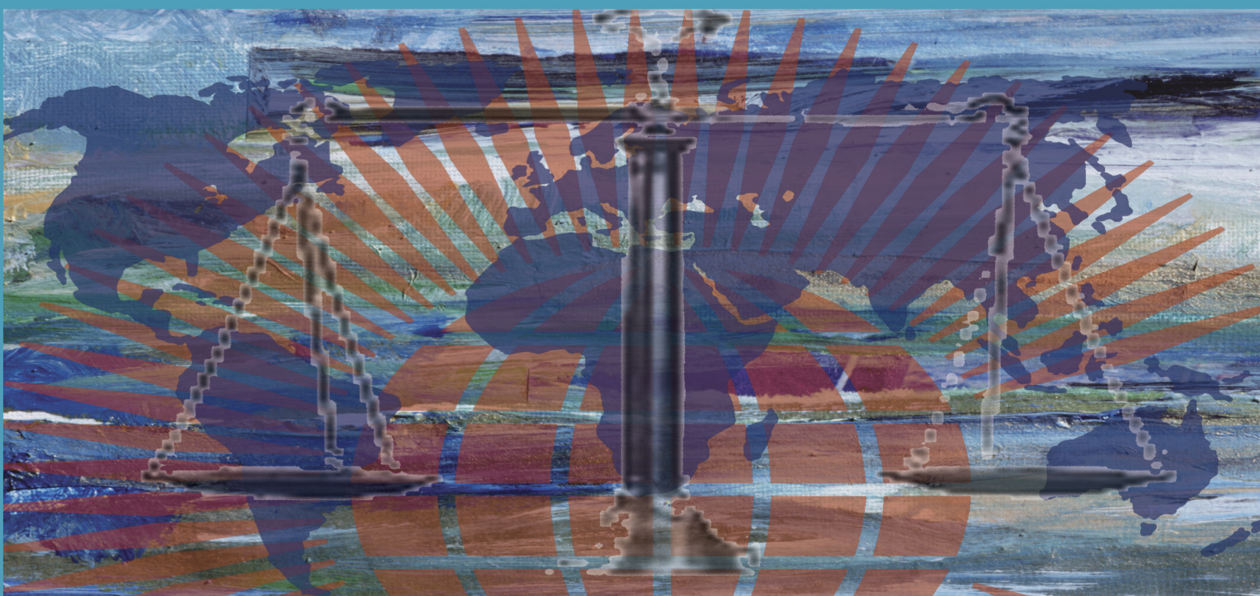
The Prosecution of International Crimes

A Practical Guide to Prosecuting ICC Crimes in Commonwealth States

Edited by Ben Brandon and Max du Plessis



Commonwealth Secretariat

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Edited by Ben Brandon and Max du Plessis

Legal and Constitutional Affairs Division
Commonwealth Secretariat
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Preface

The establishment of the International Criminal Court (ICC) on 1 July 2002 was a landmark development in the quest for universal justice. Now, for the first time, there is a permanent international body that can take jurisdiction over the prosecution of genocide, crimes against humanity and war crimes when States are unwilling or unable to do so.

Commonwealth Heads of Government were early supporters of the ICC. At their meeting in Edinburgh in 1997, they "expressed their belief that an International Criminal Court would be an important development in the international promotion of the rule of law". After the adoption of the Rome Statute of the ICC, at their meeting in Coolum, Australia in 2002, Heads of Government " encouraged member countries to accede" to it. It is only fitting, therefore, that this Commonwealth Guide has been developed in support of effective domestic prosecution of international crimes and full implementation of the Rome Statute.

While the ICC brings an important new component to international criminal and humanitarian law, it does not represent a means by which States can abdicate responsibility for bringing to justice the perpetrators of the most serious crimes of concern to the international community. Quite the contrary is true. The Preamble to the Rome Statute recalls that:

> "it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes."

In fact, a case is only admissible before the ICC if the State that has jurisdiction over the crime in question is either unwilling or unable genuinely to carry out the investigation or prosecution. Each nation must thus play its part in ending impunity for those who commit international crimes. For this to be achieved, States parties to the Rome Statute need to put in place comprehensive and effective implementing legislation. Efforts to assist States with the adoption of such laws are ongoing.

This Guide is part of these efforts. With contributions from a number of experts who have in-depth knowledge of both the Rome Statute and national laws, its aim is to give practitioners access 'at a glance' to the world of the ICC and to help build domestic capacity within Commonwealth countries to conduct prosecutions of international crimes.

History has made clear that there can be no peace without justice. The aim of the ICC and the prosecution of international crimes is to achieve peace through justice. It is our hope that this Guide will help further efforts towards full implementation of the Rome Statute and make a positive contribution to the ongoing endeavours of Commonwealth States to end impunity for those who commit the most serious of crimes.

Don McKinnon
Commonwealth Secretary-General

Introduction

Max du Plessis, Ben Brandon and Kimberly Prost

This Guide arises out of, and is a response to, the creation of the world's first permanent International Criminal Court (ICC). The Statute of the ICC was adopted on 17 July 1998 by an overwhelming majority of the States attending the Rome Conference. The conference was specifically aimed at attracting States and non-governmental organisations so that they might debate and adopt a statute that would form the basis for such a court.[1]

The ICC and the Human Rights Inspiration

The general rule in international law is that States are able to exercise their domestic criminal law jurisdiction over criminal offences that affect their domestic concerns.[2] As such, criminal jurisdiction is usually exercised over crimes that are committed within a State's territory (like murder, theft and rape). It may also sometimes be exercised over crimes that are plotted abroad (such as high treason) because they threaten the domestic order.

However, some offences affect not only the domestic legal order but also the international legal order. The classic example of such a crime is piracy, whose perpetrators were described as enemies of the human race. Today, certain crimes are agreed to be of such a serious nature that their perpetrators are also rightly considered enemies of humankind. The crimes that fall under the ICC's jurisdiction are drawn from this category and include genocide, crimes against humanity and war crimes.

Because there has not until recently been a permanent international criminal court with jurisdiction to try these crimes, and leaving aside isolated examples such as the international criminal tribunals at Nuremberg and Tokyo, it was previously left to national courts to do the job. Where a national court exercised jurisdiction over an international crime with no jurisdictional link on the basis of, for example, territoriality or nationality, it was said to be exercising 'universal jurisdiction'. Perhaps the most famous example of this is the trial of Adolf Eichmann. In *A-G of Israel v Eichmann*,[3] the District Court of Jerusalem decided that Israel had jurisdiction over atrocities committed during World War II by Eichmann, a Nazi officer, on the grounds that the said atrocities were not domestic crimes alone but crimes against the law of nations.

As we shall see, under the ICC Statute an important role has been retained for domestic courts, which are said to act in a complementary relationship with the Court in punishing the world's worst criminals.[4] But where such courts are not willing or able to act against

1 The Statute was finalised at the Rome Conference, attended by 160 States, from 15 June to 17 July 1998. For an account of the negotiating process at the Conference, see Philippe Kirsch and John Holmes, 'The Rome Conference on an International Criminal Court: The Negotiating Process' (1999) 93 *American Journal of International Law (AJIL)* 2.

2 See Chapter 2 for further and comprehensive discussion of the topic of 'jurisdiction' under international criminal law.

3 (1961) 36 *International Law Review (*ILR) 5.

4 On 'complementarity', see further Chapter 2.

the enemies of humanity, the ICC ensures that impunity does not follow their actions. The rise of a court with the power and competence to try the likes of Eichmann, Pinochet or Mengistu, or their foot soldiers, torturers or henchmen, can only be properly appreciated against the backdrop of the immense strides that human rights and humanitarian law have taken in the 20th century.

Aspirations to establish such a permanent international criminal court can be traced back to shortly after World War II and the adoption by the newly created United Nations, on 9 December 1948, of a resolution mandating the International Law Commission (ILC) to begin work on a draft statute for such a court.[5] In the climate of the Cold War, little was done to take the project forward, however, and the idea of an international criminal court was revivified only in the 1980s with a proposal by Latin American and Caribbean States, led by Trinidad and Tobago, who envisaged it as their last resort to prosecute international drug traffickers.[6] The ILC was thereafter directed by the UN General Assembly to again consider drafting a statute.

The early 1990s saw the Commission preparing the draft, and by 1994 it had adopted a formal Draft Statute for an International Criminal Tribunal and forwarded it to the General Assembly for consideration.[7] At the same time, 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. The International Criminal Tribunal for the former Yugoslavia (ICTY) was established by the Security Council in 1993 and mandated to prosecute persons responsible for serious violations of international humanitarian law committed in that territory since 1991.[8] Then, in November 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 1994.[9]

The Yugoslav and Rwandan Tribunals were important milestones in international criminal law. Not only were the Tribunals necessary responses to the atrocities that had been committed in these countries, they also fuelled the widespread belief that a permanent international criminal court was both desirable and practical. The ICTY Statute, for example, influenced the draft Statute that the ILC was busy drawing up in the early 1990s. By the time delegates convened in Rome, the Tribunals could provide a reassuring model of what a permanent international criminal court might look like. These two Tribunals – the first international criminal tribunals since Nuremberg – are close relatives, sharing virtually identical statutes, as well as the same Prosecutor and Appeals Chamber. One of their most important features has been the independence of the prosecutors. Indeed, the

5 See William Schabas, *An Introduction to the International Criminal Court*, 2001, p vii.

6 See Kriangsak Kittichaisaree, *International Criminal Law,* 2001, p 27.

7 See James Crawford, 'The ILC's Draft Statute for an International Criminal Tribunal' (1994) 88 *AJIL* 140; James Crawford, 'The ILC Adopts a Statute for an International Criminal Court' (1995) 89 *AJIL* 404.

8 See UN Security Council Resolution 808 of 22 February 1993 and Resolution 827 of 25 May 1993. For detailed accounts of the creation of the ICTY, see M C Bassiouni and P Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia,* 1996, chapters I-III. See also Virginia Morris and Michael Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia: A Documentary History and Analysis,* 1995.

9 See UN Security Council 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.

integrity, neutrality and good judgment of the Tribunals' prosecutors, Richard Goldstone and his successors, Louise Arbour and Carla del Ponte, answered the critics who warned of a reckless, rogue and irresponsible prosecutor. Most significantly, for our purposes, is that the Tribunals stand together as a working model of international criminal justice. Unpacked, this model has certain defining characteristics that draw their inspiration from the rule of law: an international criminal forum applying rules of international law, staffed by independent prosecutors and judges, holding persons individually responsible for crimes against humanity and war crimes, after allowing them a fair trial.

The ICC displays all these features but, unlike *its ad hoc* predecessors, it is a permanent tribunal. After five weeks of intense negotiations in Rome, 120 countries voted to adopt the treaty, seven voted against it and 21 abstained. A number of important Commonwealth States were among those that supported the adoption of the treaty, which would come into force upon 60 ratifications. The magic number was reached by April of 2002. To date, the Rome Statute has been signed by 139 States and 97 States have ratified it. The Statute entered into force on 1 July 2002, at which time the Court's jurisdiction over genocide, crimes against humanity and war crimes took effect.

The ICC is situated in The Hague, the Netherlands. The judges for the Court were chosen in February 2003 and were sworn in on 11 March 2003 at its inaugural session. The President is the Canadian Philippe Kirsch. The Prosecutor has been chosen – the highly respected Argentine lawyer, Luis Moreno Ocampo – and the Court is expected to hear its first case soon. This will in all likelihood be an African affair, either a prosecution relating to the ongoing conflict in Northern Uganda[10] or the targeting of recent crimes said to have been committed in the territory of the Democratic Republic of the Congo.[11]

The import of the ICC ought not to be underestimated. Described by William Schabas as "arguably the most significant international organisation to be created since the United Nations", it has ushered in a new era in the protection of human rights. What makes this new era remarkable is that the idea of an international criminal court is something that international lawyers have struggled for many years to properly conceptualise, let alone realise. They have over time pointed to a conceptual problem associated with the idea of international criminal law that arises because of the structure of the international legal system itself.[12] Because international law was seen simply as the contractual relations between States, the idea of an international criminal law – involving a public law dimension with an underlying system of shared social ethics – seemed strangely inappropriate, given that the international regime has no global sovereign[13] and is morally pluralistic.[14]

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10 See UN Wire, 30 January 2004, 'First International Criminal Court Case Targets Uganda's Rebels'.

11 See Press Release of the Office of the Prosecutor of the International Criminal Court, 19 April 2004, 'Prosecutor Receives Referral of the Situation in the Democratic Republic of the Congo'.

12 See generally Gerry Simpson, 'War Crimes: A Critical Introduction' in Timothy McCormack and Gerry Simpson (eds), *The Law of War Crimes: National and International Approaches,* 1997, pp 16-17.

13 As George Schwarzenberger argued in 1950: "[A]n international criminal law that is meant to be applied to the world powers is a contradiction in terms. It presupposes an international authority which is superior to States". See Schwarzenberger, 'The Problems of International Criminal Law' (1950) 3 *Current Legal Problems* 263, quoted in Simpson, note 12 above at 17.

14 Simpson points out that "[t]the moral or naturalistic orientation of must criminal law depends on a system of shared social ethics or an underlying natural law. Conversely, the international law regime is morally pluralistic and normatively consensual" (Simpson, note 12 above at 17).

In order to overcome this conceptual difficulty, international lawyers have focused their attention on what ought to be obvious to any person committed to the attainment of justice under international law. This is that a truly successful international legal system needs to be built on a social system that denounces and punishes crimes that tear at the fabric of humanity. Under international law such a social system is realised in a number of ways, including the very notion of an international criminal court. This international social system and its 'international' public morality are evidenced in the strengthening of human rights and the humanitarian law of war in the second half of the 20th century. Moreover, there has been a growing conceptual awareness that because individuals live under the international legal system, they must necessarily have rights and obligations flowing from it. The fact that delegates at Rome were able to come together and finalise the Rome Statute suggests the existence of a social system built on universal respect for the idea of human rights. This system recognises that to allow the most serious war crimes and crimes against humanity to go unpunished diminishes and threatens all those who live under it.

The Commonwealth Guide to International Criminal Law

Due to the obvious importance of the ICC regime for Commonwealth States, the Commonwealth Secretariat has chosen to publish and distribute this Guide to International Criminal Law. The Guide has been produced by expert authors for government legal and judicial officers, the police and practising lawyers in Commonwealth States.

Those involved in criminal justice and law enforcement in Commonwealth States are increasingly expected to possess expertise in international criminal law. The ICC will in all likelihood begin prosecuting its first case in 2005, and already 27 of the 53 Commonwealth States have accepted the jurisdiction of the Court.[15] Five of those States – Australia, Canada, New Zealand, South Africa and the United Kingdom – already have domestic laws that implement the provisions of the Rome Statute ('the ICC Statute') into their national legal systems. Already, some prosecutors, the police and other government law officers in Commonwealth States have received requests for the arrest and extradition of persons suspected of war crimes and crimes against humanity as well as invitations to assist in their investigation and prosecution.

The purpose of this Guide is to serve as a useful practical text. It contains two main sections: the first is a universal introduction to international criminal law; the second is intended to contain an in-depth analysis of the implementing legislation in each Commonwealth State. For the first edition of the Guide the editors have included chapters on the implementation legislation of the five States mentioned above. As other Commonwealth States adopt implementation legislation, chapters will be commissioned from authors in those States for inclusion in the second edition, planned for 2006. The Guide is intended to be an accessible resource, covering international criminal law issues that are likely to arise in day-to-day practice.

15 Antigua and Barbuda, Australia, Barbados, Belize, Botswana, Canada, Cyprus, Dominica, Fiji, Gambia, Ghana, Guyana, Lesotho, Malawi, Malta, Mauritius, Namibia, Nauru, New Zealand, Nigeria, Saint Vincent and the Grenadines, Samoa, Sierra Leone, South Africa, Trinidad and Tobago, United Kingdom and Zambia (as at 4 December 2004).

The Commonwealth Secretariat considers that there is a pressing need for such a Guide, and that it is in the interests of all members of the Commonwealth for legal professionals and all those working in the criminal justice system to be fully versed in the practical realities of bringing to justice those who have committed the gravest of international crimes.

Abstract of the Guide

As noted above, the Guide is divided into two parts. Part I is intended to serve as an overview of international criminal law. It begins in Chapter 1 with a discussion of the institutions of the ICC and provides an overview of Court procedures that are explored in greater detail in later chapters. Chapter 2 examines the different types of jurisdiction employed in the court systems of Commonwealth States and international tribunals, including the ICC. The discussion is particularly important in light of the complementarity regime under the ICC Statute. It should be appreciated in this respect that the ICC Statute is intended to encourage the prosecution of international crimes in domestic, not international courts. Under what is described as "the complementarity principle" the courts of domestic States parties to the ICC Statute have an obligation to prosecute international crimes and do so through their respective implementation legislation. For a proper understanding of that legislation, we have included a comprehensive discussion of the jurisdictional principles that underpin the domestic prosecution of international crimes.

Chapter 3 sets out the core crimes that lie at the heart of the ICC regime – genocide, crimes against humanity and war crimes – that, because of complementarity, will form the subject of domestic prosecutions. Many domestic criminal practitioners will be familiar with the terminology of international criminal law. Terms such as 'genocide' and 'crimes against humanity' have long been the common parlance of headline writers, politicians and warlords. But all of these terms have highly technical meanings, and this chapter therefore explains all of the relevant terminology by examining the history of international criminal jurisprudence, from Nuremberg to Rome, Jerusalem to The Hague.

Until the creation of the ICC, the experience of Commonwealth States in the investigation and prosecution of international crimes was limited to their participation in extradition and mutual legal assistance arrangements with other States. While many national, regional and international law makers have already begun to address the issue of mutual co-operation and assistance in the fight against international terrorism, organised crime and drug trafficking, the Guide details the relevant ICC provisions that oblige mutual co-operation and assistance in relation to the ICC crimes. Part 9 of the ICC Statute introduces a comprehensive framework for arrest and surrender, the gathering of evidence and other forms of assistance including asset forfeiture, that extends beyond the bi-lateral or regional co-operation that is a feature of existing mutual assistance and extradition arrangements. This new and innovative framework under the ICC Statute now involves States Parties in the joint and co-operative enterprise of investigation and prosecution of ICC crimes. Chapter 4 sets out in detail the relevant provisions of the ICC Statute pertaining to this new co-operative scheme.

Chapter 5 considers various doctrines that are essential to the proper understanding of international criminal law, from command responsibility to amnesties. The chapter explores legal doctrines that are more or less exclusive to international criminal law and

have emerged from the jurisprudence of the international *ad hoc* tribunals, national courts and international legal instruments. These doctrines are often linked to the unique nature of the core crimes prosecuted in international tribunals that will form the subject matter of prosecutions in domestic courts under the complementarity regime. Command responsibility, for instance, is a concept that can only have emerged from a legal system that seeks to punish those who are responsible for crimes committed by soldiers during an armed conflict. Other doctrines, such as the principle of immunity for Heads of State and State officials and the question of amnesties, remain acutely relevant to domestic attempts to prosecute the world's worst criminals.

Part II of the Guide is concerned with the implementation of the ICC Statute in those States that are members of the Commonwealth and party to the Statute. The main content is intended to be individual chapters for each Commonwealth State that has ratified the Statute and implemented its provisions into national law. In this first edition of the Guide there are chapters for Australia, Canada, New Zealand, South Africa and the United Kingdom. These chapters have been prepared by contributing authors who are expert lawyers with practical experience of criminal proceedings in the relevant jurisdiction and a working knowledge of international criminal law. Part II thus focuses on a practical analysis of the implementing legislation in each Commonwealth State and seeks to provide guidance to all those involved in the criminal justice system – including police, prosecutors, courts and defence attorneys – as to how to apply international criminal law in their own territory. Part II also provides a helpful collection of the various responses of Commonwealth nations to the ICC Statute, thereby facilitating comparative research and learning. These chapters will hopefully prove a valuable resource for officials throughout the Commonwealth as they tread into unfamiliar territory together.

Parts I and II, although self contained and quite distinct in content, are inter-related and share the same philosophy of approach. Both sections are aimed at providing a practical, comprehensible guide to international law, for everyday use in the offices, courts, police stations and chambers of legal professionals and others in the Commonwealth concerned with the investigation and prosecution of the most serious international crimes. It is hoped that the Guide will be an indispensable aid to achieving universal justice, for the victims and accused, and those who represent them.

Key documents of relevance with respect to the Court – namely the Rome Statute, the Elements of Crimes, the Rules of Procedure and Evidence and the Regulations of the Court – can be found at http://www.icc-cpi.int/officialjournal/legalinstruments.html. Hard copies can also be obtained from the Legal and Constitutional Affairs Division at the Commonwealth Secretariat.

The United States and the ICC

As part of the country chapters in Part II readers will notice a section that details the relevant country's response to American pressure to conclude what have become known as 'Article 98 agreements'. No contemporary guide to international criminal law would be complete without a discussion of the United States' position regarding the ICC.

Until quite recently the US was a vocal supporter of the idea of an international criminal court, with President Bill Clinton issuing calls for a permanent war crimes tribunal shortly

before the Rome Conference for the creation of the ICC when addressing genocide survivors in Rwanda.[16] At the Rome Conference, US opposition to the Court first appeared during the drafting process, an opposition that had concretised in the closing days of the conference to the point that the US was one of seven States that voted against the Statute.[17] Despite this position, in Bill Clinton's last days in office the US signed the ICC Statute.

Once in government, the Bush administration quickly took steps to set its face against the Court, and lodged with the UN Secretary-General a letter on 6 May 2002 giving formal notice that the US had no intention of becoming a party to the Rome Statute. The letter also requested that the US declaration be reflected in the Rome Treaty's official list – effectively cancelling out the US signature to the treaty that was entered by the Clinton administration on 31 December 2001. This measure – referred to as 'unsigning' – set the US in opposition to the Court. Under Article 18 of the 1969 Vienna Convention on the Law of Treaties, a State that has signed but not ratified a treaty is obliged to "refrain from acts which would defeat the object and purpose of the treaty…until it shall have made its intention clear not to become a party to the treaty". Having made its intention clear in this letter, the US then had a freer hand to act to use diplomatic means to oppose the Court.

The US has adopted three principal strategies to oppose the Court. The first measure, and one that lays the groundwork for the two others, is the passing of the American Servicemembers Protection Act 2001.[18] The Act restricts US participation in peacekeeping missions and prohibits military assistance to those nations that ratify the Rome Statute, with the exception of NATO member countries and other major allies (Australia, Egypt, Israel, Japan, the Republic of Korea and New Zealand have been cited as members of this category). As it currently stands, the Act displays various features that militate against the Court. Among its most striking provisions are the following:

- Under the Act the US may not participate in any peacekeeping mission unless the President certifies to Congress that the Security Council has exempted US Armed Forces members from prosecution and each country in which US personnel will be present is either not a party to the ICC or has an agreement with the US exempting US Armed Forces members from prosecution.[19]
- The Act prohibits any governmental entity in the US, including state and local governments or any court, from co-operating with the ICC in matters such as arrest and extradition of suspects, execution of searches and seizures, taking of evidence, seizure of assets and similar matters.[20]

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16 During March 1998, at Kigali. See Lawrence Weschler, 'Exceptional Cases in Rome: The United States and the Struggle for an ICC' in Sarah Sewall and Carl Kaysen (eds), *The United States and the International Criminal Court*, 2000, p 91.

17 Although the vote was non-recorded at the US's suggestion, the US, China, Israel and India made explicit that they had voted against the adoption of the Statute. The other three States voting against the adoption of the Statute were presumably Libya, Iraq and either Algeria, Qatar or Yemen. (See Jonathan Charney, 'Progress in International Criminal Law' (1999) 93 *AJIL* 452 at 452 and fn. 17. Mexico, Singapore, Sri Lanka, Trinidad and Tobago, and Turkey explained that they had abstained. See generally in this regard Kittichaisaree, *International Criminal Law,* 2001, pp 36-37.

18 The Act has been adopted by the US Senate and the House of Representatives. At the time of writing it has not yet entered into force.

19 Section 5.

20 Section 4. These and other provisions in the Act are in addition to existing US law (the 2000-2001 Foreign Relations Act), which prohibits any US funds to the ICC once it has been established (see the Global Policy Forum Document, 'The American Servicemembers' Protection Act: An Overview', available at http://www.globalpolicy.org/intljustice/icc/2001/0621usbl.htm).

There is also provision in the Act to authorise the US President to use "all necessary and appropriate means" to free US or allied personnel detained by or on behalf of the ICC.

With the American Servicemembers Act in place, one can more easily appreciate the two further steps that the US has taken in opposing the Court. The first is that the US has insisted on the signing of bilateral immunity agreements with other States whereby the State agrees not to send US citizens and other persons connected to the US for trial to the ICC. Under the American Servicemembers Protection Act, US military assistance to States Parties to the ICC is prohibited unless they sign such an agreement. The US has reportedly extracted these agreements from over 90 countries. These agreements create a potential conflict of obligations for State Parties to the Rome Statute.

Finally, the US has taken action within the Security Council to obtain a one year 'stay' on any investigations or prosecutions involving non-State Party personnel contributing to the peacekeeping mission in Bosnia. The resolution, obtained initially in 2002, was renewed in 2003; however, due to pressures from other Security Council members, it was not renewed in 2004.

Conclusion

This Guide has been written by individuals who are excited about the prospects of international criminal law more generally and within the Commonwealth in particular. The Rome Statute of the ICC adopted in 1998 has its flaws – the nature of the drafting process and the political issues at stake ensured that. However, we have now reached a stage where the principle of individual criminal liability is established for those responsible for the most serious human rights violations, and where an institution has been established – on a permanent basis – to ensure the punishment of such individuals. The ICC, with independent prosecutors putting tyrants and torturers in the dock before independent judges, reflects a post-war human rights aspiration come true. Together with national courts acting in complement, the Court is a shining example of how human rights might be realised under international law. The vigour and energy with which Commonwealth States have supported the ICC is testament to the continuing relevance of the Commonwealth to the contemporary aspirations of the global community, one of which must be the eradication of impunity for international crimes.

Durban and London
6 December 2004

Part I: The International Criminal Court

Chapter 1

Håkan Friman and Darryl Robinson

Institutional Framework of the ICC

1 Introduction

The creation of the International Criminal Court (ICC) reflects the conviction of States that more consistent and effective enforcement of criminal justice is an essential component in deterring crimes and building stability. The creation of *ad hoc* international tribunals (the International Criminal Tribunals for the former Yugoslavia and Rwanda – ICTY and ICTR) and hybrid tribunals (in Sierra Leone, East Timor and Cambodia) were regarded as valuable steps. However, the *ad hoc* approach entails several disadvantages. Creating a new institution for each situation involves extensive delays, redundancies, inconsistencies and inefficiencies. A permanent institution should overcome these difficulties since it is already up and running, is ready to respond to future situations, accumulates expertise and experience, and ultimately should serve as a more consistent deterrent.

The ICC has a subject matter jurisdiction limited to the most serious crimes of concern to the international community as a whole, namely, genocide, crimes against humanity and war crimes. The crimes are very carefully defined in the Rome Statute of the ICC (Articles 6 to 8) and are discussed in detail in Chapter 3. For even greater precision, the definitions are further elaborated on in the 'Elements of Crimes', a set of guidelines adopted by the States Parties.

The ICC Statute rests on the principle of 'complementarity', which means that the Court shall not substitute the primary responsibility of States to deal with crimes of the kind that also fall under its jurisdiction. Hence, a case is inadmissible before the ICC if a State is genuinely investigating or prosecuting it, or has done so.[1] The principle of complementarity is discussed further in Chapter 2 of this Guide.

The temporal jurisdiction of the Court is limited to crimes occurring after the date of entry into force of the Statute, namely 1 July 2002.[2] Thus the Court is not a remedy for crimes of the past, which must be addressed by national, other international or hybrid initiatives.

Because the crimes within the jurisdiction of the ICC are those generally recognised as giving rise to universal jurisdiction, it would have been legally feasible to vest the Court with universal jurisdiction over such crimes, since the Court reflects a collective exercise of jurisdiction by the States Parties. Nonetheless, in recognition of the position of some cautious States, the Rome Conference for the creation of the ICC limited the jurisdiction of the Court to those bases most clearly established in criminal law: (1) the territorial principle and (2) the active nationality principle Thus, the Court may act only where its

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1 Article 17, Rome Statute of the ICC. Articles cited in the footnotes in this chapter are from the Statute unless otherwise indicated.

2 Article 11.

jurisdiction has been accepted by the State on whose territory the crime occurred or the State of nationality of the person accused. Acceptance of jurisdiction may be provided automatically, by virtue of being a State Party, or may be provided by a non-State Party making a declaration of acceptance of jurisdiction.[3] In addition to these two bases, the Court may also act with respect to any situation referred to it by the United Nations (UN) Security Council, acting pursuant to Chapter VII of the UN Charter.[4] These and other principles of jurisdiction are discussed in the next chapter.

The judges of the Court are elected by the Assembly of States Parties. The 18 judges elect three of their number to serve as the Presidency (composed of the President and the First and Second Vice-President). The Presidency is responsible for the proper administration of the Court, with the exception of the Office of the Prosecutor.[5]

The judges are divided into an Appeals Division, a Trial Division and a Pre-Trial Chamber Division.[6] They are responsible for the judicial functions of the Court, namely, ensuring the conduct of fair, effective and open proceedings in accordance with the Statute and other relevant legal instruments and, in so doing, safeguarding the rights of all parties.

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.[7] The OTP is headed by the Prosecutor, who has full authority over its management and administration.[8] However, in the interests of efficiency and consistency, the Prosecutor relies extensively on the Registry for administrative services.

The Registry is responsible for the non-judicial aspects of the administration and servicing of the Court, without prejudice to the functions and powers of the Prosecutor. The Registry is headed by the Registrar, who is elected by the judges and who exercises his or her functions under the authority of the President of the Court.[9]

An Assembly of States Parties oversees the work of the Court. This provides management oversight, considers and decides the budget for the Court, conducts elections and performs other functions. The Assembly meets at least once per year.[10]

Although it is distinct from the UN, the ICC was created under its auspices and is designed to have a close and constructive relationship with it.[11] This is reflected *inter alia* in the provisions for Security Council referrals of situations to the Court, Security Council requests for deferral of proceedings[12] and the UN's role in the enforcement of ICC judgements.

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3 Article 12.

4 Article 13(b).

5 Article 38(3)(a).

6 Articles 34 and 39.

7 Article 42(1).

8 Article 42(2).

9 Article 43.

10 Article 112.

11 A relationship agreement between the Court and the UN has been concluded. See Article 2.

12 Article 16.

2. Key Aspects of ICC Procedures

2.1 Pre-investigation: triggering mechanisms, analysis and collection of information

An ICC investigation may be triggered in three different ways: (1) by a referral from a State Party, (2) by a referral from the Security Council or (3) by the Prosecutor, acting on his or her own initiative (*proprio motu*) on the basis of information from any source.[13] In each of these situations, the OTP is required to carry out certain steps before an investigation can be initiated.

The alternative of *proprio motu* initiation of an investigation by the Prosecutor is an extremely important mechanism under the ICC Statute. Any individual or organisation may submit information on alleged crimes to the Prosecutor. The Prosecutor is obliged to protect the confidentiality of the information provided, to analyse all such communications and to provide a response once a determination is reached. The OTP may seek additional information where this is needed in order to reach a determination as to whether or not there is a reasonable basis on which to proceed.

Where the Prosecutor decides to proceed, he or she may seek authorisation from the Pre-Trial Chamber to commence an investigation. In order to grant the request, the Chamber must also be satisfied that there is a reasonable basis to proceed with an investigation and determine that the case appears to fall within the jurisdiction of the Court.[14]

Where a referral of a situation is received from the Security Council or a State Party, the OTP must analyse the information, and the Prosecutor shall initiate an investigation, unless he or she determines that there is not a reasonable basis to do so. This decision does not require an authorisation by the Pre-Trial Chamber, but the Chamber may review the Prosecutor's decision in certain circumstances.[15]

Regardless of the trigger mechanism, the basic test is the same: whether there is a reasonable basis to proceed.[16] In making this determination, the Prosecutor (and, where engaged, the Pre-Trial Chamber) is required to consider not only whether: (1) there is a reasonable basis to believe that a crime under the Statute has been or is being committed and (2) the case is or would be admissible in accordance with the complementarity criteria, but also whether (3) taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve "the interests of justice".[17]

The first criterion requires that the OTP have sufficient information regarding the possible crime(s). The second criterion requires a consideration both of the gravity of the situation

13 Article 15.

14 Quite detailed information will also have to be submitted to the Chamber together with the request, see Regulation 49 of the Court Regulations.

15 The Statute provides scope for the Pre-Trial Chamber to review a decision by the Prosecutor not to proceed. See Article 53(3).

16 Rule 48 of the Rules of Procedure and Evidence (RPE), referring back to the criteria set forth in Article 53(1).

17 Article 53(1).

as well as any ongoing or previous national investigations or prosecutions.[18] The third criterion contains an important aspect of prosecutorial discretion, and includes an assessment of the gravity of the crime, the interests of victims and various other considerations, such as the age or infirmity of the alleged perpetrator.[19]

In order to assess these rather complex factors and determine whether an investigation should be commenced upon the referral, the Prosecutor will in general need to collect additional information. This is an arduous task, requiring:

- information on the alleged crimes;
- knowledge of the legal and other circumstances in the State in question;
- national proceedings taking place;
- the security context;
- any relevant local or international initiatives; and
- the views and concerns of local and international actors.

Thus, even before a determination can be reached on whether to start a formal investigation, it is necessary that the OTP carry out considerable analysis and obtain access to relevant information. Assistance and co-operation by States, international and non-governmental organisations (NGOs) and others is therefore essential.

2.2 Investigations

2.2.1 General obligations of the OTP

The OTP must carry out both investigations and prosecutions. This role differs from that of prosecutors in common law criminal justice systems, but coincides with that of the prosecutor in the ICTY and ICTR and indeed a good number of civil law criminal justice systems. Lawyers, analysts and investigators, as well as other professionals, will work in close co-operation during the investigation. Special teams will be established for each investigation. In addition, the investigation should be targeted, and considerations of what is needed for prosecution and trial will guide the work throughout. Hence, trial attorneys will also take part in order to lay the basis for a smooth transition from investigation to prosecution.

Unlike the ICTY, ICTR and many domestic legal systems, however, the role of the ICC Prosecutor is not solely to seek sufficient evidence for a prosecution and conviction. Instead, the mandate of the OTP is to "extend the investigation to cover all facts" and "investigate incriminating and exonerating circumstances equally" in order to "establish the truth".[20] This is a much broader task, based on a principle of objectivity. While appearing almost overwhelming, it could, properly applied, save time and effort, *inter alia* by reducing and avoiding late amendments or withdrawals of charges and even discontinued trials.

18 Article 17.

19 Article 53(2)(c).

20 Article 54(1)(a).

Collecting and examining evidence is the main exercise performed by the OTP during the investigation. The Prosecutor is also entitled to request the presence of and to question persons being investigated, victims and witnesses.[21] Primarily, this is to be done with the assistance of States through means similar to inter-State co-operation. However, the Prosecutor also has the right to take certain non-coercive measures on the territory of a State.[22] Under very limited circumstances, the OTP may also take specific investigative steps on site with the authorisation of the Pre-Trial Chamber.[23] In addition, special arrangements can and will be made with States to allow further OTP presence and work in territories where this is necessary.

2.2.2 Role of the Pre-Trial Chamber

The world's legal systems take different approaches as to the involvement of judges in investigations. The ICC Statute represents a compromise in this respect, providing a certain defined role for the Pre-Trial Chamber.

The Pre-Trial Chamber considers challenges concerning jurisdiction and admissibility, and it can consider such issues on its own motion.[24] At the request of the Prosecutor, it may issue arrest warrants, summons to appear and other orders and warrants as may be required for an investigation.[25] The Chamber may also, upon request, take steps and seek co-operation to assist the defence.[26] It may provide for protection and privacy of victims and witnesses, protection of arrested persons and protection of national security information. It may also seek forfeiture orders for the benefit of victims.[27]

The Pre-Trial Chamber has an important role to play concerning so-called 'unique investigative opportunities'.[28] The Prosecutor must alert the Chamber to such opportunities. It has powers to intervene to ensure the efficiency and integrity of the proceedings and in particular to protect the rights of the defence. Such measures can include making recommendations or orders regarding procedures, the appointment of experts, authorising counsel to represent a suspect and taking steps to collect or preserve evidence.

2.2.3 The principle of complementarity

As noted above, the prospect of national proceedings must be considered by the OTP in the decision as to whether to initiate an investigation. In addition, once an investigation is initiated, the State of territoriality or nationality shall be alerted and afforded a chance

21 Article 54(3).

22 Article 99(4).

23 Articles 54(2)(b) and 57(3)(d).

24 Articles 18 and 19.

25 Article 57(3)(a).

26 Article 57(3)(b) and Rule 116.

27 Article 57(3)(c).

28 Article 56.

29 Article 18. This does not apply, however, in the case of a Security Council referral.

30 Article 19.

to claim the right to investigate and prosecute.[29] In accordance with the ICC Statute,[30] States and suspects may also, at any stage, challenge the admissibility of the case. Admissibility will be an issue throughout any proceedings up until the initial appearance before the Court.

2.2.4 Co-operation with States and others

Lacking a police force – and often lacking access to crime scenes, archives and witnesses – the Prosecutor will have to rely extensively on the co-operation of States and other entities. This topic is dealt with extensively in Chapter 4 of this Guide.

In brief, the Prosecutor has independent powers to make requests, which must be adhered to in accordance with Part 9 of the Statute, but may also approach the Pre-Trial Chamber on such matters.[31] The co-operation may relate to a very wide range of measures. Special provisions apply with respect to arrest and surrender of suspects. Co-operation concerning arrest and surrender will be of utmost importance, particularly since the presence of the accused is a precondition for trial.[32]

The Prosecutor may also enter into arrangements or agreements that may be necessary to facilitate the co-operation of a State, intergovernmental organisation or person.[33] Such arrangements and agreements are now being negotiated and concluded by the OTP.

In practice, co-operation will require extensive contact between the OTP and national authorities. In order to ensure that evidence is admissible, certain procedures or requirements will have to be met, for example, when a statement is taken or other evidence obtained.[34] OTP presence may be necessary during this process. Different legal and practical obstacles may arise and, in some States, national authorities may not have much experience of international legal assistance. Both informal and formal consultations will need to take place. Of particular importance is that States Parties meet their obligation to ensure that there are domestic procedures available for all forms of co-operation under the Statute.[35] In most States, this will require special legislation.[36]

The most important co-operation partners will be States, but other partners are also essential. International organisations may provide invaluable information and material, as may other organisations and groups. For example, extensive co-operation between the ICTY and the armed forces – drawn from across the international community – that were present in the Former Yugoslavia has taken place. In addition, facilitation of co-operation may take other forms, such as providing the OTP with special expertise.

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31 Articles 54(3)(c) and 57(3)(a).

32 Article 63.

33 Article 54(3)(d). In addition, the Court Regulations empower the President to conclude arrangements and agreements that relate to the whole Court (see Regulation 107).

34 See also Article 99(1).

35 Article 88.

36 The OTP is also developing clear and user-friendly routines and templates for co-operation requests, which should simplify and clarify many practical matters.

The ICC Statute lays down a scheme for the issue of arrest warrants by the Court,[37] which will thereafter be enforced by domestic law enforcement officers or local courts at the request of the ICC. Alternatively, a summons to appear may be issued for suspects. There are no other explicit provisions regarding warrants issued by the Court that provide for coercive measures. Instead, the States Parties are required to assist with such measures at the Court's request.[38] In addition, a Chamber (primarily the Pre-Trial Chamber) may, at the Prosecutor's request, issue such orders and warrants as may be required for the purposes of an investigation. It is unclear whether coercive measures could flow from such orders and warrants and it is likely that this will be determined through practice.[39]

2.2.5 Confidentiality

Confidentiality is a difficult question in criminal proceedings. On the one hand, providers of sensitive information, for example, military intelligence or information that may put people at risk, will require confidentiality as a prerequisite for the provision of any such material. On the other hand, the rights of the suspect or accused must be protected and judicial functions concerning supervision and control must be allowed. The question is particularly pronounced in international proceedings, and requests for confidentiality are often put to the OTP. The co-operation regime of the Rome Statute allows States to withhold national security information and permits transmission on condition that sensitive material is used by the OTP solely for generating new evidence.[40] The Prosecutor may agree not to disclose, at any stage, material obtained with conditions attached and to take measures to ensure confidentiality.[41]

2.2.6 From investigation to prosecution

The decision whether to prosecute requires a determination of the strength of the evidence, as well as a new review of admissibility questions and considerations of "the interests of justice", including the personal circumstances of the accused.[42]

The drafting of charges poses a particular challenge with respect to international crimes and international criminal proceedings, as the case law of the ICTY and ICTR makes clear. Moreover, important provisions relating to the legal effect of the charges and amendments thereto are not entirely unambiguous and will have to be resolved by the Court in due course.

Once charges have been confirmed by the Pre-Trial Chamber and the case is transmitted to the Trial Chamber,[43] further preparations will be needed before the case is trial ready.[44]

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37 Article 58.

38 Article 93.

39 The legal basis being Article 57(3)(a).

40 Articles 72, 73 and 93(4) (national security information) and 93(8)(b) (conditions).

41 Article 54(3)(e) and (f).

42 Article 53(2).

43 Article 61.

44 Article 64.

2.3 Trials and appeals

2.3.1 General

Trials take place before the Trial Chamber, which is mandated to ensure that the trial is fair, expeditious and conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses. Trials are held in public and in the presence of the accused, other than in certain exceptional cases.[45]

The Prosecutor, as well as the Court as an institution, has a clear interest in short proceedings. The length and complexity of the ICTY and ICTR proceedings have affected the reputation of these tribunals and indeed international criminal justice as a whole. The procedural scheme of the ICC provides opportunities to do things differently, which may mean a reduction in the length of the proceedings.[46]

In international criminal trials, many decisions are appealed, not least by way of interlocutory appeals. One reason for this is that, given that international criminal law is in its infancy, many unresolved legal issues remain that may need authoritative resolution. The ICC Statute makes an effort to limit the scope for such appeals.[47] Regarding judgments, both the Prosecutor and the convicted person are entitled to appeal.[48] The appeals work is, in the experience of the ICTY and the ICTR, very demanding for the Office of the Prosecutor and the ICC will be no exception.

2.3.2 Disclosure

Different legal traditions take very different views as to how the disclosure of evidence should be conducted. In civil law systems all evidence is collected in a 'dossier', which is available to the judge. Common law systems operate more complex schemes for disclosure between the parties. The conduct of the trial is also different. Initially, the procedures of the ICTY and the ICTR were rather civil law-oriented, but over time the judges felt the need for tighter control over the proceedings and a more common law-influenced approach is now discernable.

Taking these experiences into account, the ICC will apply a more mixed regime, and some important questions will have to be resolved in case law.[49] One clear intention, however, is that much of the disclosure is intended to take place before the charges are confirmed and the case remitted for trial.

A related issue is the enormous volume of material that cases of the type prosecuted before the ICC may generate. This difficulty can be reduced through the pursuit of focused investigations (bearing in mind the principle of objectivity) as well as the use of electronic databases in effecting disclosure.

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45 Articles 63 and 64(7).

46 See the Report of the informal working group of experts on length of proceedings, available at http://www.icc-cpi.int/otp/otp_proceedings.html.

47 Article 82.

48 Article 81.

49 Rules 76-84 of the RPE.

2.3.3 The role of the defence

The ICC Statute contains explicit provisions on the rights of the suspect and the accused – inspired by international human rights instruments such as the International Covenant on Civil and Political Rights. These provide for the right, *inter alia*, to legal assistance.[50] The right to counsel of the suspect's or accused's choosing applies during the process of questioning in the investigation (by the OTP or by national authorities on behalf of the Court) and in proceedings from the first appearance before the Pre-Trial Chamber to any final appeal.[51] A defence counsel may also be appointed in relation to a so-called 'unique investigative opportunity'[52] and at any time after arrest to assist in proceedings before the Court concerning the arrest.[53]

Additional provisions on the assignment of legal assistance, including the required qualifications of counsel, are laid down in the Rules of Procedure and Evidence (RPE)[54] and the Regulations of the Court.[55] Counsel shall be selected from a list established by the Registrar. The Registrar's decision to refuse a request for assignment of counsel may be reviewed by the Presidency. Free legal assistance shall be provided to a person who has insufficient means to pay for it. The Regulations also establish an Office of Public Counsel for the defence to take on specified tasks.[56] Moreover, the Registrar has a duty to organise the Registry in a manner that promotes the rights of the defence and to provide assistance, advice and other facilities.[57]

A Code of Professional Conduct is currently being drafted by the Presidency and will be adopted by the Assembly of States Parties.[58] This task is being performed in close consultation with representative bodies of counsel, legal associations and others.

The prosecution and the defence are in general adversarial parties in criminal matters, but their practical interaction may take quite different forms. As already mentioned, the Prosecutor's obligation to investigate objectively provides a possibility for early interaction and intervention by the defence. The defence may request the OTP to take specific measures and also turn to the Pre-Trial Chamber for assistance. The defence is entitled to assert its right to remain silent throughout any investigation or prosecution before the ICC.

Another important feature is that the defence may have an influence on the trial procedures through agreement with the OTP. For example, while the presiding Judge retains a decisive role concerning the conduct of the trial, it is possible for the parties to

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50 Articles 55(2)(c) and 67(1)(d).

51 Rule 121(1) of the RPE.

52 Article 56(2)(d).

53 Rule 117(2) of the RPE.

54 Rules 20 to 22.

55 Regulations 67 to 85.

56 Regulation 77.

57 Rule 20.

58 Rule 8.

agree on the order and manner in which the evidence is to be submitted.[59] They may also conclude a statement of agreed facts, which the Chamber may treat as proved.[60]

2.3.4 The role of victims

A key feature of the Rome Statute is the extensive consideration given to victim protection, representation and reparations.

The Statute requires all organs of the Court to protect victims and witnesses, and the Rules of Procedure and Evidence set out more detailed schemes for protective and special measures.[61] Additionally, the Prosecutor has a duty to respect the interests and personal circumstances of victims (and witnesses) when conducting the investigations and prosecutions.[62]

In fact, the safety and security of victims and witnesses is a major concern in investigations of this kind. The hostilities that have given rise to the commission of the crime(s) may be ongoing and, since it does not have its own police force, the ICC will have to rely on external assistance. Criminal courts in general – and the ICTY and the ICTR are no exceptions – tend to rely heavily on live evidence from witnesses. With a large number of interviews during the investigation and many witnesses called to appear before the Court, the issue of protection may become a serious problem. One strategy that is being developed is to find ways and means to minimise the number of interviews and live appearances at the Court, thereby avoiding the exposure of large numbers of victims and witnesses to threats and intimidation.

A much-hailed feature of the ICC is the role afforded to victims as direct participants in the proceedings. Unlike the situation with the ICTY and the ICTR, victims are entitled to standing in their own right and in their own interests, to participate in the criminal proceedings and even to claim reparations. An unresolved issue is whether and how the OTP and the Registry will take measures during the investigation that would assist victims with respect to claims for reparations. Another matter that will have to be resolved in practice is how the potentially quite far-reaching provisions on the participation of victims in the proceedings[63] will be implemented.

For the purpose of victims' participation in the proceedings, the Court may assign legal representatives to them. The qualifications required to act as a legal representative for a victim are the same as those for defence counsel, and a victim's legal counsel is allowed to participate more extensively in the proceedings than an unrepresented victim.[64] An Office of Public Counsel for victims is in the process of being established.[65]

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59 Article 64(8)(b) and Rule 140.

60 Rule 69.

61 Article 68 and Rules 87 and 88.

62 Article 54(1)(b).

63 Article 68(3) and Rules 89-93.

64 Rules 90 and 92. See also Regulations 77 to 82.

65 Regulation 81.

3. Major Developments

3.1 Election and recruitment

The Judges of the Court were elected by the Assembly of States Parties in 2003. They include eleven men and seven women and represent all regions of the world. From among their numbers, the Judges elected Mr Philippe Kirsch of Canada to serve as President, Ms Akua Kueyehia of Ghana as First Vice-President and Ms Elizabeth Odio Benito of Costa Rica as Second Vice-President.

Mr Luis Moreno Ocampo of Argentina was elected to serve as the Prosecutor, and he took office in June 2003. The Deputy Prosecutors are Mr Serge Brammertz of Belgium, who will be responsible for investigations, and Ms Fatou Bensouda of The Gambia, who will be responsible for prosecutions. Mr Bruno Cathala of France was selected by the Judges to serve as the first Registrar of the Court.

Pending the construction of a permanent, dedicated headquarters for the ICC, the Court has been established in interim premises in The Hague, in a building formerly belonging to a telecommunications company. The building has undergone modifications to provide for the necessary security requirements and courtroom facilities. Recruitment is continuing at a rapid pace. The number of staff is expected to grow to 489 as of the end of 2005. The infrastructure is in place to bring the Court from theory to reality, including courtrooms, security and the information technology framework for an 'electronic Court'.

3.2 Policies and regulations

The OTP has carried out an extensive and open consultation process in order to develop and articulate its major policies and strategies. This included public hearings and the circulation of a draft policy paper for discussion there and at the Assembly of States Parties. It also included rounds of expert consultations with over 125 criminal justice experts on issues such as length of proceedings, investigation and State co-operation, and complementarity in practice.[66] Other consultative processes have included meetings with NGOs and posting information on the ICC website for comment. In addition to the basic policy paper,[67] the OTP has prepared an annex explaining how it analyses referrals and communications.[68]

Some of the key elements of this policy include:

- A positive approach to complementarity. Rather than competing with national systems for jurisdiction, the OTP will seek to encourage and facilitate genuine national proceedings wherever possible.
- A proactive approach to co-operation, forging links and working in tandem with the international community, including States Parties and other supportive States, international organisations and civil society.

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66 The informal expert reports are available at http://www.icc-cpi.int/otp/otp_expconsult.html.

67 *Paper on some policy issues before the Office of the Prosecutor*, available at http://www.icc-cpi.int/library/organs/otp/030905_Policy_Paper.pdf.

68 *Annex to the "Paper on some policy issues before the Office of the Prosecutor": Referrals and Communications*, available at http://www.icc-cpi.int/library/organs/otp/policy_annex_final_210404.pdf.

- A policy of targeted prosecution, focusing on those who bear the greatest responsibility for the commission of international crimes.
- A strategy to produce short investigations, focused indictments and expeditious trials.
- A small and flexible office, relying on extensive networks of support involving States, civil society, multilateral institutions, academics and the private sector.
- An interdisciplinary investigative approach, bringing together diverse profiles.

The OTP has recruited professionals from a wide range of fields, including investigators, analysts, trial attorneys, lawyers experienced in criminal law and in international law, and experts in co-operation and international relations. The joint team structure brings these diverse experiences to bear on the complex problems of carrying out investigations in the most challenging environments.

Investigation teams are assembled for each case, with a composition and specific investigation plan designed to respond to its unique circumstances. In addition to close co-operation between investigators, analysts and experts, trial attorneys are also closely involved in order to lay the groundwork for a smooth transition from investigation to prosecution. The desired result is focused and efficient investigations, sensitive to the local situation.

The Judges have issued further directions for criminal procedures and the ICC's internal work in the Regulations of the Court.[69] In addition, the Judges are considering general topics such as approaches to the complementarity principle, victims' participation in the proceedings and principles to apply with respect to reparations to victims. Pre-Trial Chambers with fixed composition have been constituted.[70]

The Registry has developed the policies and procedures pertaining to essential issues such as defence, detention, victims, witnesses, counsel, court management and information technology. It has also commenced work towards agreements with States on issues such as witness protection and the enforcement of sentences.

3.3 Analysis and investigations

The OTP has adopted procedures and standards for the analysis of information and has put in place the personnel and technology to carry this out. As at October 2004 the OTP had already received over 1,000 communications concerning alleged ICC crimes. The great majority of these communications were manifestly outside the jurisdiction of the Court, and therefore received a response with reasons for the decision not to proceed. Other communications warranted further attention, and acknowledgements have been sent explaining that additional analysis will be carried out. Analysis can take some time, given the need to gather sufficient information on the three criteria as explained above in section 2.1. The OTP has announced that, in addition to the two situations for which investigations were initiated (see Box 1.1), it is analysing six other situations of interest.

69 Article 52.

70 Decision by the Presidency of 23 June 2004 (ICC-Pres-01/04).

Box 1.1: Investigations Being Undertaken by the ICC

The Office of the Prosecutor (OTP) has received its first two referrals from two States Parties, namely Uganda and the Democratic Republic of the Congo (DRC). Both have referred situations within their own territory. The possibility of 'self-referral' was certainly not at the forefront of the minds of delegates when the Statute was adopted, but it is a promising indication of the value of and need for the Court. Even with self-referrals, the Prosecutor must still consider the formal requirements of Article 53, as discussed above. However, such referrals do carry with them strong expectations of support and co-operation.[71]

The first referral was received from the Government of Uganda. Although the referral mentioned the situation concerning crimes alleged to have been committed by the Lord's Resistance Army, the scope of the referral was interpreted in accordance with the principles of the Rome Statute as covering any crimes (including those alleged to have been committed by government forces in northern Uganda) within the jurisdiction of the Court.

The second referral was received in March 2004 from the Government of the DRC. The OTP has been closely analysing the grave crimes being committed in that country, particularly in the Ituri region, since July 2003.

In both situations the OTP collected the necessary additional information and completed the analysis required under Article 53, and the Prosecutor determined that there was a reasonable basis to initiate an investigation. In June 2004 the Prosecutor announced the opening of the investigation into crimes committed in the DRC, and in July 2004 he announced the opening of the investigation into crimes committed in northern Uganda. The Presidency has assigned the two investigations to be dealt with by different Pre-Trial Chambers.[72]

The OTP has carried out several missions to the field in order to build co-operation and to collect information and evidence in these cases. Co-operation agreements have been signed with both Uganda and the DRC and investigations are underway.

3.4 Challenges

The ICC will continue to develop its policies and procedures as it encounters unique and unprecedented obligations and challenges. For example, the Court includes prosecutorial and judicial organs with distinct roles that must remain independent from one another, out of respect for both the Statute and the rule of law. At the same time, it is a single institution and must ensure co-ordination on issues of general strategy, external relations, public information and outreach, administration and victims policies.

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71 See also *Remarks by ICC Prosecutor Luis Moreno Ocampo at the 27th Meeting of the Committee of Legal Advisers on Public International Law (CADHI),* Strasbourg, 18-19 March 2004 (available at http://www.icc.now/documents/statements/others/ICCProsecutorCADHI18Mar04.pdf).

72 Decisions by the Presidency of 5 July 2004 (ICC-01/04 and ICC-02/04).

The Court will also need to build concrete co-operation with States, including not only prompt compliance with obligations but also support going beyond legal obligations. Without this, it cannot succeed.

The ICC will be operating in situations that pose unprecedented difficulties – situations of ongoing conflict, extreme violence and fragile or even a complete lack of stability. In such contexts it is difficult to collect even basic reliable information, let alone to acquire admissible evidence, to obtain custody of suspects, to provide victim protection and to achieve all of this while complying with the stringent requirements of the Statute in a cost effective, rapid manner. Success will require innovation and steadfast political support.

Chapter 2

Ben Brandon

Jurisdiction and Complementarity

1 Introduction

For many of us familiar with domestic criminal justice systems in common law countries, the term 'jurisdiction' has a limited meaning. It is a term rarely used in day-to-day practice. Unless you work or practice in a country organised along federal lines, or have experience of international criminal law, the meaning of jurisdiction is usually confined to a discussion of the authority of a court or tribunal to adjudicate over a particular offender or offence. In international criminal law, however, the term often has multiple and inter-linked meanings, which this chapter sets out to disentangle and explain.

Under international law, jurisdiction has been described as having three constituent elements or powers: the power to prescribe, the power to adjudicate and the power to enforce.[1]

1 *Prescriptive jurisdiction* is the power of States to make law and to determine the reach of that law.
2 *Adjudicatory jurisdiction* is a term used to describe the ability to subject a person (or thing) to proceedings in a court of law, which adjudicates upon issues brought before it by parties who have the standing to do so.
3 *Enforcement jurisdiction* reflects the power of a State to compel compliance with its laws and to redress non-compliance, whether through the courts or the executive, within the jurisdictional reach afforded to either institution by the prescriptive power of the State's law-making institutions.[2]

These powers are reserved to States and are used to preserve peace within the territory of a State and provide a degree of protection and security for its nationals and their private property from both internal and external threats.

Having described what the constituent elements of jurisdiction are, it is then necessary to understand where, and over whom, jurisdiction can be exercised. We are primarily concerned with the exercise of criminal jurisdiction over individuals (since criminal liability, both at a domestic and international level, usually attaches to an individual rather

1 Cherif Bassiouni, 'Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice', 42 *Virginia Journal of International Law* 89 (2001). Also, see *Restatement (Third) Foreign Relations Law of the United States* (1987), pp 232, 235-238; Georges Abi-Saab, 'The Proper Role of Universal Jurisdiction', 1 *Journal of International Criminal Justice* 596-602 (2003); Louse Arbour, 'Will the ICC have an Impact on Universal Jurisdiction?', 1 *Journal of International Criminal Justice*, 585-588 (2003); and Antonio Cassese, 'Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction', 1 *Journal of International Criminal Justice* 589-595 (2003).

2 Kenneth Randall, 'Universal Jurisdiction Under International Law', 66 *Texas Law Review* 785 (1988).

than a group).[3] An additional factor to take into account is the nature of the alleged crime and, in particular, whether it is an international crime.

Where a State, through its law officers or courts, exercises jurisdiction over a crime committed entirely in its own territory by one of its nationals, there is rarely any need to resort to international law and consider applicable principles of jurisdiction. However, the growth of mass transit and global commerce, together with the spread of international crime, has meant that States increasingly seek to exercise jurisdiction beyond their own borders. In doing so, they must have regard to what is permitted in international law, which has developed principles of jurisdiction to ensure that the exercise of domestic penal authority does not conflict with the general desire for harmony and order in the relations between States. Throughout this discussion of different and differing theories of jurisdiction, it is important to bear in mind that a balance must be struck between a State's interest in the offence, and the interests of other States in the offence.

States bring persons accused of having committed crimes before domestic courts under one of the four generally recognised principles of jurisdiction in international law: (1) territoriality, (2) active nationality, (3) passive nationality and (4) universal jurisdiction. Many States rely on more than one principle of jurisdiction in their administration of justice, depending on the nature of the crime alleged to have been committed.

2 Principles of Jurisdiction

2.1 The territorial principle

Until relatively recently, the majority of States only asserted jurisdiction over criminal acts when such acts were said to have been committed on their own territory. Crimes committed abroad were a matter for the forum State (i.e. the State where they occurred). This was particularly true of States that inherited the English common law approach, as articulated by Viscount Simonds in *Cox v. Army Council*:

> "… apart from those exceptional cases in which specific provision is made in regard to acts committed abroad, the whole body of the criminal law of England deals only with acts committed in England."[4]

In the vast majority of criminal cases, the UK and many other Commonwealth States continue to exercise jurisdiction on the basis of the territorial principle. Territorial jurisdiction is certainly consistent with two important rules or 'peremptory norms' of

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3 See Article 25 of the Rome Statute. Also see discussion of personal as opposed to corporate liability in Kenneth Gallant, 'Jurisdiction to Adjudicate and Jurisdiction to Prescribe in International Criminal Courts', 48 *Villanova Law Review* 763 (2003) at 799.

4 Cox v. Army Council (1962), 46 *Cr.App.R.* 258 (1963).

international law (*jus cogens*),[5] enshrined in the Charter of the United Nations: (1) the equality of sovereign States and (2) the principle of non-intervention.[6]

The relationship of these two rules to the question of criminal jurisdiction was considered by the Permanent Court of International Justice at The Hague in the *Lotus Case* (1927).[7] The Court held that:

> "The first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised outside its territory except by virtue of a permissive rule derived from international custom or from a convention."

Having stated this general proposition, however, the Court then went on to find that international law did not prohibit States from extending the application of their laws and the jurisdiction of their courts to persons, property or acts outside their territory, and indeed allowed a wide measure of discretion to do so. As a consequence, it found that:

> "Though it is true that in all systems of law the principle of the territorial character of criminal law is fundamental, it is equally true that all or nearly all the systems of law extend their action to offences committed outside the territory of a State which adopts them, and they do so in ways which vary from State to State. The territoriality of criminal law, therefore is not an absolute principle of international law, and by no means coincides with territorial sovereignty."

The *obiter dicta*[8] of the *Lotus Case* cleared the path for more contemporary assertions of jurisdiction by States, which are explored in greater detail below. But the attraction of criminal justice systems based on the territorial principle of jurisdiction remains.

- First and foremost, exercising jurisdiction by taking action in the territory of another State (for example, by arresting a suspect without the knowledge of the host State) not only potentially falls foul of international law but may present a threat to the stability of the international legal order.

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5 The definition of peremptory norms that appears at Article 53 of the Vienna Convention on the Law of Treaties 1969 is the most succinct:

"A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

Jus cogens means 'compelling law' that may not be violated by any State.

6 Article 2.1: The Organisation is based on the principle of sovereign equality of all of its members.

Article 2.4: All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State.

Article 2.7: Nothing contained within the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State….

7 *The Case of the "SS Lotus",* Series A - No. 10 PCIJ 1927.

8 Judicial opinions that have only incidental bearing on the case in question and are therefore not binding.

- Secondly, there are sound practical reasons for investigating and prosecuting crimes in the territory of the State where the offence was committed, including the availability of witnesses, a common language and a shared culture of justice. There is a degree of predictability and consistency in the administration of justice, as well as a reduced danger of exposing the same person to multiple proceedings in different jurisdictions.[9]

However, there are also disadvantages to the territorial model. It is best suited to simple crimes committed in one jurisdiction. The greatest threats posed to international peace and security by criminals and the organisations to which they belong are terrorism, drug trafficking, human trafficking, financial crime and money laundering. These crimes are often committed in multiple jurisdictions, with different elements of the criminal act occurring in different countries and time zones. The law-making institutions of many States have responded to these threats by developing new and innovative approaches to the problem of jurisdiction that do not rely to the same extent on a link between the territory of the State and the crime committed.

UK lawmakers, for example, have responded to the threat of international crime by creating new offences that are justiciable in English courts, even though part or all of the criminal act complained of takes place outside UK territory. For instance, Part 1 of the Criminal Justice Act 1993 allows offences of dishonesty to be tried in the UK provided that any of the relevant events (being acts or omissions necessary to prove the commission of a criminal offence) occurred in England or Wales.[10]

2.2 The principle of active nationality

Some States have always asserted jurisdiction over their nationals if they commit crimes, regardless of where the crime is committed. This principle is usually subject to the double criminality rule, in that the act must be proscribed in both the territory of the State that asserts jurisdiction over its national and the territory of the State where the crime is said to have been committed.

States that rely on the active nationality principle in asserting jurisdