with dictators and their henchmen who seek reasons to delay or resist being held responsible under universally applicable standards of justice. But compounding matters is the fact that each of the arguments is not substantiated by the true facts, or, perhaps worse (even if unwittingly so), is a distortion of the true facts. The danger of these distortions is obvious. As one commentator has put it: the risk is that “the rhetoric of condemnation – that the ICC is an agent of neocolonialism or neo-imperialism, that is it anti-African – may so damage the institution that ... it is simply abandoned”.<sup>263</sup>

The ICC is a tool for justice in a continent where impunity (the polar opposite of justice) has been emblematic. The importance of international criminal law for the

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<sup>260</sup> Mamdani’s thesis is set out in a recent article appearing in *The Nation* (29 September 2008) under the title “*The New Humanitarian Order*” available at <http://www.thenation.com/doc/20080929/mamdani> (accessed 8 October 2008). References hereinafter are to the article as it appears on the Web and without page citations.

<sup>261</sup> Ibid.

<sup>262</sup> See AFP “Rwanda’s Kagame says ICC Targeting Poor, African Countries ” 31 July 2008; Rwanda Radio via BBC Monitoring “Rwandan President Dismisses ICC as Court Meant to ‘Undermine’ Africa” 1 August 2008. See also Oraib Al Rantawi “A Step Forward or Backward?” *Bitter Lemons* 32(6), 14 August 2008.

<sup>263</sup> See Nicole Fritz “Black-white debate does no justice to a nuanced case” *Business Day*, 13 August 2008.

African continent is starkly highlighted by a(n African) senior legal adviser of the ICC's Registry:<sup>264</sup>

“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.”

The International Criminal Court is a call to responsibility for persons guilty of “*the most serious crimes of concern to the international community as a whole*”.<sup>265</sup> In this respect it takes seriously the words of Justice Robert Jackson, Chief Prosecutor at Nuremberg, who famously said that letting major war criminals live undisturbed to write their memoirs in peace “*would mock the dead and make cynics of the living*”.<sup>266</sup> The function of a trial in the ICC is thus first and foremost a proclamation that certain conduct is unacceptable to the world community. That may sound like an obvious statement, particularly to a domestic law prosecutor, but it is not one which international law has always embraced. While war crimes are committed every day and whole races have been defined by their experience of genocide or crimes against humanity, international laws designed to punish these acts have, for a variety of political reasons, only been put into practice at Nuremberg and Tokyo after WWII, and in the 1990s by the creation of The Hague Tribunals. This very limited outpouring of indignation has for too long sent out an insidious message at the international level that to a large degree war crimes and crimes against humanity are followed by impunity. For anyone committed to the notion of human rights, the message must change. As Kofi Annan reminded when observing the International Day of Reflection on the 1994 Genocide in Rwanda:

“We have little hope of preventing genocide, or reassuring those who live in fear of its occurrence, if people who have committed this most heinous of crimes are left at large, and not held to account. It is therefore vital that we build and maintain robust judicial systems, both national and international – so that, over time, people will see there is no impunity for such crimes”.<sup>267</sup>

The ICC and national criminal law systems working to complement it are the means by which we can cure this defect in the international legal system. The act of punishing particular individuals – whether the leaders, or star generals, or foot-soldiers – becomes an instrument through which individual accountability for massive human rights violations is increasingly internalised as part of the fabric of our international society. At the same time, it is a method by which we put a stop to the

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<sup>264</sup> See Phakiso Mochochoko, “Africa and the International Criminal Court” in E Ankumah and E Kwakwa (eds) *African Perspectives on International Criminal Justice* (2005) 249.

<sup>265</sup> See the Preamble to the Rome Statute of the International Criminal Court.

<sup>266</sup> Robert H. Jackson, *The Nurnberg Case, as Presented by Robert H. Jackson*, (1947), at 8.

<sup>267</sup> “Secretary-General Observes International Day of Reflection on 1994 Rwanda Genocide”, 07 April 2004, UN Press Document, available at <http://www2.unog.ch/news2/documents/newsen/sg04003e.htm> (accessed 10 October 2008).

culture of impunity that has taken hold at the international level, and by which we provide a public demonstration of justice. The ICC, building on the work done by The Hague Tribunals, is the means by which such a public account of justice is now possible in respect of every crime set out in the Rome Statute. In that regard, it is of singular importance to note – as the recent furore over the ICC’s call for President al-Bashir’s arrest highlights – that no one, not even a serving head of state, will be able to claim immunity from the jurisdiction of the Court.

It is of obvious concern then that the ICC has come under such vitriolic attack from within Africa and by scholars associated with Africa. What this article proceeds to do is to consider the criticisms in turn. How valid are the attacks on the ICC? And what lessons (if any) might be drawn from the fact that these attacks have been made?

### *An ICC by and for Africans – if one takes the time to look closely*

The suggestion that the ICC is the creation of Western powers couldn’t be further from the truth. It is only by ignoring the history of the Court’s creation and the serious and engaged involvement of African states in that history that one can assert that the ICC is a western court. The assertion is in any event belied by the Court’s composition. While the Court is situated in The Hague, in the Netherlands, its staff is drawn from around the world and in accordance with UN rules on regional representation, includes a number of Africans. For example, of the eighteen Judges first appointed to sit on the ICC, four are from Africa,<sup>268</sup> and the Deputy President of the Court is an African, Akua Kuenyehia. The Prosecutor is Luis Moreno Ocampo (an Argentine) and his deputy is Fatou Bensouda, a highly respected Gambian who was formerly Attorney General and then Minister of Justice in her home state. In addition, Medard Rwelamira, a citizen of South Africa and Tanzanian by birth was the first Director of the Secretariat of the Assembly of States Parties, before his untimely passing in 2006.<sup>269</sup>

The ICC is not a tool designed for use specifically in the least developed and developing countries in Africa and Asia. This view is demeaning to Africans more generally, but more specifically does no justice to the high ideals and hard work that marked African states’ participation in bringing the ICC to life in Rome. Thus,

“[c]ontrary 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”, a closer inspection of “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

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<sup>268</sup> Navi Pillay (South Africa) (who in 2008 resigned to take up the position of UN High Commissioner for Human Rights), Akua Kuenyehia (Ghana), Fatoumata Dembele Diarra (Mali) and Daniel Ntanda Nsereko (Uganda).

<sup>269</sup> For further information about the work of Dr Rwelamira at the Court see the ICC Press Release dated 5 April 2006 <http://www.icc-cpi.int/press/pressreleases/139.html> (accessed 20 October 2008).

and to bring to justice those responsible for the most serious crimes of concern to the international community”.<sup>270</sup>

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.

In the period leading up to the Rome diplomatic conference, various ICC-related activities were organised throughout Africa. This approach (replicated in other regional blocs) was consistent with the idea of enhancing universal support, and was also seen as fostering a better understanding of the substantive issues raised in the draft text of the statute.<sup>271</sup> 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.<sup>272</sup>

Also forgotten by those who would label the Court “western”, is the active and important role played by the Southern African Development Community (SADC) in its support for the ICC. In ICC-related negotiations after 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.<sup>273</sup> The participants agreed on a set of principles that were later sent to their respective ministers of justice and attorneys-general for endorsement. These principles – which no doubt today would draw winsome criticism from African critics of the court – included the far-reaching suggestions that: (1) the court should have automatic jurisdiction over genocide, crimes against humanity and war crimes; (2) the court should have an independent prosecutor with power to initiate proceedings *proprio motu*; (3) there should be full cooperation of all states with the court at all stages of the proceedings; and (4) that 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.<sup>274</sup> These principles also appeared in the Dakar

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<sup>270</sup> See Mochochoko supra note 264 243. See also Hassan Jallow and Fatou Bensouda “International Criminal Law in an African Context”, in Max du Plessis (ed) *African Guide to International Criminal Justice* (2008). I have drawn extensively on the chapter by Jallow and Bensouda in describing the Africa-heavy involvement in the lead up to the Rome Statute and during the Rome Conference itself.

<sup>271</sup> Mochochoko supra note 264 246.

<sup>272</sup> Mochochoko supra note 264 248.

<sup>273</sup> Mochochoko supra note 264 248.

<sup>274</sup> See generally Sivu Maqungo, “The establishment of the International Criminal Court: SADC’s participation in the negotiations” (2009) 9(1) *African Security Review* available at <http://www.iss.co.za/pubs/asr/9No1/InCriminalCourt.html> (accessed 20 October 2008).

declaration on the ICC and other declarations.<sup>275</sup> 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.<sup>276</sup>

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.<sup>277</sup>

As Schabas notes, at the Rome Conference “[a] relatively new force, the Southern African Development Community ..., under the dynamic influence of post-apartheid South Africa, took important positions on human rights, providing a valuable counterweight to the Europeans in this field”.<sup>278</sup>

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. The true picture that emerges then is a Court created with extensive and deep involvement of African nations – a Court in reality created *by* Africans, in concert with other nations of the world who came together at Rome.

It is also a Court which proudly counts amongst its members such a significant coterie of African nations that Africa today is the largest regional bloc represented at the ICC. After the statute was completed, in February 1999 Senegal became the first state party to ratify the Rome Statute. Steadily following suit were a host of African states parties so that today the Court enjoys – at least on paper – significant support in the region. To date, the Rome Statute has been signed by 139 states and 106 states have ratified

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<sup>275</sup> Mochochoko supra note 264 at 248–249.

<sup>276</sup> Mochochoko supra note 264 at 250.

<sup>277</sup> See Maqungo supra note 274.

<sup>278</sup> Schabas supra note 249 19.

it.<sup>279</sup> Of those 106 states a very significant proportion — 30 — are African.<sup>280</sup> Of the 53 African Union nations, Africa boasts as states parties to 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.

Aside from the fact of continent-wide ratification of the Rome Statute, African commitment to the ICC, and to the cause of international justice, has been demonstrated by for instance the strategic partnership agreement signed at the EU-Africa summit in Lisbon in December 2007 which proclaims a joint commitment that “crimes against humanity, war crimes and genocide should not go unpunished and their prosecution should be ensured”.<sup>281</sup> This commitment reflects an understanding that responsibility for the prosecution of core international crimes in Africa (and for raising awareness of these issues) are broader than the ICC alone. It is a commitment which was earlier reflected by 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.

In short, suggestions that the Court is a western creation, or anti-African, must overcome the overwhelming evidence of African involvement in the Court. The African support for the Court described above thus leads to an important conclusion. That conclusion is that the Court, and the Rome Statute which underpins its substance and processes, was regarded by Africa’s states parties as being an institution which is *for* Africa. That is, the Court has been regarded by the majority of Africa’s leaders as supportive of African ideals and values, including the goal of ridding the continent of its deserved reputation as a collage of despots, crackpots and hotspots where impunity for too long has followed serious human rights violations.

### ***The ICC in Africa: invited yet not welcome?***

The ICC is currently considering four situations. Three of those arise from so-called “State referrals” from Democratic Republic of Congo, Uganda, and Central African Republic, all states parties to the Rome Statute.<sup>282</sup> The fourth has come to the Court

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<sup>279</sup> For latest ratification status, see [www.iccnw.org](http://www.iccnw.org).

<sup>280</sup> For status of African ratification, see [www.iccnw.org/countryinfo/RATIFICATIONSbyUNGroups.pdf](http://www.iccnw.org/countryinfo/RATIFICATIONSbyUNGroups.pdf).

<sup>281</sup> See <http://hrw.org/english/docs/2007/12/04/africa17466.htm>.

<sup>282</sup> The practice of self-referrals is in some respects a practice encouraged by the OTP. The Prosecutor has explained that self-referrals are encouraged as part of a “policy of inviting and welcoming voluntary referrals by territorial states as a first step in triggering the jurisdiction of the Court” (see OTP, “Report on the Activities Performed During the First Three Years (June 2003 – June 2006)”, 12 September 2006, 7. While the practice has been welcomed by some (see for instance Claus Kress, “‘Self-Referrals’ and ‘Waivers of Complementarity’: Some Considerations in Law and Policy” (2004) 2 *JICJ*, 945), it has also been criticised as allowing states to abdicate their responsibility to prosecute international crimes to the ICC (see for example Schabas *supra* note 249 150; and Paula Gaeta, “Is the

by a Security Council referral requesting the ICC to consider the serious crimes that have been committed in Sudan, which has not ratified the Rome Statute. In addition to these, the Court is also considering violations in Cote d' Ivoire, which has also not ratified the Rome Statute but which has made a declaration in accordance with Article 12(3), which allows a non-party State to lodge a declaration with the Registrar of the Court accepting the Court's jurisdiction for specific crimes.

While geography tells us that these are all African situations, that fact alone cannot prove that the ICC has a discriminatory practice of choosing African violations over those from other parts of the world. Here is why.

### The Court's screening process

The OTP's current cases are but a small minority of matters that the Court has been asked to investigate. However, before glib conclusions can be drawn about the African focus of the Court's docket of cases, it is necessary to consider the process by which cases are screened.

As a starting point it might be noted that the OTP has adopted an impressively open and transparent approach to its work.<sup>283</sup> The OTP has explained in public documents its strategies and policies and – within the necessary constraints of confidentiality – attempted to justify the exercise of its discretion. For example, Article 15(6) of the Rome Statute requires the Prosecutor to inform those who have provided information concerning a possible prosecution when he concludes that there is no reasonable basis to proceed further. The Prosecutor has interpreted the provision generously and – as we shall see below – has issued public and detailed statements explaining his decision not to investigate crimes committed in Iraq and Venezuela, and has issued more general comments explaining why situations fall outside the jurisdiction of the Court.

The Office of the Prosecutor receives numerous submissions from various sources alleging the commission of crimes within the jurisdiction of the Court. A summary of the submissions received by the OTP is publicly available.<sup>284</sup> 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 Court, through the Prosecutor, had received over 650 communications. It is important to consider these complaints. They come to the Court from a variety of sources, including States Parties and non-

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Practice of 'Self-Referrals' a Sound Start for the ICC?" (2004) 2, *JICJ* 952). This debate, and the (to this author) valid concerns about self-referrals as an excuse for states to push to The Hague cases they should be prosecuting domestically, is beyond the scope of this article. The political and historical fact remains that each of the three self-referral cases discussed below involved a choice on the part of African states to cooperate with the ICC.

<sup>283</sup> See further Schabas *supra* note 249 356.

<sup>284</sup> For example, see [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) (accessed 14 October 2008).

party States, and NGOs and individuals.<sup>285</sup> As will be seen they reveal a disturbing lack of understanding about the Court and the Court's functioning.

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 which 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 that do not fall within the Court's remit.

Thirty-eight complaints alleged that an act of aggression had taken place in the context of the war in Iraq in 2003. The problem here is that the United States of America 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 which the drafters of the Statute expressly left until a future date, most probably some time after 2009. Two communications referred to the Israeli-Palestinian conflict. The difficulty here 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 1732 communications from over 103 countries, and that 80% of those communications were found to be “manifestly outside [the Court's] jurisdiction after initial review”.<sup>286</sup>

In short, the overwhelming number of communications directed at the OTP is simply not actionable. That fact alone places in better perspective the actual – and significantly smaller – number of communications which have lawfully been open for consideration by the OTP for possible investigation. The Court has thus dealt quickly and effectively, but also transparently, with manifestly unfounded communications, which is evidence of the robustness of its screening methods.

The approach adopted by the OTP in screening these submissions will be discussed in detail below, and results ultimately in a decision as to whether there is a reasonable basis to proceed with an investigation. The policy of the Office is to maintain the confidentiality of the analysis process, in accordance with the duty to protect the confidentiality of senders, the confidentiality of information submitted and the integrity of analysis or investigation.<sup>287</sup>

In the great majority of cases, where a decision is taken not to initiate an investigation on the basis of communications received, the Office submits reasons for its decision

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<sup>285</sup> Aside from obvious sources such as States Parties (in the case of State Party referrals) or the Security Council (in the case of Security Council referrals) the Rome Statute allows the Prosecutor to take action *proprio motu* on the basis of information he has gathered from “States, United Nations organs, intergovernmental or non-governmental organisations ... and other reliable sources that he or she deems appropriate” (Rome Statute, Article 15(2)).

<sup>286</sup> See Updated on Communications received by the Office of the Prosecutor of the ICC, dated 10 February 2006 (see [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)).

<sup>287</sup> See inter alia Rules 46 and Rule 49(1) of the International Criminal Court's Rules of Procedure and Evidence.

only to senders of communications. This policy is consistent with Rule 49(1) of the Court's Rules of Procedure and Evidence, and is necessary to prevent any danger to the safety, well-being and privacy of senders and helps to protect the integrity of the analysis process. However, in the interest of transparency, the Office may make publicly available its reasons for decision where three conditions are met: (1) a situation has warranted intensive analysis, (2) the situation has generated public interest and the fact of the analysis is in the public domain and (3) reasons can be provided without risk to the safety, well-being and privacy of senders. Accordingly, in the interests of transparency, the Office made available its decisions in relation to Iraq and Venezuela, both of which are available on the Court's website.<sup>288</sup> Five unspecified situations were reported to be subject to ongoing examination, although their identity was not publicly disclosed.<sup>289</sup> Among them are the Central African Republic, which has since been referred to the Court, and Cote d'Ivoire, which has made a declaration under Article 12(3). As Schabas points out, that "leaves three remaining situations about which we can only speculate. Columbia and Afghanistan would be good candidates for the list".<sup>290</sup>

The responses to information received regarding the alleged commission of crimes in Venezuela and Iraq illustrate how this process functions in practice.<sup>291</sup> These examples are useful given the complaint that the ICC is unfairly skewing its attention in favour of African states. Even if one disagrees (legally or otherwise) with the OTP's approach for refusing to act on requests for investigation, a reading of those reasons reveals that there is little basis for suggesting that the ICC is a Court which "unfairly" discriminates in its selection of certain situations over others.

### *Venezuela*

Most of the information submitted to the OTP 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>292</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 OTP reviewed the information provided, together with additional material obtained from open sources, media reports and reports of international and non-governmental organisations. The Office noted that, as Venezuela had ratified the

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<sup>288</sup> See [http://www.icc-cpi.int/organs/otp/otp\\_com.html](http://www.icc-cpi.int/organs/otp/otp_com.html) (accessed 20 October 2008). See also Lynn Gentile, "Understanding the International Criminal Court", in Max du Plessis (ed), *African Guide to International Criminal Justice* (2008), Institute for Security Studies.

<sup>289</sup> See OTP, "Report on the Activities Performed During the First Three Years (June 2003 – June 2006)", 12 September 2006, 9.

<sup>290</sup> Schabas *supra* note 249 163.

<sup>291</sup> 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).

<sup>292</sup> See Rome Statute article 53(1)(a).

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. Because a significant number of the allegations referred to incidents alleged to have occurred prior to 1 July 2002, the OTP focused only on those that fell within the temporal jurisdiction of the Court. In the view of the OTP, 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, the OTP's conclusion could be reconsidered in the light of new facts or evidence, and it remained open to the information providers to submit any such information.

### *Iraq*

The allegations regarding crimes committed in Iraq related to the launching of military operations and the resulting fatalities by US and allied forces. The Prosecutor's response to the allegations outlined the process of receiving and analysing information employed by the OTP. The response noted that the events in question occurred on the territory of Iraq, which was not a State Party and which had not lodged a declaration of acceptance of jurisdiction 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 under the Rome Statute the Court 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 OTP was of the view that the available information provided no reasonable 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.<sup>293</sup> Similarly, the available information provided no reasonable indications of the required elements for a crime against humanity, namely, a widespread or systematic attack directed against any civilian population.<sup>294</sup>

The OTP 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 twelve victims of wilful killing and a limited number of victims of inhuman treatment, totalling, less than twenty 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>295</sup> The OTP expressly compared the particular crimes in Iraq with the scale of the killings in the DRC, Uganda and Darfur situations, a comparison used to highlight that the ICC is a Court which gives priority to the most serious crimes committed – whether in Africa or elsewhere. In the Prosecutor’s words:

“The number of potential victims of crimes within the jurisdiction of the Court in this situation – 4 to 12 victims of wilful killing and a limited number of victims of inhuman treatment – was of a different order than the number of victims found in other situations under investigation or analysis by the Office. It is worth bearing in mind that the OTP is currently investigating three situations involving long-running conflicts in Northern Uganda, the Democratic Republic of Congo and Darfur. Each of the three situations under investigation involves thousands of wilful killings as well as intentional and large-scale sexual violence and abductions. Collectively, they have resulted in the displacement of more than 5 million people. Other situations under analysis also feature hundreds or thousands of such crimes.”<sup>296</sup>

### Assessing the gravity of the situation and judicial oversight

We have already seen how the state referral mechanism has caused the ICC, through African invitation, to exercise jurisdiction over the situations in Uganda, the DRC and

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<sup>293</sup> Article 6, Rome Statute.

<sup>294</sup> Article 7, Rome Statute.

<sup>295</sup> Since, as required under article 8(1), the Court has jurisdiction over war crimes, “in particular when 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 conclusion 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.

<sup>296</sup> See Prosecutor’s decision on Iraq, page 9, available at [http://www.icc-cpi.int/organs/otp/otp\\_com.html](http://www.icc-cpi.int/organs/otp/otp_com.html) (accessed 22 October 2008).

CAR (all States Parties) and in future Cote d'Ivoire (to date not a State Party).<sup>297</sup> 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. Contrary to the expectations of those critics who fear a court with unprincipled "universal" aspirations,<sup>298</sup> the Prosecutor has to date never exercised this power to initiate an investigation.

But whether it is a state party referral (or a future *proprio motu* investigation by the Prosecutor), even where all the jurisdictional requirements have been met, the case in question must meet an additional threshold of gravity before the Prosecutor can intervene. This criterion is most clearly expressed in article 17(1)(d) of the Rome Statute.<sup>299</sup> As the Iraq and Venezuela requests indicate, in determining whether a case is grave enough to justify further action by the Court, the OTP will take into account a range of factors, including the nature of the crimes, the scale and manner of their commission, as well as their impact.<sup>300</sup>

A proper appreciation of the gravity criterion in the Rome Statute requires one to acknowledge the inherent differences between domestic and international prosecutions, and to simultaneously appreciate the immense challenges facing the Prosecutor. Louis Arbour, who was then the Prosecutor of the International Criminal Tribunal for the former Yugoslavia, noted in a statement to the December 1997 session of the Preparatory Committee on the Establishment of an International Criminal Court that there is a major difference between international and domestic prosecution. In a domestic context, there is an assumption that all crimes that go beyond the trivial or *de minimis* range are to be prosecuted. But, before an international tribunal

"the discretion to prosecute is considerably larger, and the criteria upon which such Prosecutorial discretion is to be exercised are ill-defined, and complex. In my experience, based on the work of the two Tribunals to date, I believe that the real challenge posed to a Prosecutor is to choose from many meritorious complaints the appropriate ones for international intervention, rather than to weed out weak or frivolous ones".<sup>301</sup>

Philippe Kirsch QC and Darryl Robinson provide further elaboration. They point out:

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<sup>297</sup> Article 15(1) of the Rome Statute.

<sup>298</sup> On the myth that the Court has inclinations towards exercising a (politically or discriminatory) motivated form of universal jurisdiction, see further below.

<sup>299</sup> 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, Articles 53(1)(b) and 53(2)(b) of the Rome Statute 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.

<sup>300</sup> The prosecutorial strategy of the OTP 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).

<sup>301</sup> "Statement by Justice Louis Arbour to the Preparatory Committee on the Establishment of an International Criminal Court, December 8, 1998", pp 7-8 (emphasis added), quoted in Schabas *supra* note 249 159-160.

“Since the issue of trigger mechanisms relates to the special problems of activating an international criminal justice mechanism, it is hardly surprising that there could be no relevant legal precedents in national procedural laws. ... The ICC, however, presented a novel problem as it represented the first permanent international criminal law institution empowered to deal with future and unknown situations. Thus, it was necessary to determine the procedural mechanisms to “trigger” ICC proceedings over future situations that may arise”.<sup>302</sup>

One of the ways in which the drafters of the Rome Statute purported to assist the ICC Prosecutor to choose from many complaints the appropriate ones for international intervention by the ICC was by means of the gravity criterion. That the Prosecutor requires this trigger mechanism is made clear by the breadth and depth of complaints that the OTP has received. In its first three years of operation alone, the OTP received nearly 2000 communications from individuals or groups in more than 100 countries. One can thus appreciate the manifest difference between the OTP’s decisions on investigation and prosecution from those that a domestic prosecutor might have to make, the place for the gravity criterion within the Rome Statute, and the concomitant constraints placed on the Prosecutor.

The Prosecutor has said that, in determining whether to exercise his powers, he is required to consider three factors, all of them rooted in the provisions of the Rome Statute. First, he must determine whether the available information provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed.<sup>303</sup> Secondly, he must assess whether the case would be admissible in accordance with Article 17 of the statute: this necessitates examining the familiar standard of whether the national courts are unwilling or unable genuinely to proceed. But it also involves assessing what Bill Schabas has described as “the rather enigmatic notion of ‘gravity’”.<sup>304</sup> If these conditions are met, then the third requirement must be considered: whether it is in the “interests of justice” for the matter to be investigated.<sup>305</sup> As the Prosecutor himself has explained:

“While, in a general sense, any crime within the jurisdiction of the Court is ‘grave’, the Statute requires an additional threshold of gravity even where the subject-matter jurisdiction is satisfied. This assessment is necessary as the Court is faced with multiple situations involving hundreds of thousands of crimes and must select situations in accordance with the Article 53 criteria”.<sup>306</sup>

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<sup>302</sup> In Cassese et al supra note 163 620-621.

<sup>303</sup> See Schabas supra note 249 163, and Rome Statute Article 53(1)(a).

<sup>304</sup> See Schabas supra note 249 164.

<sup>305</sup> See Rome Statute Article 53(1)(c). Naturally these twin criteria of “gravity” and “interests of justice” will interact, and together they “provide enormous space for highly discretionary determinations” by the ICC Prosecutor (see Schabas supra note 249 164). But that is as an unavoidable consequence of creating a permanent international criminal court, and this “space” is imperative in relation to the ICC Prosecutor’s difficult task described by Arbour, of choosing “from many meritorious complaints the appropriate ones for international intervention”. Whatever the largesse of the Prosecutor’s discretion in theory, in practice it is a discretion which must be justified by reference to the Rome Statute’s conditions and which is subject to review by the Judges of the Court (in relation to review by Judges of the Court, see immediately below).

<sup>306</sup> “Letter of Prosecutor dated 9 February 2006” (Iraq) 8, emphasis added.

Furthermore, the Prosecutor's decisions are subject to oversight by Judges of the Court.<sup>307</sup> That is to say that much of the Prosecutor's so-called independence is in fact significantly constrained. While the Prosecutor is not required to obtain authorisation to initiate an investigation when a State Party or the Security Council refer a situation to the Court, he is still required at a preliminary stage to decide whether there is a "reasonable basis" to proceed".<sup>308</sup> There is increased oversight over decisions to decline an investigation. For instance, where the Prosecutor declines to investigate a case he or she shall inform the Pre-Trial Chamber (and the relevant State in cases of State referrals and the Security Council in cases of a Security Council referral) of his or her conclusion and the reasons for the conclusion.<sup>309</sup> In response, the State concerned or the Security Council may demand that the Pre-Trial Chamber review a decision of the Prosecutor not to proceed and may request the Prosecutor to reconsider that decision.<sup>310</sup> So too, where the Prosecutor, taking into account the gravity of the crime and the interests of victims, nonetheless declines to initiate an investigation because he or she has substantial reasons to believe that an investigation would not serve the interests of justice,<sup>311</sup> 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.<sup>312</sup>

#### The Court's assumption of jurisdiction: not lightly, and *on behalf* of African states

While it is a geographic fact that the Court's first cases involve situations on the African continent, it is simplistic to argue that the ICC is therefore "unfairly" targeting Africa. As the short synopsis of each situation has already indicated, each of these cases is before the ICC because the state in question self-referred the situation to the Court in terms of the Rome Statute. Reportedly, the Prosecutor has received self-referrals only from African countries.<sup>313</sup> Furthermore, the Prosecutor's decision to investigate each of these situations has been taken within the constraints laid down by the Rome Statute, including such factors as the gravity criterion and whether a reasonable basis exists for the prosecution of the perpetrators.

The Rome Statute strictly defines the jurisdiction of the Court. The subject-matter jurisdiction of the Court is limited to investigations of the most serious crimes of concern to the international community, and the temporal jurisdiction of the Court is

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<sup>307</sup> A powerful example of this is the decision of the Pre-trial Chamber in relation to the Lubanga matter.

<sup>308</sup> See Schabas *supra* 2007, 239.

<sup>309</sup> See Article 53(2) of the Rome Statute.

<sup>310</sup> See Article 53(3)(a) of the Rome Statute.

<sup>311</sup> See Article 53(1)(c) of the Rome Statute.

<sup>312</sup> Article 53(3)(b) of the Rome Statute.

<sup>313</sup> See Stephanie Hanson, Global Policy Forum, "Africa and the International Criminal Court," Council on Foreign Relations, July 24, 2008, cited in Alexis Arieff et al "International Criminal Court Cases in Africa: Status and Policy Issues", Congressional Research Service Report, September 12, 2008, 3.

limited to crimes occurring after the entry into force of the Statute, namely 1 July 2002.<sup>314</sup> 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.<sup>315</sup> In addition to these subject-matter and temporal restrictions, 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. Absent a referral from the Security Council, 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. That is a consequence of ratification. In order to become a party to a multilateral treaty, a State must demonstrate, through a concrete act, its willingness to undertake the legal rights and obligations contained in the treaty. In other words, it must express its consent to be bound by the treaty. A State may express its consent to be bound in several ways, in accordance with the final clauses of the relevant treaty. One of the most common ways is ratification.

A State that has ratified the Rome Statute 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. Thus, Article 12 of the Rome Statute 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*).

The Uganda, DRC and Central African Republic referrals demonstrate how 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.<sup>316</sup> As an illustration, it is just as well to recall the announcement by the Court after it received the first of its three African requests for investigation, from the DRC:

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<sup>314</sup> Article 11.

<sup>315</sup> Article 11(2).

<sup>316</sup> See Press Release of the Prosecutor of the International Criminal Court, No.: pids.008.2003-EN, 15 July 2003, available at <http://www.icc.int>. See also P Kirsch (*QC*) & D Robinson “Trigger mechanisms” 623-625 in Antonio Cassese et al (eds), *The Rome Statute of the International Criminal Court: A Commentary* 1 (2002). Not relevant here, but discussed further below, is the ICC Prosecutor’s power under 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* 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 in the territory of a State Party – the preconditions set out in terms of Article 12 (See Press Release of the Prosecutor of the International Criminal Court, No.: pids.008.2003-EN, 15 July 2003, available at <http://www.icc.int> (accessed 23 October 2008). See also P Kirsch (*QC*) & D Robinson *supra* note 316 661–663). At the time that this chapter was published, the Prosecutor had not utilised his *proprio motu* powers. Since then, however, the Prosecutor has done so in respect of Uganda and Côte d’Ivoire.

“The Prosecutor of the International Criminal Court, Luis Moreno Ocampo, has received a letter signed by the President of the Democratic Republic of Congo (DRC) referring to him the situation of crimes within the jurisdiction of the Court allegedly committed anywhere in the territory of the DRC since the entry into force of the Rome Statute, on 1 July 2002. By means of this letter, the DRC asked the Prosecutor to investigate in order to determine if one or more persons should be charged with such crimes, and the authorities committed to cooperate with the International Criminal Court.”<sup>317</sup>

The referrals – particularly by Uganda and the DRC – demonstrate how there have been attempts by African States to use the ICC for political ends. It is no secret that the Ugandan and the DRC Governments had their own reasons for inviting the ICC to do business in their respective countries. These appear to have been to employ the Court to prosecute rebel bands within their own territories.<sup>318</sup> While there has been criticism directed at the ICC Prosecutor for too tamely complying with these self-referrals in order to ensure cases before the Court, there is a double irony in suggesting that these African situations are evidence of the ICC’s meddling in Africa.<sup>319</sup>

It is thus difficult to comprehend or take seriously suggestions that the DRC, Uganda and CAR referrals stand as proof that the ICC is unhealthily preoccupied with Africa. It is not that the ICC is transmuted into a Western court with some colonial affection for punishment of Africans guilty of crimes against humanity. Assertions about the Court’s apparently over-developed appetite for African atrocities, or intimations of US-behind-the-scenes machinations in the Court’s choice of African investigations, are complaints that do not match the facts or the processes adopted by the OTP.

A reflection on the OTP’s screening process and the self-referrals by Uganda, DRC and the CAR suggest rather that Africa is in the court’s sights because African states parties – with serious consideration, one may fairly assume, of their rights and

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<sup>317</sup> Available at [http://www.icc-cpi.int/pressrelease\\_details&id=19&l=en.html](http://www.icc-cpi.int/pressrelease_details&id=19&l=en.html). In respect of the Ugandan referral: “*In December 2003 the President Yoweri Museveni took the decision to refer the situation concerning the Lord’s Resistance Army to the Prosecutor of the International Criminal Court. ... President Museveni met with the Prosecutor in London to establish the basis for future co-operation between Uganda and the International Criminal Court.*” (available at [http://www.icc-cpi.int/pressrelease\\_details&id=16&l=en.html](http://www.icc-cpi.int/pressrelease_details&id=16&l=en.html) (accessed 22 October 2008)). In respect of the Central Africa Republic referral: “*The Prosecutor of the International Criminal Court, Luis Moreno-Ocampo, has received a letter sent on behalf of the government of the Central African Republic. The letter refers the situation of crimes within the jurisdiction of the Court committed anywhere on the territory of the Central African Republic since 1 July 2002, the date of entry into force of the Rome Statute*” (available at [http://www.icc-cpi.int/pressrelease\\_details&id=87&l=en.html](http://www.icc-cpi.int/pressrelease_details&id=87&l=en.html) (accessed 22 October 2008)).

<sup>318</sup> See Amnesty International, “Uganda: First Ever Arrest Warrants by International Criminal Court – A First Step Towards Addressing Impunity”, 14 October 2005, AI Index: AFR 59/008/2005; see also Schabas *supra* note 249 36.

<sup>319</sup> In any event, it should be noted that the Court has consciously taken steps to resist attempts to use the Court for political ends. For instance, note the comments of the Prosecutor immediately following the Uganda referral, to the effect that the OTP would investigate conduct by all parties to the conflict – this despite the wording of the referral, which mentions only the “situation concerning the Lord’s Resistance Army”.

responsibilities as states parties to the Rome Statute, and/or because of their own strategic objectives – have chosen that outcome, and the Court has accepted that there is a reasonable basis for initiating an investigation. There is thus an insincerity to the claim that the Court is acting “unfairly” in respect of Africa. It reminds one of the host who invites guests round for dinner only to feign disappointment when they arrive.

The invitations made by the independent governments of Uganda, DRC and CAR to the ICC to investigate situations in their respective states, are invitations made by states parties to the Rome Statute. This is not insignificant. By ratifying the Statute these three states showed their acceptance (morally, and legally under international law) of the Rome Statute’s ideals. Those ideals are captured in the Statute’s preamble, which records, inter alia, a recognition by states parties that “grave crimes threaten the peace, security and well-being of the world”; an affirmation “that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation”; a determination “to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,” and “to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole”.

By becoming states parties then, the DRC, Uganda and CAR “resolved”, along with all other states that chose or choose to become members of the Rome Statute, “to guarantee lasting respect for the enforcement of international justice”. Putting to one side the political mileage that these Governments might have assumed was to be gained by self-referring a situation to the ICC, a plausible interpretation which deserves encouragement is that their actions also show respect for the principles of international criminal justice through a request to the ICC for assistance in acting against those members of rebel groups who are most responsible for international crimes.

Suggestions that these three states are unwitting pawns in some neo-colonial project are not only patronizing, they also devalue the international rule of law. It is worth noting the 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.<sup>320</sup> It is not necessary to explore the literature on this issue, except to note 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.

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<sup>320</sup> An African example relates to the African Charter on Human and Peoples’ Rights. Parties are obliged to recognize the rights, duties and freedoms enshrined in this charter and should undertake to adopt legislative or other measures to give effect to them (see Article 1 of the Charter and the decisions of the African Commission on Human and Peoples’ Rights in *Commission Nationale des Droits de l’Homme et des Libertés v Chad* 55/91 Para 20, and *Amnesty International and Others v Sudan* 48/90, 50/91, 52/91, 89/93, Para 40). The African Charter was drafted and acceded to voluntarily by African States wishing to ensure the respect of human rights on this continent. Once ratified, states parties to the Charter are legally bound to its provisions. As the African Commission has noted, a state not wishing to abide by the African Charter might have refrained from ratification (see *International Pen and Others (on behalf of Saro-Wiwa) v Nigeria* 137/94, 139/94, 154/96 and 161/97 Para 116).

What is remarkable about the Uganda, DRC, and CAR referrals is that they buck this trend. By choosing to self-refer under the Rome Statute each of the states parties demonstrated their commitment to utilise the Rome Statute and the principles agreed on at Rome by African and other states. Sadly, critics who denounce the Court's involvement in these states as anti-African not only miss the point, they also unwittingly contribute to what is rightly regarded as an African malaise: the failure to take seriously treaty commitments voluntarily assumed by States.

### ***The ICC as proxy superpower: misunderstanding universal jurisdiction***

#### Fears of an unbridled Court

Alex de Waal recently wrote that "... Africa has lost confidence in the ICC and is taking rapid steps to become a zone free of universal jurisdiction".<sup>321</sup> It is not clear whether De Waal himself believes that the ICC was the means which established the "zone" of universal jurisdiction.

Domestic crimes, as is the tradition, are largely the responsibility and concern of domestic legal systems. However, certain crimes, through their seriousness, take on a characteristic which "internationalises" them. Two broad opportunities for prosecution arise from the internationalisation of the offender's conduct.

First, the international crimes at issue might be the subject of a prosecution before an international criminal tribunal constituted especially for the investigation and prosecution of such universally despicable acts. The ICC is, *par excellence*, the model for such a prosecution (and States that are party to the Rome Statute would under the terms of the Statute have an opportunity to prosecute the ICC crimes through their domestic courts acting as an international surrogate).<sup>322</sup>

Quite aside from this treaty-inspired prosecution under the aegis of the Rome Statute, the internationalisation of certain crimes in turn provides the potential to all States of the world (in addition to the State on whose territory the crime was committed) to investigate and prosecute the offender under their domestic legal systems and before their domestic courts. This entitlement goes under the heading of what international lawyers understand as the principle of "universal jurisdiction": the competency to act

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<sup>321</sup> See Alex de Waal, writing in reference to a decision by the AU Peace and Security Council to criticize the ICC Prosecutor's decision to issue an arrest warrant for President el-Bashir ("ICC, Making Sense of Darfur: Africa's Position on the ICC" posted by Alex de Waal, 23 September 2008, available at <http://www.ssrc.org/blogs/darfur/2008/09/23/africas-position-on-the-icc/> (accessed 12 October 2008)). De Waal continues: "The positions taken at the PSC do not provide much solace to the supporters of the ICC and the advocates of universal jurisdiction".

<sup>322</sup> Another possibility of prosecution before an international criminal tribunal is exemplified in the *ad hoc* tribunals which have been created for Yugoslavia (the International Criminal Tribunal for the Former Yugoslavia), Rwanda (the International Criminal Tribunal for Rwanda), East Timor, Kosovo, Cambodia and Sierra Leone. A discussion of these tribunals is beyond the scope of this paper.

against the offender, regardless of where the crime was committed and regardless of the nationality of the criminal. While there is ongoing debate about the scope and limits of the potential exercise of universal jurisdiction under international law, Professor Cassese – previously President of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia – has convincingly explained that universal jurisdiction cannot sensibly be an absolute right of jurisdictional competence (such that any and every State is empowered to investigate and prosecute the occurrence of an international crime).<sup>323</sup> Rather, while all States are potentially empowered to act against international criminals, “universality may be asserted subject to the condition that the alleged offender be on the territory of the prosecuting State”.<sup>324</sup>

The State concerned must of course have taken steps under its domestic law to empower its officials and Courts to act upon this potential. France and Spain are examples of States that have done so, much to President Kagame’s chagrin.<sup>325</sup> The African Union has recently added its voice. In a strongly worded declaration African Presidents at the African Union Heads of State Summit in the Egyptian port city of Sharm El Sheikh condemned the French and Spanish indictments against senior officers of the Rwanda Defence Forces. The declaration calls for a meeting between the African Union and the European Union to discuss lasting solutions and to ensure that the warrants are withdrawn. The declaration concludes that the “[t]he political nature and abuse of the principle of universal jurisdiction by judges from non-African States against African leaders is a clear violation of their sovereignty and territorial integrity”.<sup>326</sup>

These examples and De Waal’s sentiments about Africa taking steps to become a universal jurisdiction free zone chime with the view of many (African) critics of the ICC, who believe that the ICC may – like the French and Spanish judges in respect of Kagame and other senior officers in the Rwanda Defence Forces – exercise a form of universal jurisdiction against African leaders. This belief conjures images of the ICC with unlimited interference power: that it is a superpower unto itself. Mamdani’s concerns about the Court are reflected in different language, but the result is the same. His complaint is that “the new humanitarian order” (of which he believes the ICC to be a part) has resulted “once again [in] a bifurcated system, whereby state sovereignty obtains in large parts of the world but is suspended in more countries in Africa and the Middle East”.<sup>327</sup>

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<sup>323</sup> The danger of countenancing such an absolute notion of universal jurisdiction was highlighted by the International Court of Justice in the *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)* ICJ Rep 14 Feb. 2002 case (the *Arrest Warrant* case). President Guillaume held, for instance, that such a system “would risk creating total judicial chaos”, and would “encourage the arbitrary for the benefit of the powerful, purportedly acting as an agent for an ill-defined ‘international community’” (para. 15).

<sup>324</sup> Cassese *supra* note 165 592. See also Roger O’Keefe “Universal Jurisdiction: Clarifying the Basic Concept” (2004), 2 *JICJ* 735.

<sup>325</sup> See the earlier discussion of Kagame’s response to the “arrogant” European calls for an investigation of his role in the Rwandan genocide.

<sup>326</sup> See Thijs Bouwkneeg, “African Presidents Condemn Western Indictments”, 2 July 2008, *International Justice*, RNW, available at <http://www.rnw.nl/internationaljustice/specials/Universal/080702-rwanda> (accessed 12 October 2008).

<sup>327</sup> See Mamdani *supra* note 260.

Now there is unquestionably merit in complaints about the unacceptably skewed nature of international politics and the abuse of international legal rules by powerful states. The United States' and United Kingdom's unlawful invasion of Iraq has sharpened the debate in this respect considerably. Nobody, let alone international lawyers, would seriously suggest that the current system is free from serious defects. There is also a real concern – otherwise well expressed by African and allied States – that the Security Council is in urgent need of reform.<sup>328</sup> But these complaints and concerns should not too easily or speedily be pressed into service against the ICC without a proper appreciation of the Court's statute. The fear seems to be that a rogue prosecutor will assert some form of unbridled universal jurisdiction wherever he or she so chooses; to drag the unsuspecting and the unworthy to The Hague, and in the process violate the sovereignty of (weak) States under the guise of "humanitarian" concern for the victims. This view appears to be based on a fundamental misunderstanding of the Rome Statute and the system of complementarity that is so central to the work of the International Criminal Court.

#### Fearing the ICC's jurisdiction – a case of being uncomplimentary about complementarity

The Rome Statute of the ICC has its flaws – the cost of compromise in a politically-sensitive drafting process and the political issues at stake ensured that – but African states along with their counterparts at Rome concluded a treaty in which the principle of individual criminal liability is established for those responsible for the most serious human rights violations, and whereby an institution has been established – on a permanent basis – to ensure the punishment of such individuals. This punishment does not follow after the Court's exercise of universal jurisdiction – as though it was an international manifestation of the French or Spanish domestic calls for action against Kagame. Investigation and punishment takes place within a carefully crafted system of complementarity between domestic actors and the ICC. Indeed, complementarity is arguably the key feature of the ICC regime. It is thus important to appreciate its significance, and in so doing, to appreciate how hollow are the fears of those who believe that the Court wields excessive and far-reaching powers of investigation (and hence the potential for interference in State sovereignty).

Proposals that the principle of universal jurisdiction should apply in respect of State referrals were rejected at the Rome Conference. 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 complementarity 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 ICC seeks to prosecute and who happen to be in one's jurisdiction.

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<sup>328</sup> What this reform entails is beyond the scope of this chapter but encompasses a variety of proposals, including procedural reforms, such as eliminating the veto held by the five permanent members, and expansion of the Council (to include amongst others an African member). For further information see Ramesh Thakur "United Nations Security Council Reform" (2004) 13(3) *African Security Review* 66.

The general nature of national implementation obligations assumed by States which elect to become party to the Rome Statute are wide ranging. The Rome Statute indicates that effective prosecution is that which is ensured by taking measures at the national level and by international cooperation. Because of its special nature, States Party 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.

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 which 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 OTP) 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. 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 OTP during the investigation or prosecution period<sup>329</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, amongst other things, lead to a referral of the State to the Assembly of States Parties, or, where the original referral came from the Security Council, 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 States accept that there are no grounds for refusing ICC

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<sup>329</sup> The extent of cooperation required of States Party is evident from the fact that the Office of the Prosecutor (OTP) has a very wide mandate to "extend the investigation to cover all facts" and investigate circumstances generally "in order to discover the truth": Article 54(1)(a) of the Rome Statute.

requests for arrest and surrender.<sup>330</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.

While the Rome Statute envisages a duty to cooperate with the Court in relation to investigation and prosecution, it should be remembered that the principle of complementarity is premised on the expectation that domestic states that are willing and able should be prosecuting these crimes themselves. The principle of “complementarity” ensures that the ICC 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 then seized with jurisdiction.<sup>331</sup>

To enforce this principle of complementarity and to further limit the Court’s propensity for interference with sovereignty, Article 18 of the Rome Statute requires that the Prosecutor 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,<sup>332</sup> and cannot begin an investigation on his own initiative without first receiving the approval of the Pre-trial Chamber.<sup>333</sup> 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 International Criminal Court would then be obliged to suspend its investigation.<sup>334</sup> If the alleged perpetrator’s state investigates the matter and then refuses to initiate a prosecution, the ICC may only proceed if it concludes that that decision of the state not to prosecute was motivated purely by a desire to shield the individual concerned.<sup>335</sup> The thrust of the principle of complementarity is that the system effectively creates a presumption in favour of action at the level of states.

Complementarity is therefore an essential component of the Court’s structure and a means by which national justice systems are accorded an opportunity to prosecute international crimes domestically. The ICC is one component of a regime – a network of states that have undertaken to do the ICC’s work for it; to act, if you will, as domestic international criminal courts in respect of ICC crimes. Because of the ICC’s system of complementarity we can therefore expect national criminal justice to play an important role of doing the ICC’s work by providing exemplary punishments which 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, has pointed out that:

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<sup>330</sup> See Article 89 – although Article 97 provides for consultation where there are certain practical difficulties.

<sup>331</sup> Article 17(1) of the Rome Statute.

<sup>332</sup> Article 18(1) of the Rome Statute.

<sup>333</sup> Article 15 the Rome Statute.

<sup>334</sup> Article 18(2) the Rome Statute.

<sup>335</sup> Article 17(2)(a) the Rome Statute.

“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.”<sup>336</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 international crimes as defined by the ICC. In this respect the Prosecutor of the Court has himself stressed the importance of what is called “positive complementarity”. Paragraph 6 of the preamble to the Rome Statute declares that “it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes”. The Prosecutor has often invoked this principle. In his September 2006 “Prosecutorial Strategy”, he stated:

“With regard to complementarity, the Office emphasizes that according to the Statute national states have the primary responsibility for preventing and punishing atrocities in their own territories. In this design, intervention by the Office must be exceptional – it will only step in when States fail to conduct investigations and prosecutions, or where they purport to do so but in reality are unwilling or unable to genuinely carry out proceedings. A Court based on the principle of complementarity ensures the international rule of law by creating an interdependent, mutually reinforcing international system of justice. With this in mind, the Office has adopted a positive approach to complementarity, meaning that it encourages genuine national proceedings where possible; relies on national and international networks; and participates in a system of international cooperation”.<sup>337</sup>

The very principle of complementarity makes it clear that by domestic prosecutors acting against international criminals, domestic courts ensure the international rule of law through a mutually reinforcing (or complementary) international system of justice.<sup>338</sup> As Professor Antonio Cassese points out, there was a practical basis at Rome for this principle:

“It is healthy, it was thought, to leave the vast majority of cases concerning international crimes to national courts, which may properly exercise their jurisdiction based on a link with the case (territoriality, nationality) or even on universality. Among other things, these national courts may have more means available to collect the necessary evidence and to lay their hands on the accused”.<sup>339</sup>

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<sup>336</sup> Slaughter, “Not the Court of First Resort”, 21 December 2003, *The Washington Post*.

<sup>337</sup> “Report on Prosecutorial Strategy”, 14 September 2006, page 5, emphasis added.

<sup>338</sup> See further William W Burke-White “Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice” (2008) 49(1) *Harvard International Law Journal* 53.

<sup>339</sup> Cassese supra note 242 351, emphasis added.

From the foregoing, it rather seems that instead of the ICC being an instrument of global or universal (in)justice disrespectful of particularly African states' sovereignty, the very premise of complementarity ensures appropriate respect for states by demanding that the ICC defers to their competence and right to investigate international crimes. The choice that complementarity offers and symbolises has apparently been ignored by the Court's African critics. As Slaughter expresses, the choice is for a nation to try its own or they will be tried in The Hague. Instead of weakening states and undermining sovereignty, properly understood the International Criminal Court regime does the opposite: it "strengthens the hand of domestic parties seeking such trials, allowing them to wrap themselves in a nationalist mantle".<sup>340</sup>

### The Sudan referral as (another) example of the ICC's African adventurism?

We have seen that the Rome Statute does not empower the ICC to roam large as an enforcer of some new world order. 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.<sup>341</sup> The referral power is a mechanism by which the Court might 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.<sup>342</sup> The Statute provides that the Council may only make such a referral by acting under its well-established Chapter VII powers of the United Nations 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. These same Chapter VII powers were invoked by the Security Council to create the International Criminal Tribunals for the former Yugoslavia and Rwanda in the early 1990s. What the Rome Statute has done is allowed the Council to refer similar situations to a new, permanent international criminal body – the ICC.

In determining whether a "threat to the peace" exists the 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.<sup>343</sup> Having had regard to these factors, the Security Council on 31 March 2005 referred the atrocities committed in the Darfur region of Sudan to the ICC for investigation.

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

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<sup>340</sup> Slaughter *supra* note 336.

<sup>341</sup> Rome Statute, Article 1, 13(b).

<sup>342</sup> See P Kirsch (QC) & D Robinson *supra* note 316 634.

<sup>343</sup> See in general P Kirsch (QC) & D Robinson *supra* note 316 630–631.

murder, rape, the displacement of civilians and the looting and burning of civilian property.<sup>344</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>345</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. At the time of writing, neither suspect has been surrendered to the Court.<sup>346</sup>

Then, in early July 2008 the Prosecutor of the ICC decided to seek an arrest warrant against President Omar al-Bashir for genocide, crimes against humanity and war crimes in Darfur. That warrant was confirmed by the Pre-trial Chamber in respect of war crimes and crimes against humanity on 4 March 2009. The decision to proceed against al-Bashir has drawn fierce resistance from South Africa's (now former) Mbeki-led Government, which together with Libya in July 2008 sought to defer any investigation or prosecution of Bashir for a 12-month period under Article 16 of the Rome Statute of the ICC.<sup>347</sup> That attempt failed, but the noise continues. To demonstrate their pique with the Prosecutor's decision, the 53-member African Union and the 56-member Organisation of the Islamic Conference have more recently pushed for action against the Court. As *The Economist* writes: "Both groups have demanded that the Security Council suspend proceedings against Mr Bashir, quite a few of their members no doubt fearing that it could be their turn next".<sup>348</sup>

Whether the ICC Prosecutor has acted prudently or otherwise in his call for al-Bashir's arrest is a thorny debate beyond the scope of this paper. What can be said is that his call has fomented what Alex de Waal has described as Africa's "push-back against the ICC".<sup>349</sup> But even if the Prosecutor's decision is ultimately proved

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<sup>344</sup> 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 ([http://www.icc-cpi.int/cases/Darfur/s0205/s0205\\_un.html](http://www.icc-cpi.int/cases/Darfur/s0205/s0205_un.html) (accessed 14 October 2008)). For an analysis of the referral, see amongst others Max du Plessis & Christopher Gevers, "Darfur goes to the International Criminal Court (perhaps)", *African security review* (2005), 14(2), 23-34.

<sup>345</sup> Copies of the warrants of arrest are available on the Court's website (<http://www.icc-cpi.int/cases/Darfur.html>) (accessed 14 October 2008).

<sup>346</sup> Although Kushayb has long been in the custody of Sudanese authorities, allegedly on charges relating to Darfur (though not the same incidents charged by the Prosecutor). See BBC News, Africa, "Darfur militia leader in custody", 13 October 2008, available at <http://news.bbc.co.uk/2/hi/africa/7666921.stm> (accessed 14 October 2008).

<sup>347</sup> Article 16 provides as follows: "No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions."

<sup>348</sup> See "Saving the President", *The Economist*, 25 September, 2008.

<sup>349</sup> See De Waal *supra* note 321.

unwise (for example, because it undermines the chances of peace in Sudan<sup>350</sup>), that does not mean that the other criticisms already directed at the Court and examined earlier have substance. Those criticisms (that the Court is western and is discriminating against Africans through the exercise of unbridled powers) are equally as hollow in respect of the Sudan referral, whatever the outcome of Prosecutor Moreno-Ocampo's actions against President al-Bashir.

For instance, it will be recalled that the Sudan referral is cited as further evidence of the ICC's predilection for African situations. Mamdani is firm about this. In his view it "is clear if we take into account the four countries where the ICC has launched its investigations: Sudan, Uganda, Central African Republic and Congo", then Africans might conclude that the Court is rapidly becoming "a Western court to try African crimes against humanity".<sup>351</sup> What is more, Mamdani believes that these situations are before the Court because they occur in "places where the United States has no major objection to the course chartered by ICC investigations."

But this is simply not correct. We have already seen that three of these situations are self-referrals, and the Darfur situation has been referred by the United Nations Security Council.

It will be recalled that before the referral the Security Council had adopted resolution 1564 which charged the Secretary-General with establishing a commission of inquiry

"to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties, to determine also whether or not acts of genocide have occurred, and to identify the perpetrators of such violations with a view to ensuring that those responsible are held accountable".

The Darfur Commission presented its report to the Security Council in February 2005.<sup>352</sup> The Commission, under the leadership of Professor Antonio Cassese and including African and Arab members,<sup>353</sup> fulfilled its mandate by visiting Sudan on

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<sup>350</sup> An outcome which is not possible to predict, although it seems that the accusations that Bashir's indictment will endanger the Sudan peace process are exaggerated. What the indictment appears so far to have achieved is movement (finally) on the part of a recalcitrant and defiant regime as it begins to run out of options. See for example Godfrey Musila "In The Face Of Impunity, We Play Politics With International Criminal Tribunals" *ISS Today*, 8 August 2008, available at [http://www.iss.co.za/index.php?link\\_id=5&slink\\_id=6446&link\\_type=12&slink\\_type=12&tmpl\\_id=3](http://www.iss.co.za/index.php?link_id=5&slink_id=6446&link_type=12&slink_type=12&tmpl_id=3) (accessed 14 October 2008). See too Nicole Fritz "Black-white debate does no justice to a nuanced case", *Business Day*, 13 August 2008.

<sup>351</sup> Mamdani *supra* note 260.

<sup>352</sup> Report of the International Commission of Inquiry on Darfur, Geneva, January 25, 2005 (hereinafter "Darfur Report"). The full report is available at [http://www.un.org/News/dh/sudan/com\\_inq\\_darfur.pdf](http://www.un.org/News/dh/sudan/com_inq_darfur.pdf) (accessed 10 October 2008).

<sup>353</sup> The African members were Therese Striggner-Scott (a barrister and principal partner with a legal consulting firm in Accra, Ghana, and who served as Judge of the High Courts of Ghana and Zimbabwe, and was the Executive Chairperson of the Ghana Law Reform Commission from January 2000 to February 2004), and Dumisa Ntsebeza (a former Commissioner on the Truth and Reconciliation Commission in South Africa, and who served as acting judge on the High Court of South Africa, as well as the South African Labour Court). The Arab member was Mohammed Fayek (then Secretary-General of the Arab Organization for Human Rights, and who previously served in Egypt as Minister

two occasions. The Commission found, inter alia, evidence of violations ‘violations of international human rights law and humanitarian law’ and that ‘clear links’ existed between all of these groups and the Sudanese government.<sup>354</sup> After an exhaustive report, the Commission’s final recommendation was that the Security Council refer the situation in Darfur to the ICC “to protect the civilians of Darfur and end the rampant impunity currently prevailing there”.<sup>355</sup> In advocating the referral of the situation in Darfur by the Security Council, the Commission pointed out that the situation in Darfur met the requirement of Chapter VII, in that it constituted a “threat to peace and security” as was acknowledged by the Security Council in its resolutions 1556 and 1564. Furthermore, the Commission also took note of the Security Council’s emphasis in these resolutions of the “need to put a stop to impunity in Darfur, for the end of such impunity would contribute to restoring security in the region”.<sup>356</sup> The Commission endorsed the ICC as the “only credible way of bringing alleged perpetrators to justice”.<sup>357</sup> It was on the strength of this recommendation that on 31 March 2005 the UN Security Council passed resolution 1593, referring the situation in the Darfur region of Sudan to the International Criminal Court.

Mamdani’s belief that Sudan is now in the Court’s sights because the United States wanted it that way does not sit comfortably with the following facts. Much has been said elsewhere about the “unhappy and extravagant”<sup>358</sup> objections of the United States to the ICC. The United States, as is well known, opposed the Court<sup>359</sup> and does not stand alone in its opposition to the ICC: it has rather unlikely allies in the form of China, Iraq and Libya, and a more predictable ally in Israel. Together these states formed part of a group of only seven countries that voted against the Rome Statute.<sup>360</sup> Indeed, it may be recalled that the US government is prohibited by law from assisting the ICC in its investigations, arrests, detentions, extraditions, or prosecutions of war crimes, under the American Servicemembers’ Protection Act of 2002.<sup>361</sup> Title II). The prohibition is extensive, covering, among other things, the obligation of appropriated funds, assistance in investigations on US territory, participation in UN peacekeeping operations unless certain protections from ICC actions are provided to specific

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of Information, Minister of State for Foreign Affairs, Minister of National Guidance, and Chef de Cabinet and Advisor to the President for African and Asian Affairs).

<sup>354</sup> Darfur Report at paras. 110 – 111.

<sup>355</sup> Darfur Report at para. 569.

<sup>356</sup> Darfur Report at para. .590.

<sup>357</sup> Darfur Report at para. 573.

<sup>358</sup> James Crawford “The drafting of the Rome Statute” in Philippe Sands (ed) *From Nuremberg to The Hague* (2003) 109.

<sup>359</sup> For a discussion of US opposition to the ICC, see amongst others William Schabas “United States Hostility to the International Criminal Court: It’s All About the Security Council”, (2004) 15 *European Journal of International Law* 701-720; Max du Plessis “Seeking an International International Criminal Court” (2002) 3 *South African Journal of Criminal Justice* 301-320.

<sup>360</sup> See Michael Scharf “The United States and the International Criminal Court: The ICC’s Jurisdiction over the Nationals of Non-party States: A Critique of the U.S. position” (2001) *Law and Contemporary Problems* 64.

<sup>361</sup> ASPA (P.L. 107-206) Title II.

categories of people, and the sharing of classified and law enforcement information.<sup>362</sup>

Given the United States' vehement opposition to the ICC, even before the Commission's report was released the US implemented contingency plans in the event that the Commission recommended that the situation in Darfur be referred to the ICC. It objected to the UN Security Council referral to the ICC because of its stated objections to the ICC's jurisdiction over nationals of states not party to the Rome Statute.<sup>363</sup> The US thus advocated the idea of a "Sudan Tribunal", as an alternative to the ICC, to the other members of the Security Council.<sup>364</sup> However, the Commission's report dealt with the reasons why such a tribunal would not be an effective alternative to the ICC. The United States even went so far as to present its "Sudan Tribunal" as an "African Court" and the ICC as a "European" tribunal, fatally ignoring the strong relations that existed then between ICC and African Union countries.<sup>365</sup> For these, and other reasons, the United States' proposal was not considered as an effective alternative.<sup>366</sup> As momentum built up to refer the situation in Darfur to the ICC, the United States obstinacy began to look churlish in the face of the ongoing massacres in the region. On 24 March 2005 France proposed a resolution, that would eventually become resolution 1593, referring Darfur to the ICC. Faced with the reality that its obstinacy was doing more damage to its reputation than the referral would do, and having secured "immunity guarantees" for U.S personnel,<sup>367</sup> the United States agreed not to veto the resolution and abstained when the Security Council voted to refer the situation in Darfur to the ICC. The US representative's reasons for this acquiescence are worth noting. She explained that "we do not agree to a Security Council referral of the situation in Darfur to the ICC", but stated that

"[w]e decided not to oppose the resolution because of the need for the international community to work together in order to end the climate of impunity in the Sudan and because the resolution provides protection from

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<sup>362</sup> It is only more recently that restrictions on military assistance to ICC members under the American Servicemembers' Protection Act of 2002 were repealed under the National Defense Authorization Acts for FY2007 and FY2008. See generally Alexis Arieff et al "International Criminal Court Cases in Africa: Status and Policy Issues", Congressional Research Service Report, September 12, 2008, at p 6.

<sup>363</sup> See US Mission to the United Nations (USUN) Press Release #055, "Explanation of Vote on the Sudan Accountability Resolution", Ambassador Ann W. Patterson, March 31, 2005.

<sup>364</sup> See "U.S. Fiddles Over ICC While Darfur Burns: U.N. Security Council Should Reject U.S. Scheme for Ad Hoc Court", *Human Rights Watch*, available at [http://hrw.org/english/docs/2005/01/31/usint10091\\_txt.htm](http://hrw.org/english/docs/2005/01/31/usint10091_txt.htm) (accessed 10 October 2008).

<sup>365</sup> "U.N. Rights Chief Details Crimes in Darfur", *Human Rights Watch*, available at <http://hrw.org/english/docs/2005/02/16/sudan10182.htm> (accessed 10 October 2008).

<sup>366</sup> See further: "U.S. Proposal for a Darfur Tribunal: Not an Effective Option to Ensure Justice" *Human Rights Watch*, available at <http://www.hrw.org/english/docs/2005/02/15/sudan10179.htm> (accessed 10 October 2008).

<sup>367</sup> Paragraph 6 of Resolution 1593 states that "nationals, current or former officials or personnel from a contributing State outside Sudan which is not party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts of omissions arising out of or related to operations in Sudan established or authorized by the Council of the African Union, unless such exclusive jurisdiction has been expressly waived by that contributing State".

investigation or prosecution for United States nationals and members of the armed forces of non-State parties”.

Her final comment is revealing: she said that although “the United States believes that the better mechanism would have been a hybrid tribunal in Africa, it is important that the international community speak with one voice in order to help promote accountability”.<sup>368</sup>

Mamdani’s views about the US-involvement in ensuring that Sudan is before the ICC reflect an exaggerated view of the US as a Machevellian force in world affairs. As Geoffrey Robertson has written about the US antics against the Court: *‘ironically they have helped to refute the argument (made by some voices on the European left) that international criminal justice serves the interests of American hegemony’*.<sup>369</sup>

It is any event worth highlighting the reasons advanced by the Darfur Commission’s recommendation that the Security Council refer the situation in Darfur to the International Criminal Court. According to the Commission there were at least six major benefits to a referral to the ICC.<sup>370</sup>

*First*, the prosecution of the crimes committed would be conducive to peace and security in Darfur. *Second*, the ICC, as the “*only truly international institution of criminal justice*” would ensure justice is done regardless of the authority or prestige of the perpetrators as the ICC sits in The Hague, far from the perpetrators’ spheres of influence. *Third*, the cumulative authority of the ICC and the Security Council would be required to compel those leaders responsible to acquiesce to investigation and potential prosecution. *Fourth*, the ICC is the “best suited organ for ensuring a veritably fair trial of those indicted by the Court Prosecutor” due to its international composition and established rules of procedure. *Fifth*, the ICC is the only international court that can investigate and prosecute without delay. *Sixth*, the ICC was the most cost-effective option.<sup>371</sup>

All these reasons (independently and cumulatively compelling) stand in the way of assertions that the ICC is biased against Africa by its involvement in investigating the Darfur situation. It might in any event be observed that the referral – under Chapter VII of the UN Charter – was exacted without a veto from any of the permanent members. That is to say, not even China and Russia (long-standing defenders of the principle of non-intervention in nations’ sovereign affairs) stood in the way of the ICC referral. Whatever unfolds in respect of the al-Bashir indictment, and whether or not the Prosecutor may be criticised for his handling of the affair, does not detract from the fact that in the first place the Darfur crisis came before the ICC for the right

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<sup>368</sup> Quoted in Schabas *supra* note 249 31.

<sup>369</sup> Geoffrey Robertson, *Crimes Against Humanity: The Struggle for Global Justice*, 3<sup>rd</sup> ed (2006) 464.

<sup>370</sup> See Darfur Report, para. 648.

<sup>371</sup> In this regard, Human Rights Watch has noted: “The ‘Sudan Tribunal’ is estimated to cost some \$30 million in the first 6-8 months and then rise up to \$100 million annually, while the ICC’s 2005 overall budget is approximately \$88 million.” – “EU Should Push for ICC Referral of Darfur During Rice Visit”, *Human Rights Watch*, available at <http://hrw.org/english/docs/2005/02/09/sudan10155.htm> (accessed 10 October 2008).

reason (and despite – rather than because of – US involvement<sup>372</sup>). That is because – as the Security Council recognised – the human rights violations involved demanded an international prosecutorial response in the interests of peace and justice.

### *Lessons to be learnt*

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 have already slowly been replaced by a “*push-back*” against the ICC. While the recent African opposition to the ICC will have been (rightly or wrongly) aggravated by the ICC Prosecutor’s decision to seek President al Bashir’s indictment, the residual reasons for that opposition remain flimsy at best.

What is worse, the reasons (or at least the motivations of some who advance them) appear to reflect an outdated and defensive view of sovereignty as a trump to human rights and justice. This is not only inconsistent with advances in international human rights worldwide, it is also today – if one takes the AU’s documents at face value – ironically un-African. The provisions of the AU’s Constitutive Act suggest that human rights are to play an important role in the work of the Union.<sup>373</sup> For instance, the preamble speaks of states being “determined to promote and protect human and peoples’ rights, consolidate democratic institutions and culture and to ensure good governance and the rule of law”. As one of its central objectives, the AU recognises the need to “encourage international co-operation, taking due account of the Charter of the United Nations and the Universal Declaration of Human Rights’ and to ‘promote and protect human and peoples’ rights in accordance with the African Charter on Human and Peoples’ Rights and other relevant human rights instruments.<sup>374</sup> Member States are accordingly expected to promote gender equality and to have “respect for democratic principles, human rights, the rule of law and good governance” and to respect the sanctity of life.<sup>375</sup> Of obvious importance, given the peer review mechanism that exists under the AU, is the principled commitment by the Union under its Constitutive Act to condemn and reject “unconstitutional changes of governments”.<sup>376</sup> There is thus a clear trend in the Act towards limiting the sovereignty of Member States and, in appropriate circumstances, permitting the involvement of the Union in the domestic affairs of African countries notwithstanding

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<sup>372</sup> It was only after the Security Council referred the Darfur situation to the ICC on 31 March 2005 that the United States began to perceive support for the ICC’s work in Sudan. In the case of Darfur, that support was only formalised more than two years later through the Darfur Accountability and Divestment Act of 2007 (H.R. 180), passed by the House on August 3, 2007, which allows US support to the ICC’s efforts to prosecute those responsible for acts of genocide in Darfur (and thereby allowing for a limited exception to the prohibitions on support for the ICC contained in the American Servicemembers’ Protection Act of 2002).

<sup>373</sup> See generally Rachel Murray *Human Rights in Africa: From the OAU to the African Union* (2004) and Andrew Lloyd and Rachel Murray “Institutions with Responsibility for Human Rights Protection under the African Union” (2004) *Journal of African Law* 48(2) 165.

<sup>374</sup> Article 3(e) and (h) of the Constitutive Act of the AU.

<sup>375</sup> Article 4(l), (m), and (o) of the Constitutive Act of the AU.

<sup>376</sup> Article 4(p) of the Constitutive Act of the AU.

the principle of non-interference by any Member State in the internal affairs of another.<sup>377</sup> There is also the very clear commitment by African States in Articles 4(m), 3(h) and 4(o) of the AU's Constitutive Act to ensuring respect for the rule of law and human rights, and condemning and rejecting impunity.

The myths around the Court's anti-African nature and its discriminatory singling out of African situations for investigation are an attack on an institution which deserves support. One can hardly overestimate the importance of Africa to the Court. The ICC's first "situations" are all on the continent. Africa is a high priority for the ICC – because African States in the case of self-referrals by the DRC, Uganda and CAR chose so, and because the international community through the Security Council felt compelled to do something about a situation in Darfur which is recognised as one of the world's worst humanitarian crisis. It is likely to remain a high priority for the foreseeable future. It is the most represented region in the ICC's Assembly of States Parties, and is a continent where international justice is in the making.

Ensuring the success of the ICC is important for peacebuilding 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. As we have seen, the Court's jurisdiction and capacity are limited so that it will be able to tackle a selection of only the most serious cases.

The danger is that the Court's work in Africa and perhaps beyond Africa will be jeopardised by myths such as those confronted in this article. If there is a lesson that might be drawn from the discussion herein it is this: there is a need in Africa for greater and more accurate public and official awareness about the work of the International Criminal Court, 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 – in particular through the complementarity regime – 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 which should be encouraged. That these African structures and organisations should be at the forefront of awareness raising is vitally 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 need for these structures and organisations to raise awareness is all the more acute in the current climate of myth-peddling and anti-ICC rhetoric.

This is a time for African voices, regional organizations and civil society to speak out against inaccuracies and distortions regarding the ICC's work in Africa. Of course that discussion must include criticism of the Court's work where criticism is due, but

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<sup>377</sup> Article 4(g).

with an understanding that the Court's position in Africa is one that needs strengthening and nurturing, for the benefit of Africans.

While it is correct that all situations currently under investigation by the ICC are African, the more plausible reason for this reality is because African victims – the real beneficiaries of the International Criminal Court's work – outnumber victims of serious human rights violations in other parts of the world. And the accusation of “unfair” prosecution of African situations is an insult to the careful screening process that the OTP has adopted in conformity with its obligations under the Rome Statute in order to determine whether there is a reasonable basis for initiating an investigation. These allegations ignore the objective fact that the Court's systems promote transparency, oversight and accountability, for example by requiring that Judges of the Court sit in oversight of the decisions of the Prosecutor to investigate or not to investigate situations of alleged international criminal law violations.

It is thus unfortunate that African leaders are now choosing to balk at the Court's work on the continent, particularly on the basis of such flimsy, and often politically motivated reasons. An alternative, and far more positive interpretation of the current (largely self-driven) focus on Africa is that some African states have chosen to break the cycle of violence and impunity that has symbolized its history, even if (as the Uganda and DRC referrals appear to show) the motivation for doing so may have been to secure short-term political gains. It is imperative that Africa's 30 members of the ICC are encouraged to take seriously their obligations under the Rome Statute to ensure accountability for perpetrators; and that its 53 members of the African Union are called to affirm rather than cheapen the AU's commitment to stamp out impunity and ensure responsibility for perpetrators of crimes against humanity, war crimes and genocide. This effort is one that African victims of international crimes deserve. The ICC as an integral means by which Africans might end impunity on their continent, and civil society and others committed to the work of the ICC in Africa need urgently to proclaim the varied and compelling reasons why it can be trusted. A failure to do so means risking the Court's work in Africa coming undone on the basis of myths and inaccuracies.

## CHAPTER 6: THE POLITICS OF INTERNATIONAL CRIMINAL JUSTICE THROUGH AN AFRICAN LENS – THE AL-BASHIR SAGA<sup>378</sup>

### *Introduction*

On 31 March 2005 the United Nations Security Council by Security Council Resolution 1593 referred the conflict in Darfur, Western Sudan, to the International Criminal Court.<sup>379</sup> Not only is this one of the first cases to come before the world's first permanent international criminal court, it is also the first time the Security Council has used its powers under Article 13 of the Rome Statute of the International Criminal Court<sup>380</sup> to “refer” a situation to the Court. Consequently, the Court now has jurisdiction in respect of a situation in the territory of a State that has not ratified the Rome Statute. On the back of this referral, the Court has also taken the step of issuing an indictment for the President of Sudan, President Omar al-Bashir, for war crimes and crimes against humanity.

In light of the defiant response of the Sudanese government to the Security Council's decision and the ICC's action against Sudanese suspects, including President al-Bashir, this extraordinary jurisdiction raises several questions regarding the Court's ability to enforce the referral. And given the African Union's strident criticism of the Security Council for failing to defer the case – an option under Article 16 of the Rome Statute, which allows for investigations and prosecutions to be suspended for 12-month periods – there is increasing attention being given to the question of the deferral power built into the Rome Statute.

Accordingly, the issue of the Sudan referral and deferral is arguably one of the most significant events since the Court's inception and worthy of close analysis. The need for such an analysis within Africa is moreover heightened by an alignment of factors, including the fact that the ICC Appeals Chamber on 3 February 2010 opened the possibility that President al-Bashir might also be liable for genocide, in addition to crimes against humanity and war crimes;<sup>381</sup> the fact that Presidential elections in

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<sup>378</sup> This chapter is ready to be submitted for publication to an international journal under the title: *The Law and Politics of Referrals and Deferrals under Articles 13 and 16 of the Rome Statute of the International Criminal Court*. Portions of it have already been published as a monograph: “*The International Criminal Court that Africa wants*”(2010) Institute of Security Studies.

<sup>379</sup> In this chapter the International Criminal Court will be referred to interchangeably as the ICC, the Court, and the International Criminal Court.

<sup>380</sup> Referred to herein as the Rome Statute.

<sup>381</sup> In March 2009, Sudan's President became the first sitting head of state to be indicted by the International Criminal Court. In their original ruling, the judges of the ICC's Pre-Trial Chamber issued an arrest warrant against President al-Bashir for a total of five counts of war crimes and crimes against humanity, but the panel threw out charges of genocide that had also been requested by Prosecutor Luis Moreno-Ocampo. The Prosecutor appealed this decision, and on 3 February, 2010, the Appeals

Sudan are set for April 2010<sup>382</sup> and the concomitant complaint that the ICC's work is interfering with the domestic democratic process within Sudan; and the fact of the ICC Review Conference, scheduled for late May early June 2010 in Kampala, Uganda, at which the question of the Sudan referral and deferral will in all likelihood be considered within the stocktaking session, and thereafter will come to be more formally debated at the 9<sup>th</sup> Assembly of States Parties Meeting in November 2010.<sup>383</sup>

The need for a meaningful debate is obvious. Many of the criticisms of the ICC's involvement in Sudan stem in great measure from a central problem of *the United Nations* – the skewed politics of the Security Council. Because of the Security Council's legitimacy problem, many States see its work as a cynical exercise of authority by great powers. The Security Council's (dis)engagement with article 16 since the Rome Statute became operative will have exacerbated rather than softened those impressions. And the result for the world's first permanent international criminal court? The result is that the uneven political landscape of the Security Council has become a central problem of *the International Criminal Court*.

In this paper consideration is given to the legal procedures and rules relevant to Security Council referral of cases to and deferral of cases before the International Criminal Court. In addition, the political factors and complexities implicated in these referral and deferral scenarios will be highlighted, with a view to better understanding complaints by the African Union and its members that international criminal justice is being applied within an uneven global political landscape. The paper also stresses the difference between “deferral” by operation of the Prosecutor's independent decision under Article 53 not to proceed with an investigation or prosecution out of concern for the interests of justice, and a “deferral” by reason of the Security Council's assessment that a prosecution or investigation is not in the interests of peace and security.

The intention of the chapter is to provide a clearer picture of the law and politics involved in Security Council referrals and deferrals, and thereby to steer the path for more fruitful discussion and recommendations to address the concerns raised within and by the African Union (and other developing nations and blocs) arising from the International Criminal Court's work in Sudan, and in particular, the ICC's declared intention of pursuing a case against the incumbent head of state of Sudan, President Omar al-Bashir.

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Chamber rendered its judgment, reversing, by unanimous decision, Pre-Trial Chamber I's decision of 4 March, 2009, to the extent that Pre-Trial Chamber I decided not to issue a warrant of arrest in respect of the charge of genocide. The Appeals Chamber directed the Pre-Trial Chamber to decide anew whether or not the arrest warrant should be extended to cover the charge of genocide. See further <http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/pr494> (accessed 12 May 2009).

<sup>382</sup> See “Sudan's Coming Elections: How did it come to this? The man at the top of the International Criminal Court's most-wanted list is the favourite to be elected president, if elections take place at all”, Jan 14, 2010, *The Economist*.

<sup>383</sup> It was decided at the Eighth Session of the Assembly of States Parties held in The Hague from 16 to 26 November 2009 that there would be no formal discussion of the African Union's proposal regarding an amendment to Article 16 (on which see further below), and that that and other proposals would be discussed after the Review conference at the Ninth Session of the Assembly of States Parties. However, it was decided at the Eighth ASP that the Review Conference will conduct a stocktaking of international criminal justice focusing on four topics: complementarity, cooperation, the impact of the Rome Statute system on victims and affected communities, and peace and justice.

## *The ICC's jurisdiction and the Security Council*

The “*revolutionary institution*”<sup>384</sup> that is the International Criminal Court came into force on 1 July 2002 and is the culmination of initiatives that began after World War I. The founding document of the court is the Rome Statute, which was adopted after the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of a Permanent International Criminal Court in Rome on 17 July 1998.<sup>385</sup> The Statute empowers the Court to prosecute the crimes of genocide, crimes against humanity, and war crimes. Cassese noted in 1999<sup>386</sup> that only in time will one be able to gauge the effect the introduction of this institution will have on the international legal order. As we shall see in this paper, time is beginning to tell: the Court has made significant strides and in respect of the Sudan referral probably its most significant stride to date, including the indictment of Sudan’s sitting president, President Omar al-Bashir.

In reviewing the establishment of the International Criminal Court it is necessary to take account of the “*unhappy and extravagant*”<sup>387</sup> objections of the United States to the Court. The United States, as is well known, has opposed the Court<sup>388</sup> and does not stand alone in its opposition to the ICC: it has rather unlikely allies in the form of China, Iraq and Libya, and a more predictable ally in Israel. Together these states formed part of a group of only seven countries that voted against the Rome Statute which established the International Criminal Court.<sup>389</sup>

It is not insignificant that the P5 States – some of whom stood and still stand outside the Court’s statute – are able nevertheless to exert influence over the ICC through the Security Council. Thus, for instance, the United States (which is not a state party) was able implicitly to endorse the referral of the Darfur situation to the ICC, and may threaten to veto a deferral of the Court’s work in Sudan. And while Sudan – a non-state party – is before the ICC, the United States will ensure that the crimes committed by Israel (another non-state party) during Operation Cast Lead are never investigated by the Court.

The Rome Statute was drafted by a plethora of the world’s states and accordingly the Court was established by way of a multi-lateral treaty. This is a significant feature of the ICC system. In the first place, it highlights that states parties have a duty to respect the Court’s legal mandate and to assist and cooperate with the Court in the achievement of its functions. In the second place, it highlights that the ICC is not a universal court. Unless its jurisdiction is extended to a situation on the

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<sup>384</sup> Antonio Cassese “The Statute of the International Criminal Court: Some Preliminary Reflections” (1999) 10(1) *European Journal of International Law* 145.

<sup>385</sup> Pheny Keiseng Rakate “An International Criminal Court for a new millennium –The Rome Conference” (1998) 23 *South African Yearbook of International Law* 217.

<sup>386</sup> Cassese supra note 384 145.

<sup>387</sup> James Crawford “The drafting of the Rome Statute” in Philippe Sands (ed) *From Nuremberg to The Hague* (2003) 109.

<sup>388</sup> For a discussion of US opposition to the ICC, see Max du Plessis “Seeking and International Criminal Court” (2002) 3 *South African Journal of Criminal Justice* 301-320.

<sup>389</sup> Michael Scharf “The United States and the International Criminal Court: The ICC’s Jurisdiction over the Nationals of Non-party States: A Critique of the U.S. position” (2001) *Law and Contemporary Problems* 64.

territory of a non-State party by a Security Council referral under Article 13(b) of the Rome Statute, the Court may only exercise territorial jurisdiction or personal jurisdiction in relation to states that are parties to the Rome Statute. The exceptional quality of the Court's jurisdiction is highlighted by the fact that the Court is a novel mechanism which does not base its jurisdiction solely on the Security Council's chapter VII power as do the *ad hoc* tribunals for the former Yugoslavia and Rwanda, nor "Special Agreements" such as the Special Court for Sierra Leone. Rather the Court 'inherits' the jurisdiction of State parties to the Rome Statute. In this respect the Court has jurisdiction *ratione loci* as well as jurisdiction *ratione personae*. The former grants the Court jurisdiction over crime committed in the territory of a State party and the latter grants it jurisdiction over crimes committed by nationals of a State party.

The ICC is thus primarily a treaty-based mechanism and does not have universal jurisdiction of its own. The abovementioned jurisdictional limitations of the Court are particularly important for our purposes as it is precisely these limitations that necessitated the referral brought about by Security Council resolution 1593.

### ***Referrals: the law and the politics***

#### Article 13 – a legal means for "positive" political intervention

The Rome Statute acknowledges an important role for the Security Council of the United Nations by allowing the Council to influence the work of the Court in two essential matters. As we have seen, aside from the territoriality and nationality triggers for the Court's jurisdiction, one further means by which the Court might come to deal with a case is by way of a Security Council referral. Article 13(b) of the Rome Statute provides the Council an opportunity for "positive" intervention in the following terms:

"The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if: ... (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations ...".

Chapter VII of the United Nations Charter in turn declares that:

"The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide which measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security".

These two provisions together envisage a situation where the Security Council, acting under its Chapter VII authority, refers a *situation* to the ICC for investigation and possible prosecution. Through such a referral the Court may be seized with jurisdiction in relation to crimes committed on the territory of a state that is not party to the ICC regime, such as Sudan. A referral by the Security Council provides the ICC with jurisdiction over countries and their nationals, irrespective of whether those

countries are party to the Rome Statute.<sup>390</sup> The reason for this is that the Court's jurisdiction under an Article 13(b) referral comes from a resolution by the Security Council, such resolutions being binding on all member States of the UN. In order for the referral to be lawful it must be exercised in accordance with Chapter VII; that is, the situation referred to the Court must constitute a 'threat to peace and security' within the international community. Such a referral of a matter to the Court by the Security Council must be seen for what it is however, namely, an exceptional occurrence which until recently appeared highly unlikely judging from the initial responses to the Court, specifically from veto-bearing States such as the US and China.

One of the most divisive issues at the Rome Conference, described by Cassese as a clash "between sovereignty-oriented countries and states eager to implement the rule of law in the world community",<sup>391</sup> was the question of how prosecution would be initiated in the International Criminal Court. On the one side the "like-minded countries" argued for a progressive prosecutorial regime whereby the prosecutor could undertake *proprio motu* prosecutions. On the other side, United Nations Security Council veto-bearing states such as China and the United States predictably sought a court that would be subject to Security Council control. As Schabas points out the real reason for the United States' well-recorded contempt for the International Criminal Court is the peripheral role the Security Council plays in the Court's functioning.<sup>392</sup>

In the end the Rome Statute reserved power to the Security Council to refer "situations" to it pursuant to Article 13(b) of the Court's Statute. This referral power has far-reaching implications for many States, particularly for the Court's detractors. That is because, as pointed out earlier, the Court potentially has jurisdiction that covers the territory of every State in the world, whether or not the State in question is a party to the Statute.<sup>393</sup> This extraordinary and controversial jurisdiction stems from the binding nature of Chapter VII resolutions of the Security Council on all UN member States. In this sense the Security Council referral process "operates in the spirit of the UN collective security framework".<sup>394</sup>

Article 13(b) then is especially important in relation to intra-state conflicts involving States that are not part to the Rome Statute, such as Sudan. This is because these States, which may either directly or indirectly be involved in the atrocities committed, would be beyond the grasp of the ICC. Consequently, Cassese calls this article the "sledgehammer" of the ICC, which "may prove to be the most effective to seize the Court whenever situations similar to those in the former Yugoslavia and Rwanda occur".<sup>395</sup>

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<sup>390</sup> Bourgon "Jurisdiction *ratione loci*" in Antonio Cassese et al (eds) *The Rome Statute of the International Criminal Court: A Commentary* (2002) 556.

<sup>391</sup> Cassese *supra* note 384 161.

<sup>392</sup> William A. Schabas "United States Hostility to the International Criminal Court: Its All About the Security Council" (2004) 15(4) *European Journal of International Law* 701-720.

<sup>393</sup> Leila Nadya Sadat & S. Richard Carden "The International Criminal Court: An Uneasy Revolution" (2000) 88 *Georgetown Law Journal* 404.

<sup>394</sup> See Gerry Simpson, "Politics, Sovereignty and Remembrance" (2004) in Dominic McGoldrick et al (eds) *The Permanent International Criminal Court: Legal and Policy Issues* 56.

<sup>395</sup> Cassese *supra* note 384 161.

From a legal perspective, it is enough to point that that apart from article 13(b) of the Rome Statute, there is limited guidance under the Statute on the mechanics of a Security Council referral to the ICC. The exercise of the powers of referral by the Security Council is however submitted to specific conditions arising from its competence under the UN Charter and from the inherent characteristics of a permanent international criminal court as established by the Statute.<sup>396</sup> The most important of these are two substantial conditions that arise directly from article 39 of the UN Charter:

“(a) the Security Council can take action only if it determines, in the first place, the existence of a threat to the peace, breach of the peace, or act of aggression; and (b) the measures taken must pursue the objective of maintaining or restoring international peace and security”.

The Council has a wide discretion in determining the exercise of these conditions, but the following factors will play a role:

- the gravity of the crimes committed;
- the impunity enjoyed by the crimes’ perpetrators; and
- the effectiveness or otherwise of national jurisdictions in the prosecution of these crimes.<sup>397</sup>

It might also be noted that the Relationship Agreement between the United Nations and the ICC makes provision for cooperative steps to be taken by the two institutions in respect of a referral:

**“Article 17. Cooperation between the Security Council of the United Nations and the Court**

1. When the Security Council, acting under Chapter VII of the Charter of the United Nations, decides to refer to the Prosecutor pursuant to article 13, paragraph (b), of the Statute, a situation in which one or more of the crimes referred to in article 5 of the Statute appears to have been committed, the Secretary-General shall immediately transmit the written decision of the Security Council to the Prosecutor together with documents and other materials that may be pertinent to the decision of the Council. The Court undertakes to keep the Security Council informed in this regard in accordance with the Statute and the Rules of Procedure and Evidence. Such information shall be transmitted through the Secretary-General.

...

3. Where a matter has been referred to the Court by the Security Council and the Court makes a finding, pursuant to article 87, paragraph 5 (b) or paragraph 7, of the Statute, of a failure by a State to cooperate with the Court, the Court shall inform the Security Council or refer the matter to it, as the case may be, and the Registrar shall convey to the Security Council through the Secretary-General the decision of the Court, together with relevant information in the case. The Security Council, through the Secretary-General, shall inform the

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<sup>396</sup> See generally Luigi Condorelli and Santiago Villalpando “Referral and Deferral by the Security Council” in Antonio Cassese et al *The Rome Statute of the International Criminal Court: A Commentary* 1 (2002) 630 *et seq.*

<sup>397</sup> *Ibid* 631.

Court through the Registrar of action, if any, taken by it under the circumstances.”

We thus see that article 13(b) of the Rome Statute is narrowly drawn,<sup>398</sup> providing merely for the possibility of a referral to the Prosecutor by the Security Council “acting under Chapter VII of the Charter of the United Nations”. Given this paucity of guidance under the Statute, the Sudan referral remains the guiding (and only) precedent; and we would do well therefore to consider in detail the facts that contextualise the referral. As demonstrated below, there are positive lessons, but also very many negative ones, to be drawn from the referral.

### The Sudan referral: good guide, bad guide?

#### i) The facts that gave rise to the Sudan referral

On 31 March 2005 the United Nations Security Council for the first time invoked its powers under Chapter VII of the UN Charter as read with Article 13(b) of the Rome Statute and referred the conflict in Darfur, Western Sudan, to the International Criminal Court.

Sudan is the largest country in Africa with a territory covering about 2.5 million square kilometres and has an estimated population of 39 million. It shares borders with Egypt in the North, the Red Sea, Eritrea and Ethiopia in the East, Uganda, Kenya and the Democratic Republic of the Congo in the South, and the Central African Republic, Chad and Libya in the West. The predominant religion in Sudan is Islam and the predominant language is Arabic.<sup>399</sup>

Sudan has a violent history. Since gaining independence in 1956 it has been ruled by military regimes (occasionally interspersed with periods of democratic rule) and power has repeatedly come to be had through *coups d'état*.<sup>400</sup> The current President, General Omar Hassan al-Bashir, came to power after a *coup d'état* in June 1989, which resulted in the exile or imprisonment of many Sudanese.<sup>401</sup>

Since February 2003 the region of Darfur in Western Sudan has been ravaged by mass scale atrocities seemingly motivated by underlying racial tensions. The conflict is rooted in tensions over arable land. There was sporadic violence reported in the 80s and 90s<sup>402</sup> with clashes between “African” and “Arab” tribes. The fighting has been further exacerbated by “competing economic interests” (largely over oil reserves) and the “political polarisation” of the region.<sup>403</sup>

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<sup>398</sup> The other two trigger mechanisms by contrast are regulated in detail: see article 13 read with article 14 (for the referral of a situation by a State Party) and article 15 (for a *proprio motu* investigation by the ICC Prosecutor).

<sup>399</sup> *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, February 2005* paras. 40 – 41.

<sup>400</sup> *Ibid* para. 43.

<sup>401</sup> *Ibid* para. 47.

<sup>402</sup> *Ibid* para. 58.

<sup>403</sup> *Ibid* para. 60.

The tensions simmered over in April 2003, when the Sudanese Liberation Movement/Army (SLM/A), made up of discontented “African” rebels, attacked numerous government installations. One such attack was on an airport in al-Fashir in which seventy-five Sudanese soldiers were killed. In response, the Sudanese Government, relying on the underlying racial tensions in the region, called on local tribes to assist in repelling the rebels. Evidence suggests that the Sudanese government then armed and provided military support, largely in the form of air support, to the “Arab” militia (known as the *janjaweed*),<sup>404</sup> who have since killed, raped and robbed black “Africans”. Although the Sudanese government continues to deny any involvement in these atrocities,<sup>405</sup> survivors and aid workers, as well as the UN International Commission of Inquiry on Darfur and numerous human rights organisations,<sup>406</sup> confirm it. The Sudanese government admits creating “self-defence militias”<sup>407</sup> (paramilitary units known as the Popular Defence Forces (PDF)) but denies any involvement with the *janjaweed* which has been responsible for the majority of the violence.

The situation in western Darfur has been exacerbated and complicated by the ongoing north-south civil war in Sudan, which began in 1983 and finally ended on 9 January 2005 when the First-Vice President Taha and Sudan People’s Liberation Army Chairman John Garang signed the Comprehensive Peace Agreement. It is estimated that two million people have died as result of this 21-year civil war<sup>408</sup> and it has been suggested that the impunity enjoyed by perpetrators of war crimes and crimes against humanity in this conflict paved the way for the atrocities committed in Darfur.

In March 2004 the Secretary-General of the UN spoke out fervently against the conflict in Darfur calling the “civilian casualties and human rights violations unacceptable” and expressing his grave concern regarding the situation in Darfur.<sup>409</sup> In response, the Security Council in February 2005 unanimously passed a resolution to deploy 10 000 peacekeepers to southern Sudan to monitor the peace treaty. This followed a decision in May 2004 by the Assembly of Heads of State and Governments of the African Union to deploy the African Mission in Sudan to monitor the situation in Darfur.

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<sup>404</sup> This is a local Arabic colloquialism which, loosely translated, means “devils on horseback” and has been used by locals to describe Arab militiamen and the Security Council in Resolution 1564. *Ibid* para. 100.

<sup>405</sup> “Arms and injustice continue to fuel the war in Sudan” (2005) 35(1) *The Wire* 4.

<sup>406</sup> *Ibid*. Also, in a video interview given to Human Rights Watch, an alleged top militia leader, Musa Hilal, said that the Sudanese government “backed and directed Janjaweed activities in northern Darfur”. Although Hilal denied that he was a leader of the militia and that any of his followers had committed atrocities, various eyewitness accounts contradict his assertions. Human Rights Watch also claim to be in possession of government documents that evidence Khartoum’s official support of Hilal. See “Darfur: Militia leader implicates Khartoum: Janjaweed Chief says Sudan Government backed attacks” *Human Rights Watch*, available at <http://hrw.org/english/docs/2005/03/02/darfur10228.htm> (accessed 16 May 2009).

<sup>407</sup> “Q&A: Sudan’s Darfur conflict” *BBC News*, available at <http://news.bbc.co.uk/go/pr/fr/-/2/hi/world/africa/3496731.stm> (accessed 16 May 2009).

<sup>408</sup> “UN imposes sanctions over Darfur” *BBC News*, available at <http://news.bbc.co.uk/go/pr/fr/-/2/hi/africa/4392605.stm> (accessed 16 May 2009).

<sup>409</sup> “Sudan: Annan warns of ‘devastating impact’ of fighting in Darfur region” *UN News*, available at <http://www.un.org/apps/news/storyAr.asp?NewsID=10281&Cr=sudan&Cr1=#> (accessed 16 May 2009).

ii) The UN commission of enquiry

The Security Council had also previously adopted resolution 1564 which charged the Secretary-General with establishing a commission of inquiry

“to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties, to determine also whether or not acts of genocide have occurred, and to identify the perpetrators of such violations with a view to ensuring that those responsible are held accountable”.

The Darfur Commission presented its report to the Security Council in February 2005. The Commission, under the leadership of Professor Antonio Cassese, fulfilled its mandate by visiting Sudan on two occasions.

On its first visit, from 8 to 20 November 2004, the Commission met with various senior government officials, non-governmental organization representatives, political parties and United Nations officials from Sudan. It met with witnesses to atrocities, internally displaced persons, tribal leaders and also visited refugee camps in Chad.

On its second visit, from 9 to 16 January 2005, the Commission interviewed witnesses and met further with officials and UN staff. The Commission also sent a member to Eritrea over 25 to 26 November 2004 to meet with representatives of the rebel groups. Two members of the Commission also met with a delegation from the African Union from 30 November to 3 December 2004 in Addis Ababa to discuss the AU’s role in resolving the situation in Sudan.<sup>410</sup> The Commission reported that on the whole the Government of Sudan, as well as the rebel groups willingly co-operated with the Commission.

The Commission reported that the term *janjaweed* is being used to describe members of the PDF and other government agencies as well as the Arab militia,<sup>411</sup> which suggests that the distinction proffered by the government is a false one. In any event, the Commission found that evidence suggests that members of all of these groups were guilty of committing “violations of international human rights law and humanitarian law” and that “clear links” exist between all of these groups and the Sudanese government.<sup>412</sup> On the basis of these links and the circumstances surrounding the various attacks, the Commission found that, in most instances, the relevant Government officials could be held criminally responsible for the crimes committed by these groups on the basis of the doctrine of common purpose or the notion of superior responsibility.<sup>413</sup>

The Commission also found that the various reported attacks by the government and the *janjaweed* on civilians constituted “large-scale war crimes” and that the mass killing of civilians by the government and the *janjaweed* were both widespread and

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<sup>410</sup> Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, February 2005 paras. 20 – 24.

<sup>411</sup> Ibid paras. 104 – 105.

<sup>412</sup> Ibid paras. 110 – 111.

<sup>413</sup> Ibid paras. 121 – 126.

systematic, and, as such, were “likely to amount to a crime against humanity”.<sup>414</sup> With regard to the rebels, the Commission found that although they were also responsible for attacks on civilians, there was no evidence to suggest that these attacks were widespread or systematic. Therefore, while the killing of a civilian by the rebels would amount to a very serious war crime, the Commission did not conclude that these constituted crimes against humanity.<sup>415</sup> Important, given the horrific sexual violence committed against women and children in Darfur, is that the Commission found that “rape or other forms of sexual violence committed by the janjaweed and Government soldiers in Darfur was widespread and systematic and may thus well amount to a crime against humanity”, as would the crime of sexual slavery.<sup>416</sup>

Regarding the question of genocide, the Commission concluded that the Government of Sudan had not pursued a policy of genocide. The Commission came to this conclusion on the basis of the absence of the crucial element of genocidal intent on behalf of the government. However, the Commission did not rule out the possibility of individuals involved in the conflict possessing the requisite genocidal intent. The Commission was resolute in pointing out that its conclusion with respect to genocide “should not be taken as in any way detracting from, or belittling, the gravity of the crimes perpetrated in that region”.<sup>417</sup>

As far as the Commission’s objective of identifying perpetrators goes, it decided to withhold the names from the public domain and instead placed them in the custody of the Secretary-General who would deliver them to the relevant prosecutor.<sup>418</sup>

The Commission 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”.<sup>419</sup> (As pointed out earlier in this thesis, this is no small finding). The complementarity principle built into the Rome Statute Statute might be relied on by the Sudanese government (even as a non-party State) to argue that it is willing and able to prosecute the offenders. Should it in fact be willing and able, then the ICC may have to acquiesce in the prosecution of offenders so as to allow the Sudanese authorities to perform domestic 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.

The Commission’s final recommendation was that the Security Council refer the situation in Darfur to the International Criminal Court “to protect the civilians of Darfur and end the rampant impunity currently prevailing there”.<sup>420</sup> The Commission endorsed the ICC as the “only credible way of bringing alleged perpetrators to justice”.<sup>421</sup> The Commission also recommended that the Security Council establish a

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<sup>414</sup> Ibid paras. 267 & 293.

<sup>415</sup> Ibid paras. 268 & 296.

<sup>416</sup> Ibid para. 360.

<sup>417</sup> Ibid paras. 489 – 522.

<sup>418</sup> Ibid para. 525.

<sup>419</sup> Ibid para. 568.

<sup>420</sup> Ibid para. 569.

<sup>421</sup> Ibid para. 573.

Compensation Commission to provide compensation to the numerous victims of the atrocities committed in Darfur.

On 31 March 2005 the UN Security Council passed resolution 1593, referring the situation in the Darfur region of Sudan to the International Criminal Court.

iii) Why the ICC was considered appropriate to deal with the crimes committed in Darfur

It is important to highlight the reasons advanced by the *Darfur Commission's* recommendation that the Security Council refer the situation in Darfur to the International Criminal Court. No doubt these considerations played a role in the Security Council's determination of whether it ought to exercise its powers under Chapter VII of the UN Charter to refer the matter to the ICC. According to the Commission there were at least six major benefits to a referral to the ICC.

*First*, the prosecution of the crimes committed would be conducive to peace and security in Darfur.

*Second*, the ICC, as the "only truly international institution of criminal justice" would ensure justice is done regardless of the authority or prestige of the perpetrators as the ICC sits in The Hague, far from the perpetrators' spheres of influence.

*Third*, the cumulative authority of the ICC and the Security Council would be required to compel those leaders responsible to acquiesce to investigation and potential prosecution.

*Fourth*, the ICC is the "best suited organ for ensuring a veritably fair trial of those indicted by the Court Prosecutor" due to its international composition and established rules of procedure.

*Fifth*, the ICC is the only international court that can investigate and prosecute without delay.

*Sixth*, the ICC is the most cost-effective option.<sup>422</sup>

Thereafter, the Commission detailed why it considered other possible judicial mechanisms inadvisable. The Commission also provided cogent reasons against the establishment of an *ad hoc* tribunal, such as those for Yugoslavia and Rwanda, on the grounds that they are both expensive and notoriously dilatory in the prosecution and punishment of offenders and consequently the "*political will*" required within the international community to establish tribunals of this nature would be absent.<sup>423</sup> Also, protracted expansion procedures, already overburdened schedules and similar concerns regarding cost, militated against the expansion of the existing *ad hoc* tribunals.<sup>424</sup> Similarly, concerns regarding, inter alia, delays endemic in establishing infrastructure as well as unavoidable cost implications went against the creation of "mixed courts" such as the Special Court for Sierra Leone.<sup>425</sup>

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<sup>422</sup> In this regard, Human Rights Watch has noted: "The 'Sudan Tribunal' is estimated to cost some \$30 million in the first 6-8 months and then rise up to \$100 million annually, while the ICC's 2005 overall budget is approximately \$88 million." – "EU Should Push for ICC Referral of Darfur During Rice Visit", *Human Rights Watch*, available at <http://hrw.org/english/docs/2005/02/09/sudan10155.htm> (accessed 17 May 2009).

<sup>423</sup> Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, February 2005 para. 574.

<sup>424</sup> *Ibid* para. 575.

<sup>425</sup> *Ibid* paras. 576 – 582.

In advocating the referral of the situation in Darfur by the Security Council, the Commission pointed out that the situation in Darfur meets the requirement of Chapter VII, in that it constitutes a “threat to peace and security” as was acknowledged by the Security Council in its resolutions 1556 and 1564. Furthermore, the Commission also took note of the Security Council’s emphasis in these resolutions of the “need to put a stop to impunity in Darfur, for the end of such impunity would contribute to restoring security in the region”.<sup>426</sup>

iv) The problems begin: the ambivalent text of SC resolution 1593

For the reasons set out above the Sudan referral appears to be a good example of the Security Council acting in compliance with article 39 of the UN Charter by considering that the crisis in Sudan was sufficient for it to take action because of the existence of a threat to the peace or breach of the peace; and thereby concluding that an article 13(b) referral of the situation to the ICC would be a suitable measure to maintain or restore international peace and security. The lead-up to the referral – and in particular the Security Council’s decision to invoke the assistance of an independent Commission of Enquiry – reflect well on the process.

However, there are significant difficulties with the referral itself, which arise both at the level of politics and at the level of law.

Starting with the politics: paragraph 6 of SC Resolution 1593 includes an odd statement. It reflects that the Security Council:

“Decides that nationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing state for all alleged acts or omissions arising out of or related to operations in Sudan established or authorized by the Council or the African Union, unless such exclusive jurisdiction has been expressly waived by that contributing State.”

It is an open secret that the paragraph was inserted to mollify the United States, and to ensure that it did not exercise its veto (it instead abstained) during voting on SC Resolution 1593. However, this form of immunity for non-parties’ nationals sits uncomfortably within a Security Council referral of a situation on the territory of a non-party state to the International Criminal Court. As the representative for Denmark said in a statement at the time Resolution 1593 was adopted: “We also believe that the International Criminal Court (ICC) may be a casualty of resolution 1593 (2005). Operative paragraph 6 of the resolution is killing its credibility – softly, perhaps, but killing it nevertheless”.<sup>427</sup>

Now to the law: it is accepted by international lawyers that paragraph 6 is legally invalid. As Schabas points out:

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<sup>426</sup> Ibid para. 590.

<sup>427</sup> UN Doc. S/PV.5158 p 6, cited in Bill Schabas, *An Introduction to the International Criminal Court*, 3<sup>rd</sup> ed (2007) 156.

“This is quite plainly contrary to treaty provisions binding upon virtually all United Nations Member States, including the United States. It is well known that the four Geneva Conventions oblige a State Party ‘to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and [to] bring such persons, regardless of their nationality, before its own courts’. Similar duties are imposed by the Convention Against Torture. But Resolution 1593 tells them to do the opposite”.<sup>428</sup>

It is also incompatible with the Rome Statute, it being recalled that when Uganda self-referred violations by the rebel Lords Resistance Army to the ICC in a manner which avoided scrutiny of violations by Government soldiers, the Prosecutor of the Court (after an initial misstep) clarified that no such exception could be effective.<sup>429</sup> As Schabas highlights:

“Indeed, this is why the concept of referral in the Rome Statute relates to ‘situations’ rather than to ‘cases’. The language was adopted specifically to avoid the danger of one-sided referrals, which could undermine the legitimacy of the institution. But, when the Security Council performed a similar manoeuvre, the Prosecutor was silent. He might have sent the Resolution back, telling the Security Council that it was impossible to proceed on such a basis, and to reprise the adoption without paragraph 6.”<sup>430</sup>

The politicised nature of the referral is thus self-evident, yet “[t]hose States favouring referral to the Court must have felt that they had the better of the Americans, and that the poisonous [paragraph] injected by the latter did not fatally compromise the referral itself”.<sup>431</sup>

v) *A luta continua*: the ongoing difficulty of enforcing SC resolution 1593

There are other, perhaps more serious, problems with Resolution 1593. Arguably the most glaring is that regarding cooperation with the Court. Paragraph 2 of the Resolution states as follows:

“Decides 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 and, while recognizing that States not party to the Rome Statute have obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully”.

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<sup>428</sup> Bill Schabas, *An Introduction to the International Criminal Court*, 3<sup>rd</sup> ed (2007) 156.

<sup>429</sup> See *Situation in Uganda (ICC – 02/04-01/05)*, Decision to Convene a Status Conference on the Investigation in the Situation in Uganda in Relation to the Application of Article 53, 2, December 2005, paras. 3-4, cited in Bill Schabas, *An Introduction to the International Criminal Court*, 3<sup>rd</sup> ed (2007) 157.

<sup>430</sup> Bill Schabas, *An Introduction to the International Criminal Court*, 3<sup>rd</sup> ed (2007) 157.

<sup>431</sup> *Ibid* 159.

This language is obtuse and the expression “cooperate fully” is made without reference to the legal framework in the Rome Statute applicable to Sudan’s cooperation duties.<sup>432</sup> As Goran Sluiter points out:

“‘Full cooperation’ is a complex legal notion, and may be subject to various interpretations. One may be tempted – with a view to effectively combating impunity – to regard it as imposing an unconditional obligation of result, in the sense that every request for assistance must be executed. The problem, however, is that full applicability, *mutatis mutandis*, of Part 9 of the [Rome] Statute is inconsistent with such a notion of ‘full cooperation’, because it contains a number of grounds for justifying refusal of cooperation”.<sup>433</sup>

In his June 2006 address to the Security Council, Luis Moreno Ocampo stated that:<sup>434</sup>

“I wish to emphasize ... that we are now entering a new phase where unconditional cooperation will be essential to complete the investigation and identify those most responsible for crimes committed in Darfur in an expeditious manner. Our speed will depend on the cooperation received.”

Following the Prosecution’s identification of those most responsible for the crimes selected for prosecution, cooperation from the Government of Sudan or the Security Council will not only expedite the prosecution of such individuals, but will be a *sine qua non* for such prosecutions.

Although the Government of Sudan has cooperated with the ICC on certain issues, such cooperation appears to be limited to supplying information in support of their assertion that their national “accountability mechanisms” preclude the ICC’s involvement on the basis of complementarity.<sup>435</sup> This is clearly illustrated by the recent statement by the Sudanese Justice Minister that: “If they are here to discuss the progress of trials or the role of national justice then we are ready to give them whatever information they are looking for...But if the matter is about investigations, then they ... don’t have the jurisdiction.”<sup>436</sup>

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<sup>432</sup> See Goran Sluiter, “Obtaining Cooperation from Sudan – Where is the Law?” (2008) *JICJ* 6 871 – 884.

<sup>433</sup> *Ibid* 877.

<sup>434</sup> *Statement of the Prosecutor of the International Criminal Court, Mr. Luis Moreno Ocampo to the UN Security Council pursuant to UNSCR 1593* (2006) 14 June at 2.

<sup>435</sup> For example the *Third Report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR 1593* (2005) states, at 4, that “the Government the Sudan facilitated the visit of an OTP delegation to Khartoum in February 2006 for an extensive programme of meetings with representatives of various judicial and investigative mechanisms and Government departments including the Minister of Justice, the judges of the Special Courts and the Chief Justices of each Darfur state, senior officials of the Ministry of the Interior, representatives of the prosecution services and the Judicial Investigations Committee, the Advisory Council for Human Rights, the Committee for Combating Gender-Based Violence, the National Commission of Inquiry and the Wali of South Darfur”.

<sup>436</sup> “Sudan says intl court has no jurisdiction in Darfur”, *Reuters*, 15 June 2006, available at [http://today.reuters.com/News/newsArticle.aspx?type=topNews&storyID=2006-06-15T115058Z\\_01\\_MCD523280\\_RTRUKOC\\_0\\_US-SUDAN-DARFUR.xml](http://today.reuters.com/News/newsArticle.aspx?type=topNews&storyID=2006-06-15T115058Z_01_MCD523280_RTRUKOC_0_US-SUDAN-DARFUR.xml) (accessed 16 May 2009).

On the assumption then that there may be a number of cases declared admissible before the International Criminal Court, how will the ICC carry out its investigations and ultimate prosecutions? As Cassese has stressed:<sup>437</sup>

“[T]he principal problem with the enforcement of international humanitarian law through the prosecution and punishment of individuals is that the implementation of this method ultimately hinges on, and depends upon, the goodwill of states”.

This “goodwill” is vital in intra-state conflicts such as the conflict in Sudan. De Waynecourt-Steele has noted that “[o]ver the last few decades, many of the [ICC] crimes have been committed internally, that is, by organs of the state or by persons controlled by the state, against nationals of that state”.<sup>438</sup> Consequently, the State with jurisdiction over the the majority of these crimes is the same State that was involved in the perpetration of the crimes. This has an obviously severe impact on the ‘the [C]ourt’s ability to fulfil the Rome Statutes mandate’.<sup>439</sup> The fact that such an internal conflict has been referred to the ICC by the Security Council under Article 13(b) of the Rome Statute does not detract from these problems.

The Court’s task is complicated and aggravated by the fact that because Sudan is not a State party to the ICC, it owes no treaty obligations to the Court. This is an inevitable problem with the referral of situations involving non-party States to the ICC as the referral extends the Court’s jurisdiction beyond the enforcement parameters of the Rome Statute, leaving the Court to rely on the Security Council to enforce that jurisdiction. This problem is one that was foreseen by the drafters of the ICC Statute, but which was never satisfactorily attended to.

Cassese proposes that there are two definitive state cooperation regimes in international criminal law: the *inter-state* regime and the *supra-state* regime. Under the *inter-state* regime, the Court concerned has no “superior authority over states except for the legal power to adjudicate crimes perpetrated by individuals subject to state sovereignty”. In terms of this regime, “the Court cannot in any way force states to lend their cooperation, let alone exercise coercive powers within the territory of sovereign states.”<sup>440</sup>

Under the *supra-state* regime it is presumed that “the international judicial body is vested with sweeping powers not only vis-à-vis individuals subject to the sovereign authority of states, but also towards states themselves”.<sup>441</sup> In terms of this regime, the court is empowered to issue binding orders to states and, in case of non-compliance, may set in motion enforcement procedures. It is generally accepted that the ICTY and ICTR – being bodies created by the Security Council – fall within the remit of the “supra-state” model.

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<sup>437</sup> Cassese “On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law” (1998) 9(1) *European Journal International Law* at 2.

<sup>438</sup> Tiffany de Waynecourt-Steele “The Contribution of the Statute of the International Criminal Court to the enforcement of international law in light of the experiences of the ICTY” (2002) 27 *South African Yearbook of International Law* 7.

<sup>439</sup> *Ibid* 7.

<sup>440</sup> Antonio Cassese “The Statute of the International Criminal Court: Some Preliminary Reflections” (1999) 10(1) *European Journal of International Law* 164.

<sup>441</sup> *Ibid*.

The provisions of the Rome Statute that relate to “International Cooperation and Judicial Assistance” are Articles 86 to 102. Article 86 places a general obligation on State Parties to cooperate with the Court and Articles 87 and 88 deal with the pragmatics of State party cooperation. The remaining Articles deal with a variety of issues, including: requests for surrender, competing requests, provisional arrests, postponements, costs and other forms of cooperation. These provisions are not limited to State party cooperation but empower the court, in various instances to request the cooperation of non-party States as well. An example of this is Article 89 which provides that “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...” (emphasis added).

Because the Rome Statute is a treaty-based legal instrument, States were able to set out exactly “how they wish international justice to work”. In so doing, they appear to have adopted “a mostly state-oriented approach”.<sup>442</sup> This is apparent from at least the following four features of the Statute:<sup>443</sup>

- i) The Rome Statute does not provide that the execution of judicial processes must be done by agents of the Prosecutor and, in light of the “insistence in the Statute on the need to comply with the requirements of national legislation”, one must assume that these processes will be executed by the relevant authorities within the respective State.
- ii) Although Article 87(7) does allow the Court to refer a recalcitrant state to the Assembly of State Parties or the Security Council in the case of an Article 13 Security Council referral, it does not set out any consequences that might be incurred as a result of the State’s recalcitrance.
- iii) In terms of Article 90(6) and (7), when faced with two conflicting requests, a State may choose whether to comply with a request for surrender from the Court or a request for extradition from a non-party State.
- iv) Article 93(4) creates a “national security exception” that a State may use to refuse to cooperate with the Court.<sup>444</sup>

Consequently, the Rome Statute represents the conservative consensus of states regarding the practices relating to state cooperation. Arguably, therefore, the judges of

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<sup>442</sup> Ibid 165.

<sup>443</sup> Ibid 165.

<sup>444</sup> Ibid 166. See also de Waynecourt-Steele supra note 439 34, where the author suggests that the Rome Statute takes a “dichotomous” approach to State cooperation, incorporating “elements of each into its model”. She cites the terminology used in the Rome Statute as well the “absence of the traditional refusal grounds for states to refuse delivery of a person to the court” in support of her submission.

the ICC do not have the same latitude as their counterparts in the *ad hoc* tribunals to adopt far-reaching and sovereignty-inhibiting formulations of the provisions relating to the cooperation of States. Unlike the International Criminal Tribunals for Yugoslavia and Rwanda, which carry the imprimatur of the Security Council, the International Criminal Court is a creature created by states, and limited by state sovereignty concerns. It is thus possible that the ICC will be obliged to follow an inter-state model in terms of which the court has no “superior authority over states’ and is unable in ‘any way [to] force states to lend their cooperation’”.<sup>445</sup> This would be debilitating for those wishing to see justice in Darfur. As Cassese notes:

“[T]he framers of the Rome Statute were not sufficiently bold to jettison the sovereignty-oriented approach to state cooperation with the Court and opt for a ‘supra-national’ approach. Instead of granting the Court greater authority over states, the draughtsmen have left too many loopholes permitting states to delay or even thwart the Court’s proceedings.”<sup>446</sup>

On the other hand, the referral of a situation to the Court by the Security Council is by no means an ordinary event. A referral adopted under Chapter VII of the UN Charter extends the Court’s jurisdiction to all UN member States, including Sudan. There are certain provisions in the Rome Statute that indicate that there is a distinction between Article 13 referrals and the other instances whereby the Court become seized with a matter. These provisions suggest that an Article 13 referral stands as an exception to the otherwise debilitating “state-orientated” approach that resonates through the other jurisdictional provisions of the Rome Statute. For example, Article 12(2) requires that one or more of the States with jurisdiction over the crimes concerned in terms of territoriality or nationality must be a State party to the Statute.

This requirement does not apply in the instance of a Security Council referral under Article 13(b). De Waynecourt-Steele suggests that this means that “a referral by the SC automatically establishes the jurisdictional competence of the court and provides a potentially powerful basis for the enforcement of individual criminal responsibility upon non-party States to the Rome Statute”.<sup>447</sup> Similarly, Article 18(1) states that once a Prosecutor has ‘determined that there would be a reasonable basis to commence an investigation’, he or she must notify all States who would ‘normally exercise jurisdiction over the crimes concerned’. However, this provision only applies to referrals by State parties and Prosecutor-initiated proceedings and its application is explicitly excluded as far as Article 13(b) referrals are concerned.

These two Articles, 12(2) and 18(1), suggest that there is less deference owed to States and their sovereignty, in terms of consent and notification, in the case of an Article 13(b) referral. Finally, in terms of Article 87(7), if a State party refuses to comply with a request from the Court for cooperation, it may be referred to the Assembly of States, or, in the event of an Article 13(b) referral, to the Security Council. This article demonstrates that there is a difference regarding enforcement of an order of the Court in a matter where the Court has been seized with jurisdiction in terms of Article 13(b) – such matters are to be left to the Security Council.

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<sup>445</sup> Antonio Cassese “The Statute of the International Criminal Court: Some Preliminary Reflections” (1999) 10(1) *European Journal of International Law* 164.

<sup>446</sup> *Ibid* 170.

<sup>447</sup> De Waynecourt-Steele *supra* note 439 5.

Accordingly, a Security Council referral may clothe the ICC with enforcement powers that are akin to those of the *ad hoc* tribunals in The Hague.<sup>448</sup> In the instance of a referral, the Court is on all fours with the ICTY or the ICTR in that it has a mandate from the Security Council to bring justice to a situation, and it will act, for all intents and purposes, as a supra-state institution. In *Tadic*, the ICTY discussed the nature of the Security Council's Chapter VII power and stated that:

“These powers are *coercive* vis-à-vis the culprit State or entity. But they are also *mandatory* vis-à-vis the other Member States, who are under an obligation to cooperate with the Organization (Article 2, paragraph 5, Articles 25, 48) and with one another (Articles 49), in the implementation of the action or measures decided by the Security Council”.<sup>449</sup>

The problem of recalcitrant states was also experienced by the ICTY and the approach there adopted in dealing with such states is of assistance to the Court in dealing with the potentially recalcitrant Sudan. The mechanism adopted by the ICTY is a rule 61 proceeding in terms of which the ICTY reports a state that has refused to execute its warrants of arrest to the Security Council which would then, in turn, take appropriate action against the state concerned. Were the ICC to follow this example, then, according to Sadat & Carden, this would involve the ICC making ‘findings of noncompliance’ and directing them to the Security Council.<sup>450</sup> The ICC would then be at the mercy of the Security Council to adopt a similar procedure against a recalcitrant Sudan as it could not force the Security Council to ensure Sudan's cooperation.

One thing is manifestly 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”.<sup>451</sup>

From the foregoing discussion it is apparent that the referral represents many challenges for the ICC. As Cassese suggests, whilst

“the establishment of such tribunals [as the ICC] constitutes a major inroad into the traditional omnipotence of sovereign states’, regrettably ‘state sovereignty

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<sup>448</sup> See further Dan Sarooshi “The Peace and Justice Paradox: The International Criminal Court and the UN Security Council” in Dominic McGoldrick et al (eds) *The Permanent International Criminal Court: Legal and Policy Issues* (2004) 388, where the author states that “the corpus of jurisprudence of the ICTY/ICTR, the predecessors of the Court, in interpreting their respective Statutes will be invaluable as a source of authority for the Court...as an aid in interpreting its own Statute, since many of the provisions are identical or analogous in nature...”.

<sup>449</sup> *Prosecutor v. Dusko Tadic* – Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (1995) para. 31, emphasis added.

<sup>450</sup> See Leila Nadya Sadat & S. Richard Carden “The International Criminal Court: An Uneasy Revolution” (2000) 88 416.

<sup>451</sup> See Dan Sarooshi supra note 448 404.

resurfaces when it comes to the day-to-day operations of the Tribunal and its ability to fulfil its mandate.”<sup>452</sup>

In addition to the complexities of the Sudan referral and its meaningful enforcement with (and increasingly, it would appear, without) the assistance of the Security Council, the situation is complicated even further by increasing calls by the African Union and aligned partners that the Sudan investigation in respect of President Al-Bashir be deferred by a further Security Council resolution pursuant to article 16. Before coming to a discussion of the legal and political ramifications of such deferral power, it is important to consider two matters:

The first is the manner in which the ICC is dealing with the Sudan referral, and thereby to understand that the Prosecutor’s investigations in relation to Sudan stand independently from the Security Council referral that triggered the Court’s jurisdiction in the first place;

The second is the ICC’s responsibility to respect the complementarity principle, and to defer under Article 53 of the Rome Statute to any meaningful local investigation and/or prosecution within Sudan of the crimes that are in the Court’s purview.

### ***Security Council referrals and prosecutorial investigations: a distinction with a difference***

#### Introduction

Article 13 is limited to cases where ICC crimes appear to have been committed and the situation “is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations”.<sup>453</sup>

The text of article 13 thus itself indicates that the Council is empowered to refer cases to the Prosecutor of the ICC. It is for the prosecutor to independently decide what and who should be investigated from the “situation” which the Security Council has chosen to refer to the Court. Two important points may be made here. First, article 13 retains such an independent power of assessment for the Prosecutor because of the considerable importance placed by certain states on the ICC being an independent judicial institution free from political influence, including the United Nations and in particular its politicised Security Council. Second, because of this independent discretion, the fact that the Security Council has referred a situation to the Prosecutor does not necessarily mean that the Prosecutor will investigate the case or that the referral will lead to prosecution.

This is amply demonstrated by the Prosecutor’s work in response to Security Council resolution 1593 referring the Sudan situation to the ICC. Following the referral of the situation in Darfur to the ICC by the Security Council, the various ICC mechanisms were engaged. First, the ICC Prosecutor was required to inform the ICC

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<sup>452</sup> See Cassese “On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law” (1998) 9(1) *European Journal International Law* 6 (emphasis added).

<sup>453</sup> Emphasis added.

judges of the referral of a situation, which the Prosecutor duly did by way of a letter on 4 April 2005. Subsequently, on 21 April 2005, the situation in Darfur was assigned to *Pre-Trial Chamber I*.<sup>454</sup>

### Preliminary analysis

We have seen that the Prosecutor is not obliged to investigate and prosecute a situation at the behest of the Security Council. His duty to make an independent assessment whether or not such investigations and prosecutions are warranted is affirmed by Article 53 of the Rome Statute. In this regard Article 53 (1) states that:

“[t]he 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”.

This pre-investigation phase has been termed the *preliminary analysis* of the situation.

Accordingly, the ICC prosecutor, pursuant to the referral and in terms of Article 53(1) of the Rome Statute, began by gathering and assessing relevant information in order to determine whether there was a reasonable basis to initiate an investigation into the crimes committed in Sudan. Article 53(1) of the Statute enunciates three considerations that inform his decision regarding whether or not to initiate an investigation: whether a crime has been or is being committed within the Court’s jurisdiction; whether complementarity precludes admissibility, and; whether or not the interests of justice militate against initiating an investigation.<sup>455</sup> To assist with this process, the Prosecutor received a list of 50 names as well as over 2500 evidential items from the Darfur Commission.<sup>456</sup> The Prosecutor indicated that he did not consider the list of names binding and may undertake his own investigation to determine which individuals bear the “greatest responsibility for the crimes to be prosecuted by the Court”.<sup>457</sup>

It is important to note that the principle of complementarity is equally applicable to states – like Sudan – that are not party to the Statute. Article 17, which sets out the complementarity regime, provides that the ICC must defer to the investigation or prosecution of a “State which has jurisdiction over” the case. It does not talk about “States Parties” that have jurisdiction over the case. So it seems clear that this reference to a state “which has jurisdiction” over a case includes non-party States, in that a non-party State may well have jurisdiction over the case on the basis of traditional principles of jurisdiction (territoriality, or nationality). This is also apparent from Article 18(1) which provides that all states parties, as well as “those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned”, must be notified by the Prosecutor that he

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<sup>454</sup> *Decision Assigning the Situation in Darfur, Sudan to Pre-trial Chamber I*, The Presidency, ICC-02/05, 21 April 2005.

<sup>455</sup> Articles 53(1)(a), (b) and (c) of the Rome Statute respectively.

<sup>456</sup> Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, February 2005 para. 525.

<sup>457</sup> *Report of the Prosecutor of the International Criminal Court, Mr. Luis Moreno Ocampo, to the Security Council Pursuant to UNSCR 1593 (2005) 2.*

intends to initiate an investigation. It is thus clear that Sudan may be able to frustrate the ICC's exercise of jurisdiction by insisting that it is willing and able to prosecute the offenders allegedly guilty of war crimes and crimes against humanity in the Darfur region. We return to this prospect further below.

In undertaking his *preliminary analysis*, the Prosecutor interpreted Article 53(1) of the Rome Statute as entailing the consideration of "whether there *could* be cases that would be admissible within the situation in Darfur".<sup>458</sup> On 1 June 2005, after examining, *inter alia*, the Sudanese justice system and "traditional systems for alternative dispute resolution", and interviewing various interested parties, the Prosecutor decided that there are cases that will be admissible in terms of Article 53(1); which is to say that the Prosecutor's office believes that the complementarity principle does not stand in the way of a prosecution by the International Criminal Court of at least certain cases. What is important to note is that this determination does not mean that the Sudanese Government is "unwilling and unable" to prosecute *all* crimes committed in Darfur; it merely means that for the purposes of the Prosecutor's preliminary analysis there was scope for the Court's intervention.

So far the ICC Prosecutor has taken a proactive position as far as complementarity is concerned. Mr Ocampo has explained that:

"The admissibility assessment is an on-going assessment that relates to the specific cases to be prosecuted by the Court. Once investigations have been carried out, and specific cases selected, the OTP (Office of the Prosecutor) will assess whether or not those cases are being, or have been, the subject of genuine national investigations or prosecutions. In making this assessment the OTP will respect any independent and impartial proceedings that meet the standards required by the Rome Statute."<sup>459</sup>

Having considered all the requirements of Article 53(1), the Prosecutor wrote to the Presiding Judge of Pre-Trial Chamber I on 1 June 2005 to say that he believed there was "a reasonable basis to initiate an investigation into the situation in Darfur".<sup>460</sup> Subsequently, the ICC publicly announced on 6 June 2005 that the Prosecutor would be opening an investigation into the situation in Darfur, pursuant to resolution 1593.<sup>461</sup>

### Investigatory stage

The initiation of a formal investigation in terms of Article 53 of the Rome Statute brought the Prosecutor's investigative powers under the Rome Statute into full effect.<sup>462</sup> According to the Prosecutor, there are numerous sub-phases to the investigatory process: during the first sub-phase the Prosecutor "collects information

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<sup>458</sup> Ibid 3 (my emphasis).

<sup>459</sup> Ibid 4

<sup>460</sup> *Decision Assigning the Situation in Darfur, Sudan to Pre-trial Chamber I*, The Presidency, ICC-02/05, 21 April 2005.

<sup>461</sup> "The Prosecutor of the ICC opens investigation in Darfur", *ICC Press Release*, 6 June 2005, ICC-OTP-0606-104-En.

<sup>462</sup> *Report of the Prosecutor of the International Criminal Court, Mr. Luis Moreno Ocampo, to the Security Council Pursuant to UNSCR 1593 (2005) 5.*

relating to the universe of crimes alleged to have taken place in Darfur, as well as the groups and individuals responsible for those crimes”.<sup>463</sup> During the second sub-phase of the investigation the Prosecutor “will select specific cases for prosecution unless he considers, in accordance with article 53(2) of the Statute, that there is not a sufficient basis for prosecution”.<sup>464</sup>

In undertaking the first phase of investigation through collating information relating to the crimes committed in Darfur the Prosecutor has reportedly documented “thousands of alleged direct killings of civilians by parties to the conflict”, “hundreds of alleged cases of rape”, “information and evidence to suggest that the civilian population was forcibly displaced from their homes, in a widespread and systematic manner” and “information indicating that parties to the conflict directed attacks on other non-military objectives”.<sup>465</sup> Although the Prosecutor explicitly stated that he “has not, and will not, draw any conclusions as to the character of the crimes [under investigation] pending the completion of a full and impartial investigation”, from the Prosecutor’s general description of the crimes documented by his Office it appears that they may qualify as war crimes, crimes against humanity or possibly genocide or instances of genocide. The question of whether genocide or acts of genocide have been committed is particularly contentious in the context of Darfur, and from an early stage in the investigation the Prosecutor noted in a report to the Security Council that witnesses have stated that “men perceived to be from the Fur, Massalit and Zaghawa groups were deliberately targeted”. This, according to the Prosecutor, includes eye-witness accounts of statements made by the perpetrators “reinforcing the targeted nature of the attacks, such as ‘we will kill all the blacks’ and ‘we will drive you out of this land’”.<sup>466</sup>

Consequently, after comprehensively analysing the crimes allegedly committed in Darfur since 1 July 2002, the Prosecutor “identified particularly grave events” for full investigation, and possible prosecution. In this regard the Prosecutor noted:<sup>467</sup>

“Although any crime falling within the jurisdiction of the Court is serious, the gravity of the crimes is central to the process of case selection. The Office looks at factors such as the scale and nature of the crimes (in particular, high number of killings), the systematic character and impact of the crimes, as well as other aggravating factors.”

Other factors considered by the Prosecutor in this regard include crime patterns, geographical locations of alleged crimes, security concerns, accessibility of evidence and the preventative impact that a prosecution might have.<sup>468</sup> The next step involves

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<sup>463</sup> *Second Report of the Prosecutor of the International Criminal Court, Mr. Luis Moreno Ocampo, to the Security Council Pursuant to UNSCR 1593* (2005) 1.

<sup>464</sup> *Ibid.*

<sup>465</sup> *Third Report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR 1593* (2006) 14 June 1-2.

<sup>466</sup> *Ibid* 1.

<sup>467</sup> *Ibid* 2.

<sup>468</sup> See *Third Report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR 1593* (2006) 14 June at 3 and *Second Report of the Prosecutor of the International Criminal Court, Mr. Luis Moreno Ocampo, to the Security Council Pursuant to UNSCR 1593* (2005) 2.

the identification of those individuals most responsible for the incidents selected. In this regard the Prosecutor explained that:<sup>469</sup>

“Given the scale of the alleged crimes in Darfur, and the complexities associated with the identification of those individuals bearing greatest responsibility for the crimes, the Office currently anticipates the investigation and prosecution of a sequence of cases, rather than a single case dealing with the situation in Darfur as a whole.”

#### The next step: Admissibility in respect of specific cases

In terms of Article 53(2) of the Rome Statute, the Prosecutor will refrain from prosecuting these specific cases if he decides that there is an insufficient legal or factual basis to seek a warrant or summons under Article 58;<sup>470</sup> the case is inadmissible under Article 17<sup>471</sup> or the prosecution is not in the interests of justice.<sup>472</sup> Accordingly, at this point the issue of complementarity once again becomes relevant in terms of Article 17.

Although this enquiry will be made in respect of *specific cases* selected by the Prosecutor, it is useful to note that the Prosecutor has explained to the Security Council that:<sup>473</sup>

“Based upon our current assessment, it does not appear that the national authorities have investigated or prosecuted, or are investigating or prosecuting, cases that are or will be the focus of our attention such as to render those cases inadmissible before the ICC.”

It must be noted further however that the Prosecutor qualified this, and other statements previously made with regard to complementarity, by stating that this assessment is ongoing and a final determination will only be made in respect of specific cases.<sup>474</sup>

Nevertheless, the importance of this statement cannot be overstated. This is particularly true in light of the fact that the Sudanese authorities have already indicated that they consider the ICC to be precluded from investigating or prosecuting crimes committed in Darfur on the basis of complementarity. The basis of this assertion is that the crimes concerned will be investigated by the *Special Criminal Court on the Events in Darfur* (the Darfur Special Court) which was established on 7 June 2005 – the day after the ICC publicly announced the Prosecutor’s intention to formally investigate the situation in Darfur – as, in the words of the Sudanese Justice

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<sup>469</sup> *Third Report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR 1593* (2006) 14 June at 3.

<sup>470</sup> Article 53(2)(a).

<sup>471</sup> Article 53(2)(b).

<sup>472</sup> Article 53(2)(c).

<sup>473</sup> *Statement of the Prosecutor of the International Criminal Court, Mr. Luis Moreno Ocampo to the UN Security Council pursuant to UNSCR 1593* (2006) 14 June 4.

<sup>474</sup> *Ibid.*

Minister, “a substitute to the International Criminal Court”.<sup>475</sup> Explicit reference was made by the Ministry of Justice to Article 17 of the Rome Statute in this regard.<sup>476</sup>

In subsequent reports to the Security Council, the ICC Prosecutor revealed that, notwithstanding the Sudanese Government’s announcement at the time the Darfur Special Court was established that “approximately 160 suspects had been identified for investigation and possible prosecution”, the Special Court has conducted only six trials involving less than thirty suspects.<sup>477</sup> Similarly, upon the Darfur Special Court’s inception its President stated that it would have jurisdiction over, *inter alia*, crimes against humanity and war crimes; however, to date, cases have concerned incidents of armed robbery, receipt of stolen goods, unlawful possession of firearms, intentional wounding, murder and rape.<sup>478</sup> Finally, the defendants concerned were either low-ranking military personnel or civilians.

In addition to the Darfur Special Court, numerous institutions have been constituted by the Sudanese Government to purportedly bring the perpetrators of atrocities in Darfur to justice, these include: a Judicial Investigations Committee; Special Prosecutions Commissions; National Committee of Inquiry; Committees Against Rape; and the Special and Specialised Courts of 2001 and 2003 respectively.<sup>479</sup>

In the event that a case selected for prosecution is being investigated or prosecuted by the Darfur Special Court, or another national court or institution, the Prosecutor has had to rely on the exceptions to the principle of complementarity contained in Article 17 of the Rome Statute to show that the Sudanese authorities are *unwilling* or *unable* to investigate and/or prosecute the case concerned.

#### i. Unwilling

In terms of Article 17(2) of the Rome Statute, a State will be considered *unwilling* to investigate or prosecute when:

- “(a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility...
- (b) 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
- (c) 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”.

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<sup>475</sup> “Sudan: Judiciary challenges ICC over Darfur cases’, *IRIN*, available at [http://www.irinnews.org/report.asp?ReportID=47802&SelectRegion=East\\_Africa&SelectCountry=SU DAN](http://www.irinnews.org/report.asp?ReportID=47802&SelectRegion=East_Africa&SelectCountry=SU DAN) (accessed 20 May 2009).

<sup>476</sup> *Ibid.*

<sup>477</sup> *Third Report of the Prosecutor of the International Criminal Court to the UN Security Council 1593 (2005)* 14 June 2006 5.

<sup>478</sup> *Ibid.*

<sup>479</sup> *Third Report of the Prosecutor of the International Criminal Court to the UN Security Council 1593 (2005)* 14 June 2006 3. See also *Annex 1* to this Report.

From the initial progress, or lack of progress, made by the Darfur Special Court, it is reasonable to note that there is a general *unwillingness* on the part of the authorities in Sudan to prosecute the crimes committed in Darfur. Thus, in a report to the Security Council on Darfur, the UN Secretary General noted:

“Meanwhile, high-ranking State officials and leaders of armed groups and militia have not been held accountable for violence and crimes against civilians...The lack of a good faith effort to investigate and hold individuals accountable for war crimes, crimes against humanity and other offences reinforces a widely shared sense of impunity.”

Moreover, the President of the Darfur Special Court was recently reported as saying that.<sup>480</sup>

“Higher authorities are not interested in these cases to be presented to the court or for them to even come to the knowledge of the court”.

## ii. Unable

In terms of Article 17(3) of the Rome Statute, a State will be considered *unable* to prosecute when “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”.

Unlike Article 17(2) which requires a determination of “unwillingness” on a case-by-case basis, the wording of this exception suggests that the ICC may make a more general determination as far as “inability” is concerned. Article 17(3) describes a collapse or unavailability of the judicial system – a fact which is likely to be a predictable and long-term condition which will not vary on a casuistic basis. There is an obvious difficulty inherent in proving inability since there is no universal benchmark or yardstick against which to measure the efficacy of a national judicial system. According to a policy paper released by the Prosecutor: “This provision was inserted to take account of situations where there was a lack of central government, or a state of chaos due to the *conflict or crisis*, or public disorder leading to collapse of national systems which prevents the State from discharging its duties to investigate and prosecute crimes within the jurisdiction of the Court”.<sup>481</sup>

In respect of Darfur, the ICC Prosecutor, the UN Secretary General, the Darfur Commission and others have suggested that the Sudanese authorities may in fact be *unable* to effectively prosecute the crimes committed in Darfur. For example, ICC Prosecutor Luis Moreno Ocampo has acknowledged that it “is clear that the national authorities face significant challenges to the conduct of effective criminal proceedings in Darfur, particularly in light of the fact that the conflict has destroyed or dislocated the normal criminal justice infrastructure”. He added that “efforts have been made by

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<sup>480</sup> “If not Peace, then Justice” (2006) April 2 *New York Times Magazine* 48.

<sup>481</sup> *Paper on some policy issues before the Office of the Prosecutor* (2003) 4 (emphasis added).

the Government of the Sudan to rectify these deficiencies, but these efforts have also reportedly been restricted by the lack of security on the ground”.<sup>482</sup>

### Tribal reconciliation process or another form of amnesty

In addition to the abovementioned judicial and quasi-judicial mechanisms, the Government of Sudan has also initiated a “tribal reconciliation and conflict resolution” process in terms of which tribes from both sides are brought together to negotiate their differences.<sup>483</sup> Although this process has reportedly led to the cessation of inter-tribal clashes in western Darfur, it has not been as successful in other localities in the region.<sup>484</sup> As far as the effect that such processes will have on the principle of complementarity, the Prosecutor has already stated that “[t]hese processes are not criminal proceedings as such for the purposes of assessing the admissibility of cases before the ICC”.<sup>485</sup> Moreover, the Secretary-General has also noted that they “should not be a substitute for the prosecution of war-crimes cases”.<sup>486</sup>

To the extent that an individual who falls within the jurisdiction of the ICC may be amnestied in terms of this process, it is worth noting the following. There is an ongoing debate regarding the role of Truth Commissions in international justice and, more pertinently, their effect on complementarity. For one thing, the repercussions of an accused being granted amnesty under national law might be interpreted by the ICC as a decision “not to prosecute” or, arguably as an “unwillingness” to prosecute. In this respect the provisions of Article 17(2)(a) will come to the fore as the article provides that an “unwillingness to prosecute” would exist where “[t]he proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility”. The ICC could thereby “ascertain the motivation for the grant of amnesty” and make a determination on that basis.

### ***Deferrals: the law and the politics***

#### Article 16: the law’s political compromise / the political compromise of the law

Article 16 of the *Rome Statute* is subtitled “*Deferral of investigation or prosecution*”, and declares:

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<sup>482</sup> *Third Report of the Prosecutor of the International Criminal Court to the UN Security Council 1593 (2005)* 14 June 2006 6.

<sup>483</sup> *Ibid* para. 12.

<sup>484</sup> *Monthly Report of the Secretary-General on Darfur* (2006) 19 May UN Doc. S/2006/306 para. 26.

<sup>485</sup> *Third Report of the Prosecutor of the International Criminal Court to the UN Security Council 1593 (2005)* 14 June 2006 6.

<sup>486</sup> *Ibid*.

“No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.”

Article 17(2) of the Relationship Agreement between the United Nations and the ICC stipulates:

“When the Security Council adopts under Chapter VII of the Charter a resolution requesting the Court, pursuant to article 16 of the Statute, not to commence or proceed with an investigation or prosecution, this request shall immediately be transmitted by the Secretary-General to the President of the Court and the Prosecutor. The Court shall inform the Security Council through the Secretary-General of its receipt of the above request and, as appropriate, inform the Security Council through the Secretary-General of actions, if any, taken by the Court in this regard.”

By Article 16 the Security Council of the UN is accordingly provided a power of “negative” intervention in the exercise of the ICC’s jurisdiction.

The issue of Security Council deferral, and more generally of the relationship between the Court and the Council, had been one of the thorniest in the negotiations leading to adoption of the Rome Statute. Article 23(3) of the International Law Commission draft of 1994 stated: “3. No prosecution may be commenced under this Statute arising from a situation which is being dealt with by the Security Council as a threat to or breach of the peace or an act of aggression under Chapter VII of the Charter, unless the Security Council otherwise decides.”<sup>487</sup> In effect, under the ILC proposal, the Court could not proceed without Security Council authorization, to the extent that “a situation” was “being dealt with by the Security Council as a threat to or breach of the peace or an act of aggression under Chapter VII”.

Although supported by the permanent members of the Security Council, this suggested version was heavily criticised, in particular because it allowed the judicial function of the ICC to be subject to a decision by a political organ.<sup>488</sup> The compromise reflected in Article 16 seriously diminishes the authority of the Council by requiring the Council to act to prevent a prosecution, rather than to act to authorise one. In other words, Article 16 requires the Security Council to take preventive action through a resolution under Chapter VII of the UN Charter requesting that no investigation or prosecution be commenced for a renewable period of 12 months. In the parlance of the Security Council, this means that a deferral will require the approval of nine of the members of the Council and the lack of a contrary vote by any of the five permanent members.<sup>489</sup>

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<sup>487</sup> UN Doc. A/49/355.

<sup>488</sup> Conderelli and Villalpando *supra* note 396 645.

<sup>489</sup> *Ibid* 646.

## The politics (and double-standards) start early: US attempts to hijack article 16

Just short of two weeks after the Court's statute became operative on 1 July 2002, and before the Court itself had opened its doors, Article 16 of the Rome Statute was being invoked. Resolution 1422 was adopted by the Security Council at its 4572nd meeting, on 12 July 2002. It was adopted by the vote of all fifteen members, including seven States parties to the Statute, including two permanent members, France and the United Kingdom. The preamble declares that the Council is "Acting under Chapter VII of the Charter of the United Nations". The Resolution in paragraph 1, directly refers to article 16 of the Rome Statute:

"Requests, consistent with the provisions of Article 16 of the Rome Statute, that the ICC, if a case arises involving current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts or omissions relating to a United Nations established or authorized operation, shall for a twelve-month period starting 1 July 2002 not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise..."

It is well known that adoption of the Resolution was provoked by the threat of the United States, in June 2002, to veto renewal of the mandate of the United Nations mission in Bosnia and Herzegovina.<sup>490</sup>

Resolution 1422 would expire after twelve months, and on 12 June 2003, at its 4772<sup>nd</sup> meeting, the resolution was renewed for a further 12 months by the Council's adoption of Resolution 1487, which is essentially identical to Resolution 1422. The Council expressed its intention, as it had done the previous year, to renew the resolutions "under the same conditions each 1 July for further 12-month periods for as long as may be necessary". Only twelve members voted in favour of the resolution, however. Germany, France and Syria all abstained.

Many statements from governments regarding these controversial resolutions were highly critical. Some cited the "deep injustice" of discrimination between peacekeeping forces from sending States that are parties to the Rome Statute and those that are not.<sup>491</sup> It was further argued that the resolutions sought to modify the terms of the Rome Statute indirectly, without amendment of the treaty.<sup>492</sup> The automatic renewal implication in the resolutions was also challenged.<sup>493</sup>

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<sup>490</sup> (2002) 96 *AJIL*. 725-727. See also the statement by the United States' representative at the Council's meeting of 10 July 2002 (UN Doc. S/PV/4568, pp. 9-10). For academic comment on the subject, see inter alia Carsten Stahn, "The Ambiguities of Security Council Resolution 1422", (2003) 14 *EJIL*. 85 and Roberto Lavalle, "A Vicious Storm in a Teacup: The Action by the United Nations Security Council to Narrow the Jurisdiction of the International Criminal Court", (2003) 14 *Criminal Law Forum* 195.

<sup>491</sup> Uruguay, 12 June 2003.

<sup>492</sup> Letter from the Ambassadors to the UN of Canada, Brazil, New Zealand and South Africa to the President of the UN Security Council in relation to the draft resolution 2.2002.747 currently under consideration by the Security Council under the agenda item Bosnia-Herzegovina, 12 July 2002, UN Doc. S/2002/754.

<sup>493</sup> UN Doc. S/PV.4772, 8-9.

These statements demonstrate the politicised nature of article 16 and the Security Council's invocation thereof at the behest of – and under threat by – a veto-wielding superpower. As one leading international criminal text summarises:

“The purpose of [article 16] was to allow the Council, under its primary responsibility for the maintenance of peace and security, to set aside the demands of justice at a time when it considered the demands of peace to be overriding; if the suspension of legal proceedings against a leader will allow a peace treaty to be concluded, precedence should be given to peace. The suspension of the proceedings would be only temporary. The subsequent practice of the Council quoting Article 16 would however have surprised those drafting the Statute.”<sup>494</sup>

If anything positive may be drawn from the United States' purported *political* abuse of article 16, they are the clear statements by others at the time of the *legal* parameters of article 16. For example, in the Security Council, during the debate on Resolution 1487, the Netherlands referred to the *travaux préparatoires* to indicate that real intent of the drafters of article 16 of the Rome Statute:

“Article 16 reads that ‘no investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect’. From both the text and the *travaux préparatoires* of this article follow that this article allows deferrals -only on a case by case basis; -only for a limited period of time; -and only when a threat to or breach of peace and security has been established by the Council under Chapter VII of the UN Charter. In our view, article 16 does not sanction blanket immunity in relation to unknown future events.”<sup>495</sup>

Germany also joined the Netherlands in opposing adoption of Resolution 1422. In the public debate on 10 July 2002, Germany stated:

“Chapter VII of the United Nations Charter requires the existence of a threat to the peace, a breach of peace or an act of aggression – none of which, in our view, is present in this case. The Security Council would thus be running the risk of undermining its own authority and credibility [by adopting the draft Resolution].”<sup>496</sup>

Canada too noted that article 16 was the product of delicate negotiations, and that it was intended to be available to the Security Council on a case by case basis. In the words of its representative: “Most states were opposed to any Security Council

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<sup>494</sup> See Robert Cryer, Hakan Friman, Darryl Robinson, Elizabeth Wilmschurst *An Introduction to International Criminal Law and Procedure* (2007) 138.

<sup>495</sup> UN Doc. S/PV.4772 20.

<sup>496</sup> UN Doc. S/PV.4568 (Resumption 1), 10 July 2002, 9. See “Erklärung von Bundesaußenminister Joschka Fischer zur Entscheidung des VN-Sicherheitsrates vom 12.07. 2002, erschienen am 13.07.2002” available at <http://www.auswaertiges-amt.de> (accessed 17 May 2009).

interference in ICC action, regarding it as inappropriate political interference in a judicial process”.<sup>497</sup>

Syria, on behalf of Arab countries, echoed Canada’s sentiments, and appealed “to the Security Council to assume its responsibility and not accept these exemptions because that might damage the credibility of the Court before it is born”;<sup>498</sup> and in the Security Council during debate on Resolution 1487, stated that “the adoption of this resolution would result in the gradual weakening of the Court’s role in prosecuting those who have perpetrated the most heinous crimes that come under its jurisdiction,”, concluding that “we have full confidence in international criminal justice...”.<sup>499</sup> The same theme was picked up by the Heads of State or Government of the Non-Aligned Movement, who expressed their view that the Security Council’s actions “are not consistent with the provision of the Rome Statute and severely damage the Court’s credibility and independence.”<sup>500</sup>

The Secretary-General of the United Nations also weighed in on the debate, explaining in simple terms what article 16 was intended for:

“In making this decision, you will again rely on article 16 of the Rome Statute. I believe that that article was not intended to cover such a sweeping request, but only a more specific request relating to particular situation...”.<sup>501</sup>

What may be drawn from the above are two legal observations. In the first place article 16 is limited to deferrals of particular situations and may be invoked on a case-by-case basis. It is not a provision which may be used to bestow a general immunity on a particular class of individuals or nationals. And, as we shall see later, it is not a provision which may be used in respect of one individual alone. Secondly, article 16 is not intended as a means by which the Security Council can undermine or interfere in the independent workings of the International Criminal Court. That is to say that if the Council is to invoke article 16, it may only do so once it has made a credible finding under Chapter VII of the UN Charter that the continued investigation and/or prosecution in a particular situation would constitute a threat to the peace, a breach of peace or an act of aggression. Thus, for there to be a valid article 16 deferral there should be a formal determination by the Security Council, pursuant to article 39 of the UN Charter, that the objective conditions enabling the Security Council to invoke Chapter VII are present.

This follows not only expressly from the text of article 16 as read with Chapter VII of the UN Charter. It follows also from a proper appreciation of the

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<sup>497</sup> Statement made at a Special Plenary as part of the 10<sup>th</sup> Preparatory Commission for the International Criminal Court, convened to discuss the proposals before the Security Council with regard to immunity for peacekeepers on 3 July 2002, unofficial record prepared by the NGO Coalition for the International Criminal Court.

<sup>498</sup> Ibid.

<sup>499</sup> UN Doc. S/PV.4772, at 25-26.

<sup>500</sup> Excerpt on the ICC and UNSC res. 1422 from the Final Document adopted by the Non-Aligned Movement (NAM) at its 2003 meeting of Heads of States & Governments held in Kuala Lumpur, Malaysia, 25 February 2003.

<sup>501</sup> Excerpts from the Public Meeting at the United Nations Security Council on the Renewal of Resolution 1422, 12 June 2003, [Note: This is an unofficial record of the statements made at the Public Meeting of the Security Council on 12 June 2002, prepared by the NGO Coalition for the International Criminal Court.]

(limited) role that the Security Council enjoys in relation to the ICC. This limited role is well captured by the ILA ICC Committee in its first report:<sup>502</sup>

“With recent developments in international criminal law, it may be argued that the powers of the Security Council to interfere with international justice are implicitly limited, by virtue of a form of ‘separation of powers’ doctrine. In the past, when there was no prospect of international prosecution, the only real basis for intervention by the international community was political. The Council adopted measures under Chapter VII that were essentially political because there was no alternative. But international law and international institutions have evolved considerably in recent years. The previously almost unlimited power of the Security Council ought now to be balanced with other prerogatives, such as the need to preserve the independence and integrity of international criminal justice initiatives. Although the concept had been afloat for several years, the delegates to the San Francisco Conference did not contemplate a permanent international criminal court as an operative part of the post-war international system, and it is therefore not surprising that the problem is not addressed expressly in the Charter. But the landscape has evolved, and with the existence of the International Criminal Court it is absolutely essential that international political and legislative bodies ensure that they do not encroach upon international justice. The Security Council must now apply its mandate in such a way as to enhance and promote newer institutions, even if they have been established outside the framework of the Charter itself.”<sup>503</sup>

### The Darfur referral and article 16

The next time article 16 came expressly to be referred to by the Security Council was in the context of the Darfur referral.<sup>504</sup> When the Security Council referred the Darfur situation to the ICC in 2005 by resolution 1593, there was a reference to article 16 in the second paragraph of the resolution:

“Recalling article 16 of the Rome Statute under which no investigation or prosecution may be commenced or proceeded with by the International Criminal Court for a period of 12 months after a Security Council request to that effect”.

It is well-known that that the reference was imposed by the United States as a prerequisite for its abstention when the vote was taken. The US ambassador at the time had this to say about the section’s objectives:

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<sup>502</sup> Presented at the Berlin Conference of the International Law Association, 2004, the text of which is available at [www.ila-hq.org/...cfm/docid/7BC51FF0-0B5B-4262-806F3593281F0B66](http://www.ila-hq.org/...cfm/docid/7BC51FF0-0B5B-4262-806F3593281F0B66) (accessed 20 May 2009).

<sup>503</sup> Pages 8 – 9.

<sup>504</sup> See generally: Annalisa Ciampi, “The Proceedings against President Al Bashir and the Prospects of their Suspension under Article 16 ICC Statute” (2008) 6 *JICJ* 885-897.

“This resolution provides clear protections for United States persons. No United States persons supporting the operations in the Sudan will be subjected to investigation or prosecution because of this resolution.”<sup>505</sup>

Of course, whatever the reasons may have been for the reference to article 16 in resolution 1593, article 16 henceforth came to be invoked directly by the African Union in its response to the ICC’s investigation in Sudan. One of the complaints forcefully directed by the AU at the ICC’s work in Africa is that the Court is undermining rather than assisting African efforts to solve the continent’s problems. In this regard the Sudan referral is an illustrative example. The Sudan referral has become a touchstone for arguments around an article 16 deferral because of the decision by the Prosecutor of the ICC to indict the Sudanese president, Omar al-Bashir. This in part appears to be a central reason why South Africa and other African states have been pushing for the Security Council to defer the prosecution of al-Bashir.

This call has been repeated at the highest levels of the AU. For instance, the African Union Peace and Security Council called upon the UN Security Council to apply article 16 of the Rome Statute and “defer the process initiated by the ICC.”<sup>506</sup>

The response of the UN Security Council has been merely to “note” the AU’s calls. For instance, the matter was considered by the Security Council when it extended the mandate of UNAMID, the AU-UN Hybrid Operation in Darfur established by SC Resolution 1769, for a further 12 months to 31 July 2009. In the extension resolution – resolution 1828 – adopted on 31 July 2008 with 14 votes in favour (with the US abstaining), the Council:

“[e]mphasiz[es] the need to bring to justice the perpetrators of .... Crimes and urg[es] the Government of Sudan to comply with its obligations in this respect”.

The Council thereafter took “note” of the AU communiqué of 21 July, “having in mind concerns raised by members of the Council regarding potential developments subsequent to the application by the Prosecutor of the International Criminal Court of 14 July 2008, and taking note of their intention to consider these matters further”.<sup>507</sup>

This has drawn the ire of the African Union. At a meeting of African States Parties to the Rome Statute over 8 to 9 June 2009 the States Parties agreed that “another formal resolution should be presented by the Assembly of Heads of State and Government to the United Nations Security Council to invoke Article 16 of the Rome Statute by deferring the Proceedings against President Bashir of The Sudan as well as expressing grave concern that a request made by fifty three Member States of the United Nations

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<sup>505</sup> Quoted in Goran Sluiter, “Obtaining Cooperation from Sudan – Where is the Law?” (2008) 6 *JICJ* 879.

<sup>506</sup> See African Union Peace and Security Council Decision (PSC/MIN/Comm (CXLII)), 21 July 2008, paras. 3, 5; 9, 11(i); and thereafter African Union Assembly Decision on the Application by the International Criminal Court Prosecutor for the Indictment of the President of the Republic of the Sudan (Dec. 221 (XII)), 3 February 2009, paras. 2, 3 and Peace and Security Council Decision (PSC/PR/Comm (CLXXV)), 5 March 2009, paras. 4-6.

<sup>507</sup> See for example UN Doc. S/RES/1828 (2008).

has been ignored”.<sup>508</sup> The peak (or pique) of its response was a decision in Sirte on 3 July 2009 of the Assembly of the AU in which it stated that because

“the request by the African Union has never been acted upon, the AU Member States shall not cooperate pursuant to the provisions of Article 98 of the Rome Statute of the ICC relating to immunities, for the arrest and surrender of President Omar El Bashir of The Sudan”.<sup>509</sup>

It also expressed its “deep regret” that the request by the AU to the Security Council to defer the proceedings against President Bashir of the Sudan in accordance with Article 16 of the Rome Statute has “neither been heard nor acted upon, and in this regard, REITERATES ITS REQUEST to the UN Security Council”.<sup>510</sup>

In its Press Release following the 3 July 2009 decision in Sirte on non-cooperation with the ICC, the AU has explained that its decision “bears testimony to the glaring reality that the situation in Darfur is too serious and complex an issue to be resolved without recourse to an harmonized approach to justice and peace, neither of which should be pursued at the expense of the other”.<sup>511</sup> Accordingly, continued the press release, the 3 July decision “should be received as a very significant pronouncement by the supreme AU decision-making body and a balanced expression of willingness to promote both peace and justice in Darfour (sic) and in The Sudan as a whole” and “[i]t is now incumbent upon the United Nations Security Council to seriously consider the request by the AU for the deferral of the process initiated by the ICC, in accordance with Article 16 of the Rome Statute”.

It is clear from this and more recent statements that Africa wants its calls for a Security Council deferral of the Sudan investigation to be taken seriously, indeed acceded to. Its call for a deferral ultimately arises from a preference expressed by the AU for African solutions to African problems, and in particular for African peace efforts on the continent not to be undermined by the ICC. It is accordingly necessary to focus in some detail on the call by the AU for the ICC and/or the Security Council to give peace a chance.

### The peace and justice debate before the ICC: a presumption in favour of justice

The debate about peace and justice and how the two are to be reconciled is an old one and beyond the scope of this position paper. However, certain points are worth stressing in relation to that debate insofar as it engages the ICC.

In the first place, it may be noted that the ICC’s involvement in Sudan (or indeed other parts of Africa) is consistent with an expressed agreement in a variety of African documents that international crimes should not be met with impunity. No

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<sup>508</sup> See Recommendation 6, page 6: Report of the Meeting of African States Parties to the Rome Statute of the International Criminal Court, 8-9 June 2009, Addis Ababa, Min/ICC/Rpt.

<sup>509</sup> Decision on the Meeting of the African States Parties to the Rome Statute of the International Criminal Court (ICC), Doc.Assembly/AU/13(XIII), para. 10.

<sup>510</sup> Decision on the Meeting of the African States Parties to the Rome Statute of the International Criminal Court (ICC), Doc.Assembly/AU/13(XIII) para. 9.

<sup>511</sup> African Union Press Release: Decision of the Meeting of African States Parties to the Rome Statute of the International Criminal Court, Addis Ababa 14 July 2009.

less than the African Union's Constitutive Act (article 4(*h*)) stresses this principle. And the African Commission on Human and Peoples' Rights (the precursor to the African Court on Human and Peoples' Rights) has affirmed this commitment as an African ideal. It may be said that on paper at least, the African Union's Constitutive Act expresses a presumption in favour of prosecution for international crimes.

Secondly, striving for justice in respect of these crimes is a principle that is supported by widespread state practice on the African continent. In order to become a party to a multilateral treaty, a State must demonstrate, through a concrete act, its willingness to undertake the legal rights and obligations contained in the treaty. In other words, it must express its consent to be bound by the treaty. A State may express its consent to be bound in several ways, in accordance with the final clauses of the relevant treaty. The most common way is through ratification. It is not insignificant that more than half of Africa's States (and the largest regional grouping in the world) have ratified the Rome Statute of the International Criminal Court, thereby unequivocally expressing that they consider themselves legally committed to the principle that there ought ordinarily to be prosecutions in circumstances where serious crimes of concern to the international community have been committed. For African States parties that have domesticated the Rome Statute this principle has been given added impetus within national law. Thus, in respect of South Africa, the Rome Statute commitment to a justice-response in relation to international crimes goes beyond treaty ratification and is domestically reflected in South Africa's Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002. The ICC Act provides that there is an obligation to investigate and prosecute. The preamble speaks of South Africa's commitment to

“bringing persons who commit such atrocities to justice, either in a court of law of the Republic in terms of its domestic laws where possible, pursuant to its international obligations to do so when the Republic became party to the Rome Statute of the International Criminal Court, or in the event of the national prosecuting authority of the Republic declining or being unable to do so, in line with the principle of complementarity as contemplated in the Statute, in the International Criminal Court, created by and functioning in terms of the said Statute”.

Read as a whole there can be no doubt that in terms of the Act, Parliament favours the prosecution of international crimes, either by cooperating with the ICC in relation to suspects the Court is investigating, or if needs be by domestic prosecution in South Africa.<sup>512</sup>

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<sup>512</sup> The first object of the Act recorded in section 3(*a*) is to create a framework to ensure that the Rome Statute is effectively implemented in South Africa. The second object of the Act recorded in section 3(*b*), is to ensure that anything done in terms of the ICC Act, conforms with South Africa's obligations under the Rome Statute, including its obligation to cooperate internationally with the ICC and to prosecute domestically the perpetrators of crimes against humanity. Another object of the Act recorded in s 3(*d*), is to enable the National Prosecuting Authority to prosecute and the High Courts to adjudicate in cases against people accused of having committed crimes against humanity, both inside South Africa and beyond its borders. Once a person suspected of international crimes has been arrested, the National Director of Public Prosecutions is obliged in terms of section 5(3), when he considers whether to institute such a prosecution, to: “give recognition to the obligation that the Republic, in the first instance and in line with the principle of complementarity as contemplated in article 1 of the Statute, has jurisdiction and the responsibility to prosecute persons accused of having committed a crime”.

On the topic of state practice it might also be recalled that the situation in Sudan was considered serious enough for the Security Council to invoke its chapter VII powers to refer the atrocities to the ICC for its attention. That decision by the Council was taken – in the first place – without a veto being exercised by any of the five permanent members, and with the support of African states who recognized the gravity of the crimes that were being committed and the need for a justice response. In the second place, it must be recalled that before the referral the Security Council had adopted resolution 1564 which charged the Secretary-General with establishing a commission of inquiry

“to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties, to determine also whether or not acts of genocide have occurred, and to identify the perpetrators of such violations with a view to ensuring that those responsible are held accountable”.

The Darfur Commission, under the leadership of Professor Antonio Cassese and including African and Arab members,<sup>513</sup> presented its report to the Security Council in February 2005,<sup>514</sup> and recommended that due to the grave crimes that had been committed in Darfur the Security Council invoke its chapter VII powers to refer the matter to the ICC.

There is accordingly an understanding by African states that at the very least true and lasting peace requires a commitment to justice. The two imperatives may – and probably ought to – operate side by side.

The discussion above demonstrates that African States Parties to the ICC have already expressed their preference for a justice-response to international crimes: that is, States Parties ratified the Rome Statute because of the importance they attach to the view that there should be no impunity for international crimes; and by becoming a party to the Statute they have accepted legal duties in respect of the prosecution of persons responsible for these crimes.

Naturally, that is not to say that prosecutions must be pursued at all costs or without regard to other considerations such as timing or the progress of a particular peace process. The Rome Statute itself recognizes that the pursuit of prosecutions is not an absolute or blind commitment. But at the very least the principle in favour of prosecution – voluntarily assumed as a duty to prosecute by States Parties to the Rome Statute – should be acknowledged within Africa. And that presumption *in favour of* prosecution demands that any arguments for investigations/prosecutions to be deferred be made convincingly and backed up with demonstrable evidence. Most importantly, as argued immediately below, the arguments should be made in good

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<sup>513</sup> The African members were Therese Striggner-Scott (a barrister and principal partner with a legal consulting firm in Accra, Ghana, and who served as Judge of the High Courts of Ghana and Zimbabwe, and was the Executive Chairperson of the Ghana Law Reform Commission from January 2000 to February 2004), and Dumisa Ntsebeza (a former Commissioner on the Truth and Reconciliation Commission in South Africa, and who served as acting judge on the High Court of South Africa, as well as the South African Labour Court). The Arab member was Mohammed Fayek (then Secretary-General of the Arab Organization for Human Rights, and who previously served in Egypt as Minister of Information, Minister of State for Foreign Affairs, Minister of National Guidance, and Chef de Cabinet and Advisor to the President for African and Asian Affairs).

<sup>514</sup> Report of the International Commission of Inquiry on Darfur, Geneva, 25 January 2005. The full report is available at [http://www.un.org/News/dh/sudan/com\\_inq\\_darfur.pdf](http://www.un.org/News/dh/sudan/com_inq_darfur.pdf).

faith within – rather than outside – the international criminal justice system created under the Rome Statute.

Giving peace a chance – the legal duty on African states parties to the Rome Statute to make a case for deferral

It has been said above that although the ICC’s international criminal justice model seeks to ensure justice for perpetrators of crimes against humanity, war crimes and genocide, there is no irrebuttable presumption in favour of prosecutions under the Rome Statute. At the same time, a deferral of prosecutions is not there simply for the asking. States parties under the Rome Statute – who by their membership added their weight to the prosecution preference – have a duty to make out a convincing case for a deferral, whether that request is made by those states individually or collectively as part of a larger regional grouping such as in the African Union. And at the very least States parties have a good faith obligation as members of the Rome Statute to make their claims for deferral with proper consideration for the publicly available evidence, and then through the recognized procedures built into the Statute.

i) An objective weighing of the evidence in favour of prosecution and the evidence in favour of deferral

Considering the publicly available evidence first, the following might be noted. The Security Council on 31 March 2005 referred the atrocities committed in the Darfur region of Sudan to the ICC for investigation. The Security Council had also previously adopted resolution 1564 which charged the Secretary-General with establishing a commission of inquiry “to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties, to determine also whether or not acts of genocide have occurred, and to identify the perpetrators of such violations with a view to ensuring that those responsible are held accountable”. The Darfur Commission, under the leadership of Professor Antonio Cassese and including African and Arab members,<sup>515</sup> presented its report to the Security Council in February 2005.<sup>516</sup>

The Commission, under the leadership of Professor Antonio Cassese, and including respected African and Arab experts, fulfilled its mandate by visiting Sudan on two occasions. The Commission found that the various reported attacks by the government and the *janjaweed* on civilians constituted “large-scale war crimes” and that the mass killing of civilians by the government and the *janjaweed* were both widespread and systematic, and, as such, were “likely to amount to a crime against humanity”.<sup>517</sup> With regard to the rebels, the Commission found that although they were also responsible for attacks on civilians, there was no evidence to suggest that these attacks were widespread or systematic. Therefore, while the killing of a civilian by the rebels would amount to a very serious war crime, the Commission did not

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<sup>515</sup> The African and Arab members are previously noted above.

<sup>516</sup> Report of the International Commission of Inquiry on Darfur, Geneva, 25 January 2005. The full report is available at [http://www.un.org/News/dh/sudan/com\\_inq\\_darfur.pdf](http://www.un.org/News/dh/sudan/com_inq_darfur.pdf).

<sup>517</sup> Ibid paras. 267 & 293.

conclude that these constituted crimes against humanity.<sup>518</sup> As discussed in Chapter 6, the Commission did find that sexual violence and sexual slavery was widespread and systematic, and could amount to crimes against humanity.<sup>519</sup> The Commission also found that the Sudanese courts were unable and unwilling to prosecute, and thus advised that other mechanisms would be required to prosecute alleged offenders.<sup>520</sup> As previously indicated the complementarity principle built into the ICC Statute might be relied on by the Sudanese government (even as a non-party State) to argue that it is willing and able to prosecute the offenders. Should it in fact be willing and able, then the ICC would have to acquiesce in the prosecution of offenders so as to allow the Sudanese authorities to do the job.

After the matter had been referred to the ICC by the Security Council, and after analysing the information available (as he is required to do), 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>521</sup> In February 2007, the Prosecutor requested the Pre-Trial Chamber of the ICC 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>522</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. It is not insignificant that at the time of writing, neither suspect has been surrendered to the Court.<sup>523</sup>

Then, in early July 2008 the Prosecutor of the ICC decided to seek an arrest warrant against President Omar al-Bashir for genocide, crimes against humanity and war crimes in Darfur. That warrant also had to be confirmed by the Pre-trial Chamber before it could be issued. The Pre-trial Chamber duly did so and its decision is publicly available. While the Pre-trial Chamber accepted that there was a reasonable basis for believing that al-Bashir might be responsible for war crimes and crimes against humanity, the judges of the Pre-trial Chamber rejected the Prosecutor's

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<sup>518</sup> Ibid paras. 268 & 296.

<sup>519</sup> Ibid para. 360.

<sup>520</sup> Ibid para. 568.

<sup>521</sup> 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 ([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 amongst others Max du Plessis & Christopher Gevers, "Darfur goes to the International Criminal Court (perhaps)" (2005) 14(2) *African Security Review* 23-34.

<sup>522</sup> Copies of the warrants of arrest are available on the Court's website (<http://www.icc-cpi.int/cases/Darfur.html>).

<sup>523</sup> Although Kushayb has long been in the custody of Sudanese authorities, allegedly on charges relating to Darfur (though not the same incidents charged by the Prosecutor). See *BBC News, Africa*, "Darfur militia leader in custody", 13 October 2008, available at <http://news.bbc.co.uk/2/hi/africa/7666921.stm> (accessed 22 May 2009).

charges of genocide, stating that there was insufficient evidence to proceed against al-Bashir in respect of that crime. Thus, in March 2009, Sudan's President became the first sitting head of state to be indicted by the International Criminal Court.

The Prosecutor appealed the Pre-Trial Chamber's decision to reject genocide charges, and on 3 February 2010 the Appeals Chamber rendered its judgment, reversing, by unanimous decision, Pre-Trial Chamber I's decision of 4 March, 2009, to the extent that Pre-Trial Chamber I decided not to issue a warrant of arrest in respect of the charge of genocide. The Appeals Chamber directed the Pre-Trial Chamber to decide anew whether or not the arrest warrant should be extended to cover the charge of genocide.

The following facts are thus beyond dispute:

- regardless of their accurate characterisation (including whether genocide can be shown) grave crimes have been committed in Sudan and continue to this day.
- an independent body of experts (including a number of African and Arab individuals) has concluded that Sudan is not willing to act against the perpetrators by prosecuting them for war crimes and/or crimes against humanity
- to date the Sudanese government has failed to hand over suspects to the ICC for prosecution, and has failed domestically to act against the perpetrators of international crimes
- The independent judges of the Pre-Trial Chamber have accepted that there is a reasonable basis in the evidence presented thus far to proceed with an investigation against President al-Bashir for war crimes and crimes against humanity; and in light of the Appeals Chamber's most recent decision in respect of the correct standard for genocide, will have to consider the same question anew in respect of genocide.

It is noteworthy that when the Darfur Commission recommended that the Security Council refer the situation in Darfur to the ICC "to protect the civilians of Darfur and end the rampant impunity currently prevailing there",<sup>524</sup> the Commission endorsed the ICC as the "only credible way of bringing alleged perpetrators to justice".<sup>525</sup> That assessment remains true today, given the abject failure by Sudan to act against the perpetrators itself.

It is furthermore important to recall that in advocating the referral of the situation in Darfur by the Security Council, the Commission pointed out that the situation in Darfur meets the requirement of Chapter VII, in that it constitutes a 'threat to peace and security' as was acknowledged by the Security Council in its resolutions 1556 and 1564. Furthermore, the Commission also took note of the Security Council's emphasis in these resolutions of the "need to put a stop to impunity in Darfur, for the end of such impunity would contribute to restoring security in the region".<sup>526</sup>

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<sup>524</sup> See Report of the International Commission of Inquiry on Darfur, Geneva, 25 January 2005 para. 569.

<sup>525</sup> *Ibid* para. 573.

<sup>526</sup> *Ibid* para. 590.

But most importantly, Sudan has had an opening since February 2005 to demonstrate its willingness to act against perpetrators of violence and thereby not only to contribute towards peace, but also to oust the ICC's involvement under the principle of complementarity. It has – to use the words of the African Union – had every opportunity to give effect to an “harmonized approach to justice and peace”.

It is by now well known that the ICC is expected to act in what is described as a “complementary” relationship with states. The Preamble to the Rome Statute says that the Court's jurisdiction will be complementary to that of national jurisdiction. The principle is that national courts should be the first to act. It is only if a State is “unwilling or unable” to investigate and prosecute international crimes committed by its nationals or on its territory that the Court is then seized with jurisdiction.<sup>527</sup> To enforce this principle of complementarity, Article 18 of the Rome Statute requires that the Prosecutor of the International Criminal Court must notify all states parties and states with jurisdiction over a particular case, before beginning an investigation by the International Criminal Court,<sup>528</sup> and cannot begin an investigation on his own initiative without first receiving the approval of a Chamber of three judges.<sup>529</sup> Vitally important in respect of Sudan's conduct is that at this stage of the proceedings, it is open to states to insist that they will investigate allegations against their own nationals themselves: the International Criminal Court would then be obliged to suspend its investigation.<sup>530</sup> If the alleged perpetrator's state investigates the matter and then refuses to initiate a prosecution, the International Criminal Court may only proceed if it concludes that that decision of the state not to prosecute was motivated purely by a desire to shield the individual concerned.<sup>531</sup> The thrust of the principle of complementarity is that the system effectively creates a presumption in favour of action at the level of states.

What about states – like Sudan – that are not party to the Statute? Article 17, which sets out the complementarity regime, provides that the ICC must defer to the investigation or prosecution of a “State which has jurisdiction over” the case. We have seen above that it is open to Sudan to frustrate the ICC's exercise of jurisdiction by insisting that it is willing and able to prosecute the offenders allegedly guilty of war crimes and crimes against humanity in the Darfur region. And we have also seen that the ICC Prosecutor, pursuant to the referral and in terms of Article 53(1) of the Rome Statute, has gathered and assessed relevant information in order to determine whether there is a reasonable basis to initiate an investigation into the crimes committed in Sudan. Article 53(1) of the Statute enunciates three considerations that inform his decision regarding whether or not to initiate an investigation: these relate to whether a crime has been or is being committed within the Court's jurisdiction; whether complementarity precludes admissibility, and; whether or not the interests of justice militate against initiating an investigation.<sup>532</sup>

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<sup>527</sup> Article 17(1) of the Rome Statute.

<sup>528</sup> Article 18(1) of the Rome Statute.

<sup>529</sup> Article 15 the Rome Statute.

<sup>530</sup> Article 18(2) the Rome Statute.

<sup>531</sup> Article 17(2)(a) the Rome Statute.

<sup>532</sup> Article 53(1)(a), (b) and (c) of the Rome Statute respectively.

The Prosecutor has been clear: “In making this assessment the OTP will respect any independent and impartial proceedings that meet the standards required by the Rome Statute.”<sup>533</sup> The short point is that to date Sudan has provided no evidence that any of its domestic proceedings are worthy of such respect.

Accordingly, the deferral of the ICC’s focus on Sudan must be assessed in the following light.

*First*, any suggestion that the ICC’s involvement of the ICC should be displaced in favour of domestic prosecutions must take account of the fact that Sudan has to date been both unwilling and unable to prosecute those guilty of war crimes and crimes against humanity. Thus, it cannot plausibly be the case that a deferral will serve the interests of justice, at least insofar as those interests might have been secured by domestic prosecutions in Sudan.

*Secondly*, it must be acknowledged that the Darfur crisis came before the ICC for the right reason. That is because – as the Security Council recognised – the human rights violations involved demanded an international prosecutorial response in the interests of peace and justice. It should only be removed from the ICC for the right reason. In the absence of compelling reasons to show that the peace process in Sudan is a credible one and that the ICC’s focus on Darfur will undermine that process, the ICC’s involvement remains the only plausible means by which to secure both the interests of peace and justice.

*Thirdly*, because it is apparent that Sudan has at least since February 2005 (when the Commission presented its report to the Security Council) defiantly failed to take any meaningful steps to combat the impunity that has followed massive and ongoing crimes in Sudan, it has manifestly failed to contribute towards the restoration of security in the region. And it must be questionable what commitment the Government has towards peace. Given the Sudanese government’s long-standing failure to show a worthy commitment towards security and peace, it is difficult to understand why it should be given the benefit of the doubt through a deferral of the ICC’s investigation.

In these circumstances any consideration of calls to suspend the ICC’s involvement in Sudan raises the question: deferral to what? There is little evidence of a credible peace process in Sudan and less evidence of Sudan’s commitment to ending impunity for international crimes either by cooperating with the ICC or domestically prosecuting offenders. A deferral of the ICC’s focus on Sudan would at present be a deferral in favour of very little. That is not to say that the situation might not change in Sudan, or that a good case cannot be made out for peace over justice in other situations on the continent. It is only to say that on the available evidence at this time there appears to be little to upset the Rome Statute’s presumption in favour of prosecution in Sudan.

ii) Respecting the process in making calls for peace

Having properly assessed the evidence for and against the ICC’s involvement in any given situation, should African states or the AU remain concerned about a prosecution or investigation by the ICC there are mechanisms internal to the Rome Statute which provide a means for appropriately raising those concerns.

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<sup>533</sup> Ibid 4.

It was pointed out above that the Rome Statute itself envisages that investigations and prosecutions by or before the ICC may in certain circumstances be deferred: by a legal assessment of the Prosecutor during the investigation or prosecution stage; or by the political intervention of the Security Council. The two situations that are relevant, and which arise in respect of Sudan, flow from Article 53 and Article 16 of the Rome Statute.

Article 53 of the Rome statute provides that the Prosecutor may decline to initiate an investigation or proceed with a prosecution if that would “serve the interests of justice.” The question then is what would qualify as a basis for declining to initiate an investigation “in the interests of justice.” 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 may be made. Indeed, the wording of article 53(1)(c) suggests that gravity and the interests of victims would tend to favour prosecution. Consequently, the OTP has indicated that there is a presumption in favour of prosecution where the criteria stipulated in article 53(1)(c) and 53 (2)(c) have been met.<sup>534</sup> The OTP’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”.

That being said, it is open to a State or the suspect to argue that the Prosecutor should reach such a decision where the individual is participating in a justice process other than a traditional criminal prosecution. So one could imagine the Prosecutor declining to prosecute if the suspect was subject to alternative accountability mechanisms (one thinks of something like the South African amnesty process which provided some level of accountability or an alternative dispute resolution mechanism like the *gacaca* process in Rwanda).<sup>535</sup> While such an interpretation is certainly plausible, these are still early years before the ICC and without a track record it is not possible to predict with any accuracy whether such an interpretation would be adopted by the Prosecutor and approved by the Court. Central to this determination would be whether the alternative mechanism adopted by the country provides justice.

Accordingly, the first appropriate process for (African) states to claim that investigations or prosecutions are not in the interests of justice is through invocation of article 53 of the Rome Statute.

The second way in which investigations and prosecutions by or before the ICC may be deferred is through article 16. As we have already seen, under article 16 the Security Council can use its Chapter VII power to stop an investigation or prosecution for a year at a time. However, for that to occur requires, as we have seen, the approval of nine of the members of the Council and the lack of a contrary vote by the five permanent members. In those circumstances one can appreciate that the power of deferral – at a political level – will probably be seldom used and the independence of the judicial activity of the Court will be effectively guaranteed.<sup>536</sup>

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<sup>534</sup> This position is outlined in the OTP’s policy paper on the interests of justice ([http://www.icc-cpi.int/otp/otp\\_docs.html](http://www.icc-cpi.int/otp/otp_docs.html) (accessed 22 May 2009)).

<sup>535</sup> See Ronald Slye, “Immunities and Amnesties”, in Max du Plessis (ed) *African Guide to International Criminal Justice* (2008) Institute for Security Studies 181. And note that Human Rights Watch has argued in a 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. Human Rights Watch, “The Meaning of ‘The Interests of Justice’ in Article 53 of the Rome Statute” (June 2005).

<sup>536</sup> Condorelli and Villalpando *supra* note 396 646.

No doubt there are political criticisms that might be levelled at the Security Council being empowered to make such a decision, given its skewed institutional make-up. That concern will be dealt with further below. For now, it is enough to point out that the Chapter VII (UN Charter) legal criteria will in any event have to be met. It must be stressed that when the SC referred the matter to the ICC, the Council (on the recommendation of the independent experts in the Darfur Commission) found that the situation in Darfur constituted a threat to international peace and security. The same criteria will be applied by the Council in making any deferral decision; that is, there will have to have been a fundamental change in Sudan such that the situation there no longer constitutes a threat to international peace and security, or that continuing the ICC process is a greater threat to peace and security than deferring.<sup>537</sup> Put differently, in respect of Sudan the question is whether deferral is required because of the Security Council's Chapter VII duty to act in the interests of peace and security – in other words whether *not* deferring could be characterised as a threat to the peace or a breach of the peace. There are clearly situations where the decision not to defer to, for instance, a credible domestic peace process might affect international peace.

Thus, the second appropriate process for (African) states to call for deferral of a prosecution is through **convincing** the Security Council that such a deferral is in the interests of justice and peace.

In this regard it is to be noted that the report of the AU High-Level Panel on Darfur (the Mbeki Panel Report), issued in November 2009, lays out concrete proposals for achieving both justice and peace in the region. The report stresses the need for prosecutions of those responsible for the worst abuses committed in Darfur—including through the creation of a hybrid court to try international crimes. The panel's work was given serious consideration by the UN Security Council on 21 December 2010. It must be stressed that the Mbeki Panel took no position on the proposed hybrid court's relationship with the International Criminal Court (ICC). The Panel made it clear that it was incumbent on Sudan to demonstrate that it was acting domestically in a concerted and effective manner to deal with the perpetrators of crimes.

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<sup>537</sup> See Godfrey Musila "Beyond the al-Bashir arrest warrant" (2009) June/July *The African* 25.

## CHAPTER 7: RECENT DEVELOPMENTS, CONCLUSIONS AND RECOMMENDATIONS – AN UNEVEN LANDSCAPE AND THE NEED FOR REFORM<sup>538</sup>

### *Introduction*

In the background in the preceding chapters (and increasingly now in the forefront of international political discourse around the ICC, certainly within the AU), is the fact that international criminal justice is subject to the uneven and imbalanced landscape of global politics. For Africa, a key concern in this regard is the relationship between the UN Security Council and the ICC, specifically the Council's powers of referral and deferral under the Rome Statute (Articles 13 and 16). The skewed institutional power of the Security Council creates an environment in which it is more likely that action will be taken against accused from weaker states than those from powerful states, or those protected by powerful states. Thus the perception is that by referring the Darfur situation to the ICC but not acting in relation to, for instance, Israel, the Council – through certain influential members – is guilty of double-standards.<sup>539</sup>

This imbalance fuels concerns that international criminal justice mechanisms threaten state sovereignty. This also applies to the ICC which, although being a treaty body, is still subject to the Chapter VII referral and deferral powers of the Security Council discussed thus far. And although the Rome Statute restricts the jurisdictional reach of the ICC (thereby making investigations in Iraq and Gaza difficult), these structural limitations in the architecture of international criminal justice are far less acknowledged in the face of Security Council power to refer and defer situations to the ICC.

The primacy of this issue for Africa is clear from several developments, some of which have already been touched on above. First, the flood of criticism about the ICC's work on the continent came after the Prosecutor's announcement in June 2008 that he would be seeking an indictment for President al-Bashir of Sudan following the Security Council's 1593 referral of the Darfur situation to the ICC. These decisions not only brought to the fore the inherent defects within the Council – defects which for a long time African and other states have complained about – but the controversy was heightened because Sudan is not a state party to the ICC, yet non-state parties on the UNSC (most notably the United States) voted for or refrained from vetoing the referral (and have the power to refuse deferral).

The second indication of how the UN Security Council's role deepens concerns about the ICC is contained in the decisions and recommendations of African

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<sup>538</sup> A portion of the following chapter (further below, under the heading of South Africa and the future of international criminal justice) has already been published in the *African Security Review*. The section on Kenya has been published in the *South African Journal of Criminal Justice*. The remainder of the chapter is drawn from the article referred to in chapter 5 above and which will be submitted for publication as *The Law and Politics of Referrals and Deferrals under Articles 13 and 16 of the Rome Statute of the International Criminal Court*.

<sup>539</sup> See further Charles Jalloh, "Regionalizing International Criminal Law" (2009) 9 *International Criminal Law Review* 495.

states parties and the AU during 2009. For instance, the decision of the 3 July AU Summit in Sirte to withhold cooperation with the ICC in respect of the arrest of al-Bashir was framed in response to the Security Council's lack of consideration of the AU's request for a deferral.

At meetings of states parties called by the AU in June and November 2009, the problematic role of the Council was one of the few issues around which there was consensus. The role of the Security Council was the main concern at the AU Experts Meeting (3-5 November 2009) with the subsequent AU Ministerial Meeting (6 November 2009) recommending that Article 16 of the Rome Statute be amended to allow the UN General Assembly (under the Cold War "Uniting for Peace" resolution) to "exercise such power in cases where the Security Council has failed to take a decision within a specified time frame...". The reasoning was that the General Assembly is more representative of the world community than the Council.

Although the 8th ICC Assembly of States Parties did not adopt the proposal to include the AU's recommendation regarding Article 16 on the agenda of the Review Conference, the issue remains up for discussion in a stocktaking exercise at the Kampala Review Conference in May/June 2010 and will be formally debated at the 9th Meeting of the Assembly of States Parties in November 2010. That the AU will be pushing the issue is apparent from the AU Summit Decision in January 2010,<sup>540</sup> in which the Assembly *inter alia* took note

"of the Report of the Ministerial Preparatory Meeting on the Rome Statute of the International Criminal Court (ICC) held in Addis Ababa, Ethiopia on 6 November 2009 in conformity with the Sirte Decision, to prepare for the Review Conference of States Parties scheduled for Kampala, Uganda in May-June 2010"

and endorsed the recommendations contained therein, and in particular the following: "I) Proposal for amendment to Article 16 of the Rome Statute; II) Proposal for retention of Article 13 as is".

In that document the AU Assembly welcomed

"the submission by the Republic of South Africa, on behalf of the African States Parties to the Rome Statute of the ICC of a proposal which consisted of an amendment to Article 16 of the Rome Statute in order to allow the United Nations (UN) General Assembly to defer cases for one (1) year in cases where the UN Security Council would have failed to take a decision within a specified time frame",

and underscored "the need for African States Parties to speak with one voice to ensure that the interests of Africa are safeguarded".

The Assembly further in that document expressed its "*deep regret*" at the fact that:

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<sup>540</sup> Decision on the Report of the Second Meeting of States Parties to the Rome Statute of the International Criminal Court (ICC) DOC. Assembly/AU/8/(XIV), arising from the 14th Ordinary Session of the AU Assembly from 31 January to 2 February 2010.

“the request by the African Union to the UN Security Council to defer the proceedings initiated against President Bashir of The Sudan in accordance with Article 16 of the Rome Statute of ICC on deferral of cases by the UN Security Council, has not been acted upon, and in this regard, **REITERATES** its request to the UN Security Council”.

### ***The (South) African proposal for amendment of Article 16***

At the second *Ministerial Meeting* took place on 6 November 2009, prior to the 8<sup>th</sup> ICC ASP in The Hague, Ministers from African countries – both state parties and non-state parties to the Rome Statute – adopted seven recommendations to guide their position at the 8<sup>th</sup> Assembly of States Parties and the Review Conference in Kampala in May/June 2010. The recommendations that emerged from that *Ministerial Meeting* are nothing if not ambitious, addressing some of the most vexing questions being asked regarding the ICC, and international criminal justice generally (such as the peace versus justice question, Article 27 and 98 conflict, the role of the Security Council, and the question of determining an act of aggression for the purposes of prosecution under the Statute).<sup>541</sup> The AU Recommendations give some much-needed substance to what has – at least in the way its been represented in the media and academia – a rhetoric-driven response from Africa to the Bashir indictment. Although certain Recommendations are inspired by Bashir, they stand independent of the matter. Furthermore, from an academic perspective, to the extent that the AU has failed to articulate its objections to the ICC in a coherent manner in recent times, the current Recommendations give much-needed substance to its longstanding objections. For our purposes, Recommendation 3<sup>542</sup> stands out. It reads as follows:

#### **“Recommendation 3: Deferral of Cases: Article 16 of the Rome Statute**

Article 16 of the Rome Statute granting power to the UN Security Council to defer cases for one (1) year should be amended to allow the General Assembly of the United Nations to exercise such power in cases where the Security Council has failed to take a decision within a specified time frame, in conformity with UN General Assembly Resolution 377(v)/1950 known as ‘Uniting for Peace Resolution’, as reflected in Annex A.”

At the 8<sup>th</sup> ASP Session in November 2009 South Africa presented the proposal: arguing that Article 16 be amended to allow for the UN General Assembly to defer cases at the ICC in the event that the Security Council fails to act. Although the proposal was greeted with hostility by most states, and has received very little media

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<sup>541</sup> For the full list of Recommendations see: *Recommendations of the Ministerial Meeting on the Rome Statute of the International Criminal Court*, 6 November 2009, Addis Ababa Min/ICC/Legal/Rpt. (II). Recommendation 3 – regarding the ICC deferral procedure – was endorsed by the AU in February 2010 – CITE.

<sup>542</sup> *Recommendation 3: Deferral of Cases: Article 16 of the Rome Statute*

*Article 16 of the Rome Statute granting power to the UN Security Council to defer cases for one (1) year should be amended to allow the General Assembly of the United Nations to exercise such power in cases where the Security Council has failed to take a decision within a specified time frame, in conformity with UN General Assembly Resolution 377(v)/1950 known as “Uniting for Peace Resolution”, as reflected in Annex A.*

coverage in the aftermath of the ASP, the issue remains on the agenda for the next ASP Session in March 2010 – the all-important precursor to the Court’s first Review Conference in Kampala in mid-2010. South Africa’s Article 16 amendment – a joint position of African State Parties – is the upshot of the spirited yet ultimately unsuccessful attempts by African states to cajole the Security Council into exercising its power of deferral in favour of Bashir.

The Recommendation amending Article reads as follows:

“Article 16: Deferral of Investigation or Prosecution

- i) No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.
- ii) A State with jurisdiction over a situation before the Court may request the UN Security Council to defer a matter before the Court as provided for in (i) above.
- iii) Where the UN Security Council fails to decide on the request by the state concerned within six (6) months of receipt of the request, the requesting Party may request the UN General Assembly to assume the Security Council’s responsibility under para 1 consistent with Resolution 377(v) of the UN General Assembly.”

We have seen previously that the role of the Security Council in the operation of the Court has been contentious from the outset – with calls for both an expansion and limitation of this role. In this regard it is useful to remind those advocating for the amendment – and in effect reduction – of the Security Council’s powers, that article 16 as it ultimately appeared in the Rome Statute was already a compromise that significantly reduced the power of the SC. The original International Law Commission draft prohibited the Court from prosecuting a case “being dealt with by the Security Council as a threat to or breach of the peace or an act of aggression under Chapter VII of the Charter, unless the Security Council otherwise decides”.<sup>543</sup>

Undoubtedly, there are flaws in the proposal. The primary difficulty with the proposal is one of authority – as article 16 relies on the Security Council’s Chapter VII mandate as the guardian of international peace and security. The amendment attempts to overcome this problem by relying on the divisive Uniting for Peace resolution, adopted by the UN General Assembly in 1950 to break a deadlock over the Korean War. This resolution purports to establish a secondary responsibility in the General Assembly for the maintenance of international peace and security in the event of Security Council inaction.

Furthermore, even sympathetic countries are unlikely to support employing the defunct Uniting for Peace resolution in this legally questionable manner. There are very compelling pragmatic arguments for keeping the politics of the General Assembly out of ICC proceedings: indeed, the proposal appears to replace one form of politics (within the Security Council) with an arguably more divisive form of politics (within the General Assembly). Either way, the proposal appears to increase the chances for politicizing the work of the Court, rather than diminishing it.

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<sup>543</sup> Bill Schabas, W. An Introduction to the International Criminal Court, 3<sup>rd</sup> ed (2007) 167.

### *Until article 16 is amended – respecting the current legal regime*

A point worth stressing is that while the Rome Statute is what it is, with article 16 in its current (unamended) form, there remain a number of voluntarily agreed-upon legal obligations upon states parties. Thus, while African states are entitled to insist that the ICC be cautious of interfering in conflict situations and of undermining peace processes, certainly the 30 African states parties to the Rome Statute have a treaty duty to:

- accept that there is ordinarily a presumption in the Rome Statute in favour of prosecution;
- make calls for deferral of investigations and/or prosecution on the basis of a proper assessment of the publicly available evidence;
- make calls for deferrals by respecting the internal processes of the Rome Statute to which they are a party.

Until such time as the Rome Statute is amended, it is incumbent upon states parties to the ICC to utilise one of two Rome Statute processes in making any calls for deferral: the first is by claiming under article 53 of the Statute that investigations or prosecutions are not in the interests of justice; the second is through convincing the Security Council that such a deferral is in the interests of justice and peace under article 16 of the Statute.

And it is obviously at a more general level incumbent on these states parties to encourage the African Union to respect those processes, given its own commitment in its Constitutive Act to combating impunity for international crimes, and because a majority of the AU's members are treaty members of the Rome Statute. Accordingly, the following recommendations might thus be made:

In the first place, our earlier discussion of complementarity demonstrates that African States Parties should stress that Sudan has the ability to frustrate the ICC's exercise of jurisdiction by insisting that it is willing and able to prosecute the offenders allegedly guilty of war crimes and crimes against humanity in the Darfur region. Article 17 of the Rome Statute permits Sudan to engage directly with the Court. It permits a state that is a subject of proceedings before the ICC to raise an objection to the effect that it is willing and able to prosecute crimes that would otherwise be investigated by the ICC. Only Sudan has standing to make these arguments. Engaging the ICC has its merits: it allows Sudan to make the arguments that it and the African Union at its behest have been making in political *fora* before an institution which really matters, and which has the power (and the duty) to respond.<sup>544</sup> It should be stressed by African states parties that it is up to Sudan to take appropriate domestic measures and to convince the ICC of its ability and willingness to prosecute the international crimes which are in issue. And by corollary, it should be stressed by African states parties that if Sudan is unable to convince the ICC that it is so enabled, then the ICC remains appropriately seized with the case.

In the second place, African States Parties and the AU as their regional body should be encouraged to engage critically with the ICC – and with appropriate respect for the provisions of the Rome Statute – regarding deferral claims. For instance, the

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<sup>544</sup> See Musila *supra* note 538 25.

appeal hearings concerning the arrest warrant for President al-Bashir are one means by which the concerns might be raised by Sudan, and other African States or even the AU, with reliance on article 53 of the Rome Statute. In cases where it is considered that prosecutions would be prejudicial to the peace and security of States or the region as a whole, African States should continue to invoke article 16 of the ICC Statute to push for a deferral by the UN Security Council of proceedings initiated against President al-Bashir in conformity with previous decisions of the Peace and Security Council and the Assembly of the Union. However, such calls should not be made blindly. As states parties to the Rome Statute and with a proper appreciation of the Rome Statute's provisions, it will be incumbent on states parties to make out a case for the deferral. In that regard it will be for the states parties to show that it is not in the interests of justice for the ICC to continue with an investigation or a prosecution. And naturally, to make out that case it will be for African states parties to first insist from Sudan that it demonstrates a fundamental change on the ground such that the situation there no longer constitutes a threat to international peace and security, or that continuing the ICC process is a greater threat to peace and security than deferring.

In the third place, therefore, states parties to the Statute should insist that the African Union call upon Sudan to provide convincing evidence to the AU that there is no longer a threat to international peace and security. In this regard, the AU should be requested to urgently require Sudan to make that case to the High-Level Panel of Eminent Personalities headed by former President Mbeki.

In the fourth place, to the extent that African states are dissatisfied with the Prosecutor's current policy in respect of prosecutions, they should be encouraged to call for a revision of this prosecutorial policy. In that regard states should call for a Working Group to be established on the Prosecutor's Prosecution Policy. That Working Group might consider the following options as tentative suggestions by African states parties: a revision of the Rome Statute to include the addition of other factors that the Prosecutor should consider when exercising his discretion not to investigate or prosecute, in the interests of justice, under article 53 of the Statute; or the adoption by the Assembly of States Parties of Guidelines which the Prosecutor should take into account in exercising these functions. In order for such a Working Group to be apprised of African concerns about the peace/justice debate in relationship to the ICC's work on the continent, African states parties should be encouraged to prepare as soon as possible a policy paper suggesting a broader set of circumstances in which investigation or prosecution would not be in the interests of justice under the Rome Statute.

### *A need for increased and deeper dialogue*

As recent events make plain, concerns about the role of the UNSC are unlikely to diminish in importance for African leaders and governments, especially in light of the recommendations of the AU Panel on Darfur. Moreover, as long as these concerns remain unattended, they could deter African states from ratifying the Rome Statute, thus undermining the quest for universality. What exactly Africa wants on this issue is however unclear, considering that most African states parties appeared not to support the tabling of the AU's Article 16 recommendation at the 8th ASP. This (in)action shows the necessity of dialogue and consensus building among African states parties (within and outside the forum of the AU) on the issue.

That dialogue should proceed on the basis of a proper understanding of the law and with an appreciation of the possibilities and impossibilities (at least currently) regarding Security Council reform.

The first point worth noting is that notwithstanding the problems with the Security Councils' composition, its role within the scheme of the Rome Statute was foreseen and voluntarily agreed to by 30 African states parties who have ratified the statute, and by all the states that were at Rome and who played a role in drafting the Statute in 1998.

Secondly, it also does not help that African critics appear ready to conflate their (justified) criticism of the Security Council's politics and composition with (unjustified) attacks against the ICC for investigations that proceed from a Security Council referral. It needs to be stressed that the ICC is not responsible for the Sudan referral coming to it – but now that the referral has been made it has a legal duty to act independently under the Rome Statute to respond thereto. No doubt Israeli, US, or the abuses of other states call for an international response. But to attack the ICC for the failure of the Security Council to secure investigations is to choose the wrong whipping boy. And to denounce the justified referral of the Sudan crisis to the ICC for investigation is an unfortunate failure by African leaders to recognize that rarest of examples: the Security Council overcoming its own institutional and political deficiencies to the benefit of African victims of massive human rights violations.

That leads to the third point, which is that referral by the UN Security Council is a crucial element of the ICC's ability to ensure justice for serious crimes no matter where they are committed: Security Council referrals allow crimes committed on the territory of non-states parties to come under the ICC's jurisdiction. At the same time, following a Security Council referral, the ICC prosecutor is obliged by the Rome Statute to make an independent determination as to whether to proceed with an investigation (which determination is subject to oversight by Judges in the Pre-Trial Chamber).

These points notwithstanding, the power of the Council to refer matters to the Court with the concomitant power to decide on deferral of matters under article 16 of the Rome Statute remains a real issue. The controversial nature of the Council's relationship with the ICC arises as we have seen from the inherent defects within the Council, defects which for a long time African and other states have complained about. But the controversy is heightened in respect of the ICC and Sudan, since Sudan is not a state party to the Court, yet non-state parties on the Council voted for the referral (and have the power to refuse deferral). Accordingly, the following points may be made.

- 1) Security Council deferrals under article 16 of the Rome Statute should be avoided if possible, and if utilised then only in exceptional circumstances where the gravity of the offences and the impunity afforded to perpetrators necessitates an international prosecutorial response. The credibility of the ICC as a judicial institution demands that the ICC be protected from external influence and deferrals allow a political body to impose decisions on the ICC. Deferrals also increase the possibility that prosecutions will not take place, as the Sudan situation disquietingly demonstrates.

- 2) As stated in the SADC principles, "while recognizing the role of the Security Council in maintaining international peace and security[,] the independence and operations of the Court and its judicial functions must not

be unduly prejudice[d] by political considerations.” This same principle should apply to other political bodies, including the African Union, to preserve and promote the ICC’s independence. Irrespective of a position on the appropriateness of Security Council deferrals, regional decisions on deferrals should not be a basis for withholding cooperation with the court. This would undercut the ICC’s real or perceived ability to operate independently and impartially carry out its functions by making the court dependent on decisions of political bodies that it does not control. Furthermore, states parties have an international treaty obligation under the Rome Statute to cooperate with the ICC, and decisions by regional bodies such as the AU that undermine the duty of cooperation place such states in an invidious position.

3) While regional decisions on deferrals, especially in cases involving senior officials, risk allowing outside forces to interfere with the court’s judicial work, other types of “regional input,” however, can be valuable to fairly and effectively ensuring justice for serious crimes. One key area is promoting greater ratification of the ICC’s Rome Statute. Comprehensive ratification is the best way to ensure that the ICC can prosecute serious crimes in all parts of the world and promote the more even application of the law. African ICC states parties should call for the AU to develop a plan to promote widespread ratification of the Rome Statute within and beyond Africa.

4) A further key area for “regional input” relates to cooperation with the ICC. As the court lacks a police force to enforce its judicial orders, the ICC is reliant on cooperation by states and intergovernmental institutions. African ICC states parties should call for the AU to facilitate greater cooperation between the AU and the ICC through the recently established ICC-AU Liaison Office in Addis Ababa and the conclusion of an agreement between the AU and the ICC on cooperation. These are two measures, which have been taken by the United Nations with positive results. African ICC states parties should also call for the AU to extend an invitation to the ICC to sessions of the AU Assembly. This can help promote more effective cooperation, but also understanding and discussion of concerns between the AU and the ICC.

Finally, any discussion about the Security Council’s involvement in referring or deferring cases for investigation by the ICC will require creative thinking. It is thus recommended that a proposal be made that the Working Group at the Review Conference consider the power of the UN Security Council under the Rome Statute to refer cases to the ICC and to defer cases for one year. That Working Group might be tasked with considering the following tentative proposals:

1) whether there are mechanisms available or amendments that may be proposed that would strengthen the relationship between the Security Council and the African Union, by, for example, ensuring that any referral or deferral in respect of a continental situation be done with prior consultation with the African Union's Peace and Security Council or other suitable AU body.

2) whether there are mechanisms available or amendments that may be proposed that would ensure that any referral or deferral decision of the

Security Council be subject to review and/or confirmation by an independent body (such as the ICJ or the ICC) or by the Assembly of States Parties.

### *Kenya and the ICC*<sup>545</sup>

The world's first permanent international criminal court (the International Criminal Court or ICC), whilst seated in The Hague, has thus far demonstrated a deep investment in Africa. Still in its infancy, the ICC's first cases are all on the continent. Three countries in the Great Lakes region of Africa (the Central African Republic, the Democratic Republic of Congo, and Uganda) were the first to refer "situations" in their respective territories to the ICC Prosecutor for investigations and possible prosecutions.<sup>546</sup> Cote d'Ivoire, in West Africa, subsequently made history by becoming the first non-party to lodge a declaration accepting the ICC's jurisdiction.<sup>547</sup> Most recently, another East African nation, Kenya, indicated that it too wished to refer a situation to the Court (although, as we shall see, the ICC Prosecutor instead chose to seek authorization from the ICC's Pre-Trial Chamber for his first *proprio motu* (of his own accord) investigation of a situation).<sup>548</sup>

Before Kenya, Sudan was the last and most controversial African situation to come within the Prosecutor's sights. Unlike the other African situations which had come to the Court by way of so-called "self-referrals", it was the UN Security Council, acting under its Chapter VII authority of the UN Charter, that referred the situation in Darfur, Sudan, to the ICC.

The Kenyan situation is the focus of this note.<sup>549</sup> The situation arises from the violence that followed Kenya's flawed 2007 general election that left over 1000 people dead, caused around 400,000 to flee their homes, and brought Kenya to the brink of civil war. Leaders of both parties agreed to set up the Commission to Investigate the Post-Election Violence (the Waki commission, after its chairman, Justice Philip Waki). They also established an independent review committee to look at the flaws in the election (headed by retired South African Constitutional Court Judge Johan Kriegler), and a truth, justice, and reconciliation commission to help heal historical grievances dating from well before the 2007 general elections. The Waki

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<sup>545</sup> This portion of the chapter has been published as Max du Plessis "International Criminal Law" (2010) 2 *South African Journal of Criminal Justice* 317 to 325.

<sup>546</sup> Payam Akhavan "Self-Referrals Before the International Criminal Court: Are States the Villains or the Victims of Atrocities?" (2010) 21 *Criminal Law Forum*, 1046; Mohamed M. El Zeidy "Critical Thoughts on Article 59(2) of the ICC Statute" (2006) 4 *Journal of International Criminal Justice*, 448 (2006); Claus Kress "'Self-Referrals' and 'Waivers of Complementarity': Some Considerations in Law and Policy" (2004) 2 *Journal of International Criminal Justice* 944.

<sup>547</sup> Press Release, ICC, Registrar confirms that the Republic of Côte d'Ivoire has accepted the jurisdiction of the Court, 15 February 2005.

<sup>548</sup> Press Release, ICC OTP, Kenyan High-Level Delegation meets ICC Prosecutor (3 July 2009); Situation in the Republic of Kenya, Case No. ICC-01/09-19, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya (31 March 2010).

<sup>549</sup> See for detail Jemima Njeri Kariri and Anton du Plessis, "The ICC offers a glimmer of hope for justice in Kenya", ISS Today, 20 April 2010, available at [http://www.iss.co.za/iss\\_today.php?ID=932](http://www.iss.co.za/iss_today.php?ID=932) (accessed 2 August 2010).

commission recommended wide-ranging reforms of the police as well as the creation of a special tribunal for Kenya, independent of the judiciary, anchored in a constitutional amendment and staffed by both Kenyan and international judges and prosecutors. In the event no special tribunal was established, the Waki commission recommended that former UN Secretary-General Kofi Annan – who had chaired the negotiations that led to the current coalition government – hand over a sealed envelope containing the names of suspects to the ICC. Annan handed over the envelope and other materials from the Waki commission to the ICC prosecutor in July 2009.

After months of inaction by Kenya’s authorities on national prosecutions for those responsible for the election violence, the ICC prosecutor sought permission, in November 2009, from a pre-trial chamber of three ICC judges to proceed with an investigation.<sup>550</sup> This in itself was historic: the Kenyan investigation is the first investigation by the Court following the prosecutor’s use of his *proprio motu* powers under article 15 of the Rome Statute. The power in article 15 permits the Prosecutor to open an investigation on his own initiative on the basis of information indicating the commission of crimes within the Court’s jurisdiction. The granting to the Prosecutor of a *proprio motu* 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 in the territory of a State Party – the preconditions set out in terms of Article 12 of the Rome Statute.<sup>551</sup> For Kenya the ICC was thus a potential forum by which the perpetrators of the violence might be held accountable. That is because Kenya ratified the Rome Statute on 15 March, 2005 becoming a State Party on 1 June 2005.

Having sought permission to proceed with his investigation, the Prosecutor’s request activated a decision by the Presidency of ICC assigning the situation in the Republic of Kenya to Pre-Trial Chamber II composed of Judges Ekaterina Trendafilova, Hans-Peter Kaul and Cuno Tarfusser. That assignment occurred because under the Rome Statute, if the Prosecutor intends to commence an investigation *proprio motu* into a situation, he must first obtain authorization from the Pre-Trial Chamber of the ICC. Thus, on 26 November 2009 the Prosecutor filed his request for authorization together with 39 appended annexes running to approximately 1,500 pages.

The Prosecutor’s request was approved on 31 March 2010 in a majority decision of Pre-Trial Chamber II of the ICC.<sup>552</sup> The decision too is historic, paving the way for the Prosecutor to commence an investigation into crimes against humanity allegedly committed in Kenya. Essentially, the ICC judges have given the Prosecutor the benefit of the doubt and authorized him to conduct official investigations into crimes against humanity believed to have been committed in Kenya. Kenyan hopes for an end to impunity now rest with Prosecutor Ocampo. The Prosecutor’s task is not without its difficulties. To succeed in his efforts he will need

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<sup>550</sup> For further detail see Human Rights Watch, “ICC: Judges Approve Kenyan Investigation”, 31 March, 2010, available at <http://www.hrw.org/en/news/2010/03/31/icc-judges-approve-kenyan-investigation> (accessed 2 August 2010).

<sup>551</sup> See Press Release of the Prosecutor of the International Criminal Court, No.: pids.008.2003-EN, 15 July 2003, available at <http://www.icc.int> (accessed 2 August 2010).

<sup>552</sup> The decision is available at <http://www.icc-cpi.int/iccdocs/doc/doc854562.pdf> (accessed 2 August 2010).

to rely on the cooperation of a de facto divided Kenyan Government, he will have to ensure that witnesses remain protected, and he will have to prosecute his case while at the same time navigating the commencement of the 2012 elections in Kenya.

The majority found that upon examination of the available information, bearing in mind the nature of the proceedings under article 15 of the Statute, and in particular the low threshold applicable at this stage, the information provided by the Prosecutor established a reasonable basis to believe that crimes against humanity were committed on Kenyan territory. The majority moreover found that all criteria for the exercise of the Court's jurisdiction were satisfied, to the standard of proof applicable at this stage.

The majority therefore granted the Prosecutor's request, and allowed him to commence an investigation covering alleged crimes against humanity committed during the events that took place between 1 June 2005 (the date of the Statute's entry into force for the Republic of Kenya) and 26 November 2009 (the date of the filing of the Prosecutor's Request).

One of the most interesting aspects of the judgment related to the nature of the crimes. The murder, rapes and looting perpetrated during the election violence were clearly prohibited under Kenyan domestic law, but did they amount to "crimes against humanity" for the purposes of the Rome Statute of the ICC (such that they were crimes of concern to the international community)? A crime against humanity is made up of an underlying *actus reus* (murder, rape, torture, enslavement, are common examples) directed against a civilian population, but it triggers international concern on account of other features, including its widespread or systematic commission. Furthermore, article 7(2)(a) of the Rome Statute provides that for a crime to constitute a "crime against humanity", it must be made "pursuant to or in furtherance of a State or organisational policy". To the majority, a crime against humanity may be committed by groups that are not States or even "State-like", so long as the violence is "organised". According to the majority, the question to be considered is whether the organised group has "the capability to perform acts which infringe on basic human rights."<sup>553</sup> In determining whether a group has such capability, the majority considered the following factors to be important:<sup>554</sup>

- (i) Whether the group is under a responsible command, or has an established hierarchy;
- (ii) Whether the group possesses, in fact, the means to carry out a widespread or systematic attack against a civilian population;
- (iii) Whether the group exercises control over part of the territory of a State;
- (iv) Whether the group has criminal activities against the civilian population as a primary purpose;
- (v) Whether the group articulates, explicitly or implicitly, an intention to attack a civilian population; and
- (vi) Whether the group is part of a larger group which fulfils some or all of the above criteria.

While the majority held that there was no evidence of a policy on the part of the Government of Kenya to attack a civilian population, it was nonetheless satisfied that

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<sup>553</sup> See majority decision, para. 90 onwards.

<sup>554</sup> See majority decision, para. 93.

there is a reasonable basis for concluding that crimes against humanity have been committed, because the violence was planned, directed and organised by “various groups, including local leaders, businessmen and politicians.”<sup>555</sup>

The minority judge, Judge Kaul, dissented on this point. Judge Kaul was not satisfied that the Prosecutor had presented sufficient evidence of a State or organisational policy to commit an attack on a civilian population. Conscious of the need to maintain a clear demarcation between domestic crimes and crimes against humanity, Judge Kaul held that evidence of violence being organised is not in itself sufficient for the violence to amount to a crime against humanity. Judge Kaul found that, whilst the English text of the Rome Statute suggested that the violence merely be “organised”, the equally-authoritative French, Spanish and Arabic texts required that the policy of violence be adopted by an “organisation”.<sup>556</sup> To Judge Kaul an “organisation” may be a private entity or a non-state actor, but given that the fundamental rationale of crimes against humanity as codified in Article 7 of the Statute was to protect the international community against the extremely grave threat emanating from such policies, Judge Kaul concluded that it had to be adopted either by a State or at the policy-making level of a State-like organization. Whilst Judge Kaul accepted that the post-electoral violence may have been organised and planned in advance, in his view there was no “organisation” that had implemented a policy to attack a civilian population. Hence, Judge Hans-Peter Kaul felt unable to authorise the commencement of an investigation in the Republic of Kenya.

The majority view, which flows from a generous interpretation of the Rome Statute’s provisions, is one which enlarges the scope for human rights protection through the means of international criminal justice mechanisms like the ICC. Such a generous approach to the evidence on organizational capacity – as opposed to the minority’s re(strict)ive interpretation – does not appear inappropriate at the preliminary phase where the Prosecutor of the ICC is asking the Pre-Trial Chamber to authorize the very first phase of an investigation into alleged ICC crimes.

In any event, to the extent that Judge Kaul was concerned to draw clear lines between domestic crimes that ought to have remained the preserve of Kenyan domestic law and crimes against humanity that triggered international concern, there are other aspects of the Rome Statute which arguably could better do that work. Under the Rome Statute, even where all the jurisdictional requirements have been met for the ICC to exercise jurisdiction, the case in question must meet an additional threshold of **gravity** before the Prosecutor can intervene. This criterion is most clearly expressed in Article 17(1)(d) of the Rome Statute. 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”.

Indeed, it is the gravity criterion in the Rome Statute that requires one to acknowledge the inherent differences between domestic and international prosecutions. For instance, Louis Arbour, who was then the Prosecutor of the International Criminal Tribunal for the former Yugoslavia, noted in a statement to the December 1997 session of the Preparatory Committee on the Establishment of an International Criminal Court that there is a major difference between international and domestic prosecution. It lies in the unfettered discretion of the prosecutor. In a domestic context, there is an assumption that all crimes that go beyond the trivial or

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<sup>555</sup> See majority decision, para. 117 onwards.

<sup>556</sup> See minority decision, para. 37 onwards.

*de minimis* range are to be prosecuted. But, before an international tribunal, particularly one based on complementarity,

“the discretion to prosecute is considerably larger, and the criteria upon which such Prosecutorial discretion is to be exercised are ill-defined, and complex. In my experience, based on the work of the two Tribunals to date, I believe that the real challenge posed to a Prosecutor is to choose from many meritorious complaints the appropriate ones for *international intervention*, rather than to weed out weak or frivolous ones”.<sup>557</sup>

One of the ways in which the drafters of the Rome Statute purported to assist the ICC Prosecutor to choose from many complaints the appropriate ones for international intervention by the ICC was by means of the gravity criterion. That the Prosecutor requires this trigger mechanism is made clear by the breadth and depth of complaints that the Prosecutor has received. For example, in its first three years of operation alone, the Office of the Prosecutor received nearly 2000 communications from individuals or groups in more than 100 countries. One can thus appreciate the manifest difference between the ICC prosecutor’s decisions on investigation and prosecution from those that a domestic prosecutor might have to make, the place for the gravity criterion within the Rome Statute, and the concomitant constraints placed on the Prosecutor.

In the Kenya decision, the majority of the Pre-Trial Chamber reiterated that because “all crimes that fall within the subject-matter jurisdiction of the Court are serious ... the reference to the insufficiency of gravity is actually an additional safeguard, which prevents the Court from investigating, prosecuting and trying peripheral cases.”<sup>558</sup>

According to the Pre-Trial Chamber, the gravity of a situation must be assessed according to the *modus operandi* of the crimes, and that in this regard “it is not the number of victims that matter but rather the existence of some aggravating or qualitative factors attached to the commission of the crimes, which makes it grave.”<sup>559</sup> The Pre-Trial Chamber listed the following factors that that may be taken into account in assessing gravity:

- (i) The scale of the alleged crimes (including assessment of geographical and temporal intensity);
- (ii) The nature of the crimes allegedly committed;
- (iii) The manner in which the crimes were committed; and
- (iv) The impact of the crimes and the harm caused to victims and their families.

In respect of the Kenyan post-electoral violence, the Pre-Trial Chamber’s majority concluded that the threshold of gravity was satisfied on account of the large number of crimes, the brutality of the crimes, and the trauma that these crimes caused to victims.

In the result, the Pre-Trial Chamber authorized the Prosecutor’s investigation

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<sup>557</sup> “Statement by Justice Louis Arbour to the Preparatory Committee on the Establishment of an International Criminal Court, December 8, 1998”, 7-8 (emphasis added), quoted in William Schabas *supra* note 544 159-160.

<sup>558</sup> See majority decision, para. 56.

<sup>559</sup> See majority decision, para. 62 onwards.

into the alleged crimes against humanity committed as part of Kenya's post-electoral violence.

The Court's decision to authorize the investigation has been long awaited and is now rightfully welcomed by victims of the violence. Kofi Annan, who was instrumental in demanding accountability in Kenya (and who in late 2008 handed the Prosecutor a list of persons considered to be most responsible for the crimes committed), is one of many who have welcomed the Court's move.

It is significant that the Prosecutor, in presenting his case for authorization to the Pre-Trial Chamber, argued that the crimes in Kenya met the gravity criterion in the Rome Statute. The Pre-Trial Chamber's summary of the evidence makes for uneasy reading – the barbarity of the crimes and the depravity of the offenders suggest that the ICC will indeed be dealing with a class of violations in Kenya that ought to be of the gravest concern to humanity.

That being said, it is notable that the Kenyan situation brings the Court's African focus into even starker relief. There have been calls for the Court to spread its attention beyond Africa, and criticisms abound that the Court is unhealthily preoccupied with this continent. No doubt, alive to these concerns, in a press conference immediately after the ICC confirmed his request for an investigation, the Prosecutor reminded Kenyans that he was pursuing justice for *them*. He stressed in discussing the ICC that "this Court is their Court."<sup>560</sup>

It is nevertheless imperative that the ICC be encouraged to exercise its jurisdiction beyond Africa, where the evidence justifies such action. Africa – and indeed the world – wants and needs a Court that is committed to pursuing cases across the globe. While the ICC may (for now) be a Court for Kenyans, and the horrendous crimes committed in that country are sufficiently grave to justify the Court's intervention, there are other victims of massive atrocities that deserve the Court's assistance. One such situation – which is not in Africa – is in respect of Gaza.

In this regard it may be recalled that the Palestine National Authority submitted a declaration in February 2009 to the effect that it now recognizes the jurisdiction of the International Criminal Court in relation to any crimes committed on its territory since 2002. The Prosecutor of the ICC has been requested to consider the declaration by the Palestinian Authority to allow the ICC to investigate war crimes and crimes against humanity committed on Palestinian territory during Israel's attack on Gaza during Operation Cast Lead. The Rome Statute allows a state not party to the statute to declare that it accepts the jurisdiction of the ICC for international crimes committed within its territory. Significantly, the Palestine declaration would allow the ICC to exercise jurisdiction over crimes committed by both Palestinians and Israelis on Palestinian territory. The Rome Statute fails to define a state, and it is now been left to the ICC itself to make such a determination. Over 100 states have recognized a "State of Palestine", and it is a member of the Arab League. Moreover, the Palestinian National Authority has diplomatic relations with many states and observer status at the United Nations. As John Dugard has argued, it is not necessary for the ICC prosecutor to decide that Palestine is a state for all purposes, but only for the purpose of the ICC.<sup>561</sup> In so deciding, the Prosecutor should be urged to adopt an expansive approach that gives effect to the main purpose of the ICC.

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<sup>560</sup> See OTP Press Conference on Kenya, Prosecutor Moreno-Ocampo's Statement, 1 April 2010, available at <http://www.icc-cpi.int/NR/exeres/6B518FB1-C68F-405A-887C-19CEACF91C05.htm> (accessed 2 August 2010).

<sup>561</sup> See John Dugard, "Take the Case", *New York Times*, 23 July 23 2009.

It is notable that the 15 September 2009 Goldstone Report by a fact-finding mission (led by former Judge Richard Goldstone of South Africa) organized by the Geneva-based U.N. Human Rights Council called on both sides to thoroughly investigate the allegations of war crimes and crimes against humanity. The probes should be “independent and in conformity with international standards” and establish a committee of human rights experts to monitor any such proceedings in Israel and the Palestinian territories. If either Israel or the Palestinians fail to do so, then the 15-nation Security Council has been called upon to refer the situation in Gaza to the prosecutor of the ICC.

To date, the ICC Prosecutor has failed to decide on the request by Palestine for an investigation. And to date, the Security Council has failed to refer the situation in Gaza to the prosecutor of the ICC. While the Security Council’s inaction against Israel is expected because of the problematic and skewed politics of that body, the indecision by the Office of the Prosecutor to decide on the Palestinian request is disappointing. A decision by the ICC to investigate whether crimes were committed in Gaza, in the course of Israel’s offensive in Operation Cast Lead, would give the ICC an opportunity to show that it is not infected by a double standard and that it is willing to take action against international crimes committed outside Africa. If Kenyan victims deserve the Court, then so do those who suffered in Gaza.

### ***Conclusions for Africa and the African Union***

The ICC is far from a perfect institution and it is vital that its policies and practice improve over time. Nevertheless, the ICC remains the most important check against unbridled impunity. This is especially with regard to more politically sensitive cases, which can be difficult to address before domestic courts, such as when heads of state or senior leaders are implicated in the commission of atrocities.

Rejection of impunity is a core element of the AU’s Constitutive Act. Moreover, justice is crucial to establishing rule of law and sustainable peace on the continent. Beyond the issues identified in this paper, it remains important for African ICC states parties to affirm their support for the ICC by underscoring:

- The ICC’s important role in ensuring justice for serious crimes for African victims;
- The ICC’s function as a crucial court of last resort when national justice systems are unable or unwilling to investigate and prosecute;
- States parties’ commitment to press for wider ratification of the Rome Statute; and
- States parties’ commitment to cooperate with the ICC, including in arrest and surrender.

## *The Future of African International Criminal Justice – Civil Society, Complementarity and South Africa’s critical position*<sup>562</sup>

In this section of the thesis I conclude by discussing the important example of work done within (South) Africa by civil society to promote and entrench the ideal of international criminal justice. I do so drawing on the insights gained from working as a senior consultant on the International Crime in Africa Programme (ICAP) at the Institute for Security Studies, a programme launched in February 2008. I was fortunate to be a founding member of ICAP, and I think the work it has done in its short existence demonstrates the foundational work that civil society can and must do in shaping and leading efforts to promote international criminal justice and the International Criminal Court (ICC), including through research and awareness raising, advocacy, technical assistance and training, and supporting domestic and regional legal interventions on questions of international criminal justice.

My discussion of such civil society work takes place against the backdrop of South Africa’s increasingly up-and-down relationship with the ICC.

South Africa’s early support for the idea of a permanent international criminal court is well known. In particular, its influence at Rome in 1998 where the International Criminal Court (ICC) statute was drafted has been chronicled widely and admired deservedly. It was thus to be expected that South Africa would become a party to the Court’s statute and scheme. On 17 July 1998 South Africa signed and ratified the Rome Statute of the International Criminal Court (“Rome Statute”), thereby becoming the 23<sup>rd</sup> State Party. In order to give effect to its complementarity obligations under the Rome Statute, South Africa passed the Implementation of the Rome Statute of the International Criminal Court Act 27 2002 (“ICC Act”). The passing of the ICC Act was momentous: prior to the ICC Act, South Africa had no municipal legislation on the subject of war crimes or crimes against humanity, and no domestic prosecutions of international crimes had taken place in South Africa. South Africa was the first state in Africa to implement the Rome Statute’s provisions into its domestic law – and to date it is one of only three African states to have done so. It has moreover created a dedicated unit – the Priority Crimes Litigation Unit, headed by Advocate Anton Ackermann – to tackle the crimes outlawed under the statute, being genocide, crimes against humanity and war crimes.

And lawyers and civil society members have sought to utilise the ICC Act. Cases have been filed in South Africa in terms of the Act in recent times, perhaps the most high profile being a request for the National Prosecuting Authority (NPA) to act against Zimbabweans accused of torturing MDC members during the last election period, and more recently a dossier submitted to the NPA calling for the investigation of South Africans and others who are suspected of involvement in war crimes during Operation Cast Lead in Gaza. The cases are ongoing and have not (yet) resulted in litigation or prosecutions.

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<sup>562</sup> This portion of the chapter has already been published as “The Future of International Criminal Justice – Civil Society, Complementarity and the Case of South Africa” (2010) 19(4) *African Security Review* 2154; and a revised version was published in “Recent cases and developments: South Africa and the International Criminal Court” (2009) 3 *South African Journal of Criminal Justice* 441.

South Africa's support for the ICC tracks a broader commitment by African states to combat impunity on the continent for crimes against humanity, war crimes and genocide. Indeed, the history of the ICC's creation and the serious and engaged involvement of African states in that history demonstrate the ICC to be a Court created in part by Africans and ultimately for the benefit of African victims of serious crimes. The high ideals and hard work that marked African states' participation in bringing the ICC to life in Rome should not too easily be forgotten. Thus,

“[c]ontrary 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”,

a closer inspection of

“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”.<sup>563</sup>

Looking back then, the picture that emerges is a Court created with extensive and deep involvement of African nations – a Court in reality created by Africans, in concert with other nations of the world who came together at Rome.

Certainly, recent events have brought South Africa's relationship with the ICC into critical focus. The flashpoint is principally a decision by the ICC on 4 March 2009 to issue an international arrest warrant for President Omar al-Bashir of Sudan for grave crimes committed by his government's officers and soldiers. That warrant was issued after the Security Council of the United Nations in 2005 decided to refer the crimes committed in Sudan to the ICC for investigation and possible prosecution.

More broadly, the strong stand in support of the ICC that characterized (South) Africa's earlier position on international criminal justice is less evident today. This change in position tracks a broader “push-back” against the ICC on the continent. Aside from the pique expressed by African states against the ICC's pursuit of justice in respect of al-Bashir, it is not possible to identify with precision the reasons for this apparent change of heart. However, the complaints that have been expressed with most clarity and conviction within Africa include the suggestion that the ICC is a hegemonic tool of western powers which is targeting or discriminating against Africans because its first cases flow from this continent. There is also the suggestion that the ICC's focus only on Africa is undermining rather than assisting African efforts to solve its problems. This complaint is often expressed in terms of the referral of the Sudan situation by the Security Council to the ICC for investigation – and amounts to a criticism that the Court's work is undermining peace efforts or conflict resolution processes. That is one reason why African states through the African Union have accordingly called on the Security Council to defer the ICC's

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<sup>563</sup> See Phakiso Mochochoko, “Africa and the International Criminal Court”, in Evelyn Ankumah and Edward Kwakwa (eds) *African perspectives on international criminal justice* (2005) 243; see also Hassan Jallow and Fatou Bensouda “International Criminal Law in an African Context” (2008) in Max du Plessis (ed) *African Guide to International Criminal Justice* 15.

investigation into President al-Bashir by invoking article 16 of the Rome Statute (which allows for a suspension of prosecution or investigation for a period of up to 12 months). A related objection is that the Security Council (with its skewed institutional power) while entitled to send cases to the ICC, has made itself guilty of a double standard since it has done so in respect of Sudan but has not done so in relation to, for instance, Gaza or Iraq. Yet another objection is that the Court has deigned to proceed against a sitting head of state (President al-Bashir) of a country (Sudan) that is not party to the Rome Statute. The complaint essentially implicates questions about head of state immunity under customary international law and the extent to which the Rome Statute's provisions which strip that immunity can be made applicable to President al-Bashir.

These complaints are not the subject of this section. The point for now is that it is not altogether clear how South Africa positions itself in respect of these complaints against the ICC, partly because South Africa's recent position on the ICC has not been a model of clarity. If anything, the picture that emerges is that South Africa is at least sympathetic towards these complaints.

Reports emerged that during May 2009 South Africa had invited President al-Bashir – by then wanted by the ICC – to President Zuma's inauguration. If he were to arrive the country faced an embarrassing situation that threatened to undermine the jubilation of inauguration day.<sup>564</sup> On the eve of the inauguration the Government clarified that although the Sudanese government was invited, President al-Bashir was not. Al-Bashir chose not to visit South Africa at that time. Then July was dominated by the news that South Africa joined ranks with others at an AU meeting in Sirte, Libya, to support a 3 July AU resolution (apparently driven by President Gaddafi) calling on its members to defy the international arrest warrant issued by the ICC for al-Bashir. Confusingly, just shy of a month before that South Africa's Justice Minister at a different AU meeting on 8 and 9 June in Addis Ababa had joined with other African states to affirm a deep commitment to the Court.

The Sirte resolution of the AU on 3 July – stressing that Member States would not cooperate in the arrest and surrender of African indicted personalities – was quickly condemned as a betrayal of Africa's commitment to end impunity for human rights atrocities, and an international treaty violation. Only Botswana publicly distanced itself from the AU move, and in a letter dated 8 July 2009 to the ICC assured the Court that “as a State Party to the Rome Statute of the ICC, Botswana will fully abide with its treaty obligations and will support the International Criminal Court in its endeavours to implement the provisions of the Rome Statute”.<sup>565</sup>

South Africa eventually clarified its position after directed criticism from civil society (which is discussed further below). The Government issued a response which purported to clarify that it was committed to its legal obligations in relation to the possible arrest of President al-Bashir. On 31 July 2009 Dr Ntsaluba of Foreign Affairs explained as follows at a Press Conference:<sup>566</sup>

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<sup>564</sup> See Max du Plessis and Nicole Fritz, *New Diplomatic Fiasco Looms*, *Business Day*, 2 May 2009.

<sup>565</sup> Letter dated 8 July 2009 from the Minister of Foreign Affairs and International Cooperation of the Republic of Botswana to Justice Sany-Hyun Song, President of the International Criminal Court.

<sup>566</sup> Notes following the briefing of Department International Relations and Co-operation's Director-General, Ayanda Ntsaluba, available at <http://www.info.gov.za/speech/DynamicAction?pageid=461&sid=3378&tid=3523>.

“South Africa is the (sic) State Party of the Rome Statute of the International Criminal Court and is therefore obliged to cooperate with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court (Article 86), and hence also in the execution of arrest warrants. It is worth noting that Article 87(7) of the Statute provides that, when a State Party fails to comply with a request to cooperate, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties, or in the case of a United Nations Security Council (UNSC) referral to the UNSC.

Article 27 of the Rome Statute provides that the official capacity as Head of State or Government of an accused provides no exemption from criminal responsibility. Furthermore, Section 4(1) of the South African Implementation of the Rome Statute of the International Criminal Court Act also ousts the applicability of other domestic laws in respect of an accused, with the result that the immunity from prosecution that President El Bashir would normally have enjoyed in terms of the Diplomatic Immunities and Privileges Act, 2001 (Act No. 37 of 2001), is not be applicable.”

Remarkably, at that press conference it was disclosed that an international arrest warrant for al-Bashir “has been received” (presumably from the ICC) and “endorsed by a [South African] magistrate”. Dr Ntsaluba explained that “[t]his means that if President El Bashir (sic) arrives on South African territory, he will be liable for arrest”.

What the foregoing demonstrates is that certainly at an international level, South Africa’s position on the ICC has been confused and confusing. In a thoughtful article published in the *Business Day*<sup>567</sup> Chris Gevers has explained that what emerged clearly from the al-Bashir indictment in the first place is the need for a coherent and coordinated policy on international criminal justice within Government. The nature of these matters being such that numerous state departments are involved, coordination across government is essential. Nothing is to be gained from the equivocation that characterised South Africa’s handling of the AU resolution and al-Bashir’s indictment by the ICC. After some firm nudging, by South African civil society in particular, the Government ultimately did the right thing by honouring our treaty obligations and acknowledging the legal effect they have in the domestic sphere. However, by the time South Africa corrected its position it had already missed an opportunity to show leadership (Botswana had long since been heralded – correctly – as Africa’s principled voice on the issue); and South Africa had needlessly suffered the political cost of being portrayed as siding with al-Bashir and against the ICC; and of placing old-style OAU solidarity politics above the rights of African victims.

Secondly, and related to this, is what Gevers describes as the danger of aiming for short-term diplomatic solutions in response to such developments. South Africa lies at the centre of too many political dichotomies, and is pulled in too many directions, to properly anticipate the long-term effect of decisions based on immediate political cost. The al-Bashir matter has seen South Africa originally siding not only with African states, but also with various Arab states that had condemned the ICC indictment. Its revised, or clarified position – affirming its legal duty to arrest al-Bashir if he visited here – will not have sat well with the League of Arab States. At the same time, the request filed by NGOs in August 2009 requesting the South

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<sup>567</sup> “SA must tighten policies on international criminal justice”, 20 August 2009.

African authorities under the ICC Act to investigate South African and other nationals implicated in crimes committed during Israel's military offensive in Gaza during Operation Cast Lead will sit better within Arab capitals. At the same time, any action thereon by the SA government is likely to draw the ire of Israel. Given these conflicting political allegiances, and the already embarrassing correction Government was forced to make in respect of the al-Bashir arrest warrant, South Africa could do worse than to err on the side of principle and open commitment to its stated legal obligations.

Whether the public position adopted by the Government at this 31 July 2009 media briefing was a reversal of the position it had adopted in supporting the 3 July 2009 AU decision remains unclear. It should nevertheless be heralded as a welcome (if not overdue) clarification of South Africa's commitment to its treaty and domestic legal obligations.

In respect of Al-Bashir the central obligation flows from the Rome Statute's principle of complementarity. For South Africa, it may further be noted, this commitment in relation to international crimes goes beyond treaty ratification and is domestically reflected in South Africa's Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002. The ICC Act provides that there is an obligation to investigate and prosecute. The preamble speaks of South Africa's commitment to

“bringing persons who commit such atrocities to justice, either in a court of law of the Republic in terms of its domestic laws where possible, pursuant to its international obligations to do so when the Republic became party to the Rome Statute of the International Criminal Court, or in the event of the national prosecuting authority of the Republic declining or being unable to do so, in line with the principle of complementarity as contemplated in the Statute, in the International Criminal Court, created by and functioning in terms of the said Statute”.

Read as a whole there can be no doubt that in terms of the Act, South Africa's Parliament favours the prosecution of international crimes, either by cooperating with the ICC in relation to suspects the Court is investigating, or if needs be by domestic prosecution in South Africa.<sup>568</sup>

However, while (or because) the Government's position regarding the ICC has not at times been altogether clear, the role of civil society has become increasingly important in nudging the Government towards greater clarity and the fulfilment of its cooperation duties and the effective prosecution of international criminals, sometimes

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<sup>568</sup> The first object of the Act recorded in section 3(a) is to create a framework to ensure that the Rome Statute is effectively implemented in South Africa. The second object of the Act recorded in section 3(b), is to ensure that anything done in terms of the ICC Act, conforms with South Africa's obligations under the Rome Statute, including its obligation to cooperate internationally with the ICC and to prosecute domestically the perpetrators of crimes against humanity. Another object of the Act recorded in s 3(d), is to enable the National Prosecuting Authority to prosecute and the High Courts to adjudicate in cases against people accused of having committed crimes against humanity, both inside South Africa and beyond its borders. Once a person suspected of international crimes has been arrested, the National Director of Public Prosecutions is obliged in terms of section 5(3), when he considers whether to institute such a prosecution, to: “give recognition to the obligation that the Republic, in the first instance and in line with the principle of complementarity as contemplated in article 1 of the Statute, has jurisdiction and the responsibility to prosecute persons accused of having committed a crime”.

if necessary through the exercise of universal jurisdiction. Arising from the discussion above, three examples suffice:

*First: the threat by civil society to seek a court mandamus for the arrest of Al-Bashir*

After the press reported in early May 2009 that the South African Government had apparently invited President al-Bashir to the inauguration of Jacob Zuma as South Africa's new president on 9 May 2009, civil society in South Africa responded swiftly. In the first instance, a media release was issued by a number of influential civil society organisations on 8 May 2009. That media release read as follows:

**“PRESS RELEASE (Thursday, 7 May 2009)**

The Southern Africa Litigation Centre (SALC), Institute for Democracy in South Africa (Idasa), and Open Society Institute (OSI) note with concern a report (Business Day, "Sudan dilemma for Zuma's inauguration", 6 May 2009) that South Africa's government spokesman Themba Maseko confirmed that Sudanese President al-Bashir has been invited, along with other heads of state, to president-elect Jacob Zuma's inauguration this coming Saturday. These organisations further note the statement by Director-General Ntsaluba at a media briefing on 7 May apparently confirming that President al-Bashir will not be attending, while not denying that he had been invited.

SALC, Idasa, and OSI recall that South Africa is a party to the Rome Statute of the International Criminal Court (ICC) and thus has an obligation to assist the ICC in effecting the arrest warrant issued for al-Bashir by the ICC in March of this year. In addition to its legal obligations in this matter, South Africa played an important leadership role in the development of the Rome Statute and thus the establishment of the ICC. South Africa is also one of only three states on the continent to have domesticated the Rome Statute's provisions into South African law: a significant step which demonstrates the country's commitment to taking action on matters of international criminal justice.

Specifically, South Africa's Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 (section 8 (2)) holds that were President al-Bashir to be present on the territory of South Africa, and the International Criminal Court were to request his arrest, the Director-General of the Department of Justice “must immediately on receipt of that request, forward the request and accompanying documents to a magistrate, who must endorse the warrant of arrest for execution in any part of the Republic”.

SALC, Idasa, and OSI thus concur with the South African government's stance that if al-Bashir were to enter or be present in South Africa he would be subject to immediate arrest and welcome the Director-General's confirmation that he will not be attending.

In the event that President al-Bashir does for whatever reason choose to attend, SALC has requested Advocates Anton Katz and Max du Plessis to represent them in the event that al-Bashir arrives for President Zuma's inauguration and there is a failure by the relevant South African officials to take action in compliance with South Africa's international obligations. In

particular SALC intends to approach the appropriate court for the necessary relief to assist South Africa in complying with its obligations under the Rome Statute of the International Criminal Court.

SALC, Idasa, and OSI reiterate that States that have ratified the Rome Statute cannot be seen to be shielding persons who are alleged to be guilty of serious crimes against humanity and war crimes and who are sought for arrest and prosecution by the ICC.”

As it turned out, President al-Bashir did not attend, and the threatened court application was not necessary. But it is noteworthy that the civil society organisations concerned took the proactive step of briefing barristers to prepare court application papers in the event that al-Bashir did arrive and the South African government failed to act. Those court papers sought inter alia the following relief:

- “1. Declaring the application to be a matter of urgency and dispensing insofar as is necessary in terms of Rule 6(12) with the usual forms and service provided for in the Uniform Rules of Court;
2. Declaring the conduct of the Respondents, to the extent that they have failed to take steps to arrest and/or detain the President of the Republic of Sudan Omar Hassan Ahmad Al Bashir, to be inconsistent with the Constitution of the Republic of South Africa, 1996, and invalid;
3. Compelling the Respondents forthwith to take all reasonable steps to arrest the President of the Republic of Sudan Omar Hassan Ahmad Al Bashir without a warrant in terms of section 40(1)(k) of the CPA and detain him, pending a formal request for his surrender from the International Criminal Court;

alternatively

4. Compelling the Respondents forthwith to take all reasonable steps to provisionally arrest President Bashir in terms of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002;
5. Compelling the Respondents who oppose the application to pay costs jointly and severally, such costs to include the costs of two counsel ...”.

One may surmise whether the public forewarning of this civil society-led litigation played a part in the Government’s clarified (or reversed) position regarding its legal obligations to arrest President al-Bashir.

*Second: the mobilisation by civil society to ensure a turn-around of the South African Government’s earlier siding with the AU decision on non-cooperation*

Because of its support for the AU’s July Sirte resolution South Africa was quickly singled out for severe criticism both at home and abroad. One example of the

criticism is a statement of 15 July 2009 signed by several South African civil society organisations and many concerned individuals calling upon President Jacob Zuma to honour South Africa's treaty obligations by cooperating with the International Criminal Court in relation to the warrant of arrest issued for President Omar al-Bashir of The Sudan. ICAP, together with other civil society organisations, formulated the statement and canvassed signatures from high-profile personalities in support – including individuals of international stature such as Judge Richard Goldstone and Archbishop Emeritus Desmond Tutu. Virtually all of South Africa's leading human rights organisations, including the South African Human Rights Commission, united around the call for South Africa's government to respect its own law and Constitution and to disassociate itself from the AU decision to refuse cooperation with the ICC.<sup>569</sup>

The General Council of the Bar of South Africa issued its own strongly worded statement on the same day (GCB Circular No 111/09, 15 July 2009), in which it summed up the legal position as follows:

“The issue of whether or not President Al-Bashir will be subject to arrest and surrender in South Africa should he enter the country, is determined by reference to our laws, including the Implementation of the Rome Statute of the ICC Act and our Constitution.

The political considerations that underlie the AU's concern with the conduct of the ICC and the UN Security Council in relation to Africa should not impede our authorities from performing their express legal obligations under our law should President Al-Bashir enter South Africa.

Chapter 4 of our Implementation of the Rome Statute Act obliges our Central Authority, on receipt of a request from the ICC to enforce a warrant of arrest issued by that Court, with necessary accompanying documents, to approach a Magistrate who must endorse the ICC's warrant of arrest for execution where the accused is within our borders.”

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<sup>569</sup> The South African based organisations that endorsed the statement are: Aids Consortium, Centre for Applied Legal Studies (CALS), Centre for Human Rights, Faculty of Law, Pretoria University, Centre for Justice and Crime Prevention Centre for the Study of Violence & Reconciliation (CSV), Human Rights Institute of South Africa (HURISA), International Centre for Transitional Justice (ICTJ), International Crime in Africa Programme, Institute for Security Studies (ISS), Khulumani Support Group, Legal Resources Centre (LRC), Lawyers for Human Rights (LHR), Open Society Foundation of SA (OSF-SA), Open Society Initiative of Southern Africa (OSISA), Sonke Gender Justice Network, South African History Archive (SAHA), South African Human Rights Commission (SAHRC), and Southern African Litigation Centre (SALC).

Prominent South Africans who endorsed the statement include: The Most Reverend Desmond Mpilo Tutu, former Chairperson of the TRC, Richard Goldstone, former chief prosecutor of the International Criminal Tribunal for the former Yugoslavia and Rwanda; former judge of the Constitutional Court of South Africa, Advocate Dumisa Buhle Ntsebeza SC, former Commissioner on the International Commission of Inquiry on Darfur appointed pursuant to UN Resolution 1564, Professor Kader Asmal, Former Minister and Honorary Professor UCT and UWC, Professor Hugh Corder, Professor of Public law, UCT, Yasmin Sooka, former TRC Commissioner, Professor John Dugard, Centre for Human Rights, Pretoria University, Jody Kollapen, Chairperson of the South African Human Rights Commission, and Professor Karthy Govender, Commissioner of the South African Human Rights Commission and Professor of Law, University of KwaZulu Natal.

It is clear that Government was stung by this public condemnation of its conduct. And reports indicate that its reversed (or clarified) position was as a direct result of the swift movement by civil society organisations within South Africa to call Government to account and to remind it of its complementarity obligations as a matter of domestic and international law. Thus, on 31 July 2009, Government publicly stated that it was committed to the Rome Statute and would arrest President al-Bashir if he arrived in South Africa – and as if to dispel any further doubts, disclosed that an arrest warrant had been issued for him by senior magistrate.

Of some significance is that thereafter the Department of Justice and Constitutional Development in South Africa requested assistance from ICAP to draft a position paper dealing with recent developments on the continent relating to international criminal justice, and in which various recommendations were made for the Department to consider adopting in the run up to the Rome Statute Review Conference scheduled for May/June 2010 in Kampala, Uganda.

It might also be mentioned that in addition a continent-wide statement was produced by African civil society groups and championed by ICAP in partnership with amongst others Human Rights Watch and the International Centre for Transitional Justice. That partnership has produced a statement condemning the AU's 3 July 2009 Sirte decision and calling on African states parties to reaffirm their commitment to the Rome Statute. The statement has to date been signed by over 164 civil society organisations in Africa and the full text of the statement (which is hosted on the Human Rights Watch website<sup>570</sup>) reads as follows:

“African Civil Society Urges African States Parties to the Rome Statute to Reaffirm Their Commitment to the ICC

JULY 30, 2009

Africa: Reaffirm Support for International Criminal Court

On 3 July 2009 the African Union (AU) agreed that its members should withhold cooperation from the International Criminal Court (ICC) in the arrest and surrender of Sudanese President Omar al-Bashir. The court issued its arrest warrant for President al-Bashir on 4 March 2009 for alleged war crimes and crimes against humanity committed in Darfur.

The AU's decision threatens to block justice for victims of the worst crimes committed on the continent. It is inconsistent with article 4 of the AU's constitutive act that rejects impunity, as well as the treaty obligations of the 30 African governments that ratified the Rome Statute of the ICC. The decision also undermines the consensus reached by African ICC States Parties at a meeting in Addis Ababa in June 2009.

Recognizing our obligation to help protect human rights and uphold the rule of law, we, the undersigned civil society organizations, appeal to African ICC States Parties to reaffirm their support for the ICC and their commitment to abide by their obligations under the Rome Statute, particularly in relation to the arrest and transfer of the President of Sudan to the ICC.

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<sup>570</sup> See <http://www.hrw.org/node/84759> (accessed 5 August 2010).

The ICC was created to bring accountability for the most serious crimes of international concern: genocide, war crimes and crimes against humanity. African governments, together with civil society, played an active role in establishing the court and African governments were among the founding ratifiers of the Rome Statute.

A majority of African countries are now Parties to the ICC: Benin, Botswana, Burkina Faso, Burundi, Central African Republic, Chad, Comoros, Republic of Congo, Democratic Republic of 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 ratifying the Rome Statute, these states signaled their dedication to cooperate with the ICC to defend the rights of victims and to ensure that the perpetrators of the most serious crimes known to humankind, whoever they might be, are brought to justice.

In Addis Ababa in June, those states underscored their continued support for the court. Proposals to consider making recommendations in relation to possible withdrawal from the ICC or withholding cooperation from the court failed to win a consensus.

The decision adopted at the AU summit just three weeks later is a backward step. The basis provided by the AU for withholding cooperation with the ICC is the UN Security Council's lack of response to the AU's request for a deferral of the ICC's case against President al-Bashir. Consistent with States Parties' obligations under the Rome Statute, this is a matter to direct to the Security Council and does not warrant withholding cooperation from the ICC.

Following the AU summit, the governments of Botswana and Uganda issued statements reiterating their commitment to cooperating with the ICC. These statements are important.

Civil society across the continent has expressed concern about the AU decision. Ensuring that the determined steps to end impunity on our continent are not undermined requires a collective effort by all Africans. Instead of retreating from important achievements to date, we look to our governments to remain steadfast in their support for justice for victims of the worst crimes, including by reaffirming their commitment to cooperate with the ICC.”

It may be noted that President al-Bashir was scheduled to visit two African states parties towards the end of 2009 (Uganda and Nigeria), but ultimately – and hopefully in part on account of the civil society action described above – the indicted head of state chose to change his travel itinerary.

*Third: the use of South Africa's domestic ICC Act by civil society*

Another important initiative in Southern Africa is the use by civil society of South Africa's domestic legislation implementing the Rome Statute (The Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 – the ICC Act).

The first meaningful invocation of South Africa's ICC Act was on 18 March 2008, when the Southern African Litigation Centre (SALC) submitted a dossier to South Africa's National Prosecuting Authority (NPA), calling on it to investigate, with a view to prosecuting, senior Zimbabwean police officials who, it maintains, have committed crimes against humanity by systematically using torture against those they believed to oppose the Zanu-PF-led government. The dossier was submitted two weeks before the March 29 Zimbabwe elections. The dossier contains a legal opinion and detailed evidence relating in particular to the torture of opposition activists which occurred subsequent to a police raid on 28 March 2007 on Harvest House in Harare – the headquarters of the Movement for Democratic Change (MDC). It also contains documentation relating to other separate clusters of the systematic use of torture on the part of Zimbabwean police.

But for South Africa's ICC Act, this initiative could not have been undertaken. It gives effect to South Africa's complementarity obligations under the Rome Statute, but it arguably does more than that. In the Act's scope and ambition – for instance, in its enactment of a form of conditional universal jurisdiction – it goes beyond what was strictly required by the terms of the Rome Statute, demonstrating South Africa's then commitment to and leadership in respect of the larger international criminal justice project.

Prior to the ICC Act, South Africa had no municipal legislation on the subject of war crimes or crimes against humanity, and no domestic prosecutions of international crimes had taken place in South Africa. Under the ICC Act, a structure is created for national prosecution of crimes in the Rome Statute. In other words, the ICC Act allows for the prosecution of crimes against humanity, genocide and war crimes before a South African Court.

Of importance in relation to offences committed in Zimbabwe is that the Act allows for the prosecution of an individual who commits a core crime and who does not have a close and substantial connection with South Africa at the time of offence. Put otherwise, it is possible under the ICC Act – provided that there is sufficient evidence – to initiate a prosecution against the persons responsible for torture and other crimes against humanity committed in Zimbabwe after 1 July 2002.

Following SALC's submission to the NPA, there have been several further communications: at the request of the NPA, the advocates acting for SALC addressing the NPA on the requirement of gravity, as set out in the Rome Statute; and, again at the NPA's request, SALC undertaking to assist them in the conduct of their investigation by making witnesses and additional evidence available. However, recently the NPA has explained that they do not intend initiating an investigation and/or prosecution of those senior Zimbabwean officials whom SALC alleges to be responsible for crimes against humanity. That decision appears to be on the basis that the South African Police Service (SAPS) has decided not to initiate an investigation. In the circumstances, SALC is now intending to seek an application for judicial review of the authorities' decision. Such a court review will be a further example of civil society pressure being brought to bear on Government authorities to comply with their treaty obligations and the principle of complementarity.

The second example of the ICC's Act invocation by civil society is more recent. A team of lawyers, led by Professor John Dugard SC, was briefed to compile a dossier presented to the National Prosecuting Authority and the Directorate for Priority Crimes Investigation in South Africa on 3 August 2009.<sup>571</sup> The dossier –

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<sup>571</sup> The two NGOs in question are the Palestinian Solidarity Alliance and the Media Review Network.

submitted in terms of the ICC Act – requests the South African Government to investigate and if appropriate prosecute in South Africa foreign nationals and South Africans allegedly involved in war crimes and crimes against humanity during Operation Cast Lead. In parallel with the request made to the South African authorities, the complainants handed the dossier over to the International Criminal Court’s Prosecutor in early September 2009. Newsweek magazine has recently reported an interview with the Prosecutor of the ICC who has expressed the view that one of the individuals cited in the docket - Lt. Col. David Benjamin, a reserve officer in the Israeli military – may be a basis for the ICC to launch an enquiry. According to Newsweek, the ICC Prosecutor “believes he has all the authority he needs to launch an inquiry: Benjamin holds dual citizenship in both Israel and South Africa, and the latter has signed the ICC's charter, bringing Benjamin into the court's orbit.”<sup>572</sup>

These are two early examples, and in both cases developments are ongoing. The first striking feature of these examples is that but for the work of civil society it is not clear that the ICC Act would have been invoked by the Government or its prosecution agencies. Certainly it has taken the work of civil society for cases to be brought to the relevant authorities; and Government has not “self-initiated” cases in accordance with its statutory and treaty obligations. Accordingly, these examples for present purposes demonstrate the willingness and ability of civil society actors to utilize the provisions of South Africa’s domestic incorporation legislation to request and if necessary compel the South African authorities to act in conformity with their international treaty obligations to investigate and if appropriate prosecute individuals accused of international crimes.

Whether it is an arrest warrant for al-Bashir issued by the ICC, or requests by local NGOs for South Africa to investigate international crimes, it is clear that the demands of international criminal justice unfold within a politically charged context.

From these three examples I conclude with three lessons.

The first lesson is that it vital to push for domestic implementation legislation. The drive to ratify the Rome Statute must be backed up by energetic calls for implementation laws to be put in place. The problem too often is that international criminal justice – and the directed obligations of the Rome Statute – may be seen by Parliamentarians and justice officials as exotic, external, and ethereal. By domesticating the Rome Statute these obligations are brought home; and the sense of disconnect or at least distance between the goals of international criminal justice and that of the State is removed. In this way it becomes more difficult for Governments and their officials to wriggle or writhe their way away from their treaty obligations, not least of all because the failure by Governments to act under their own domestic law may more easily be attacked as a “rule of law issue”. Accordingly, in my view renewed energy should be directed at convincing all States Parties – which in Africa would include 30 African parties to the ICC – to adopt legislation incorporating the obligations and ideals of the Rome Statute directly into domestic law.

The second lesson is that domestic legislation may more easily and less controversially allow for universal jurisdiction as a complement to the work of international criminal tribunals. This obviously requires the in-tandem capacitation of independent and specialised domestic prosecutors and investigators who are

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<sup>572</sup> See Dan Efron, “ICC Prosecutor may charge Israeli with War Crimes”, available at <http://blog.newsweek.com/blogs/wealthofnations/archive/2009/09/21/icc-prosecutor-may-charge-israeli-with-war-crimes.aspx> (accessed 5 August 2010).

experienced enough to handle the complexities and bold enough to withstand the political controversies of pursuing cases against individuals accused of the world's worst crimes. South Africa is a case in point, at least on the African continent. It is only because of South Africa's implementation legislation (the ICC Act) that there is now a specialised prosecutorial unit in the form of the Priority Crimes Litigation Unit. I would suggest that such domestic units are an important future component of international criminal justice – both under the principle of complementarity in terms of the Rome Statute, but also as units that may in appropriate cases exercise universal jurisdiction where empowered to do so.

A third lesson, in my view, is that progressively phrased domestic legislation and specialised prosecutorial and investigatory units are not enough. There must be political will in support of this work. And here lies a vital role for civil society. Perhaps the most vital contribution that may be made by civil society is to vigilantly remind Governments, Government officials and regional bodies (including the African Union) that the ICC not the preserve of states or powerful political leaders – to be used or ignored as befits political will (or the lack thereof). Rather, that communities and individuals have an important stake in the ICC and its project of international criminal justice – that they are ultimately the most important stake- and-shareholders of a project aimed at ensuring that impunity does not follow the commission of serious international crimes.

As this thesis has attempted to show, a vital ingredient (in South Africa – and, it is predicted, elsewhere) for the success of international criminal justice, will be the strength and advocacy of civil society actors in demanding action from law enforcement authorities in the incorporation and operationalisation of a state's (or continent's) commitment to international criminal justice. What is abundantly clear is that Africa is where international criminal justice – a relatively new phenomenon – is taking stride. And South Africa, through a combination of its progressive ICC Act and its leading role on a continent whose regional body has shown a resistance to the ICC, has been placed at the heart of the action.

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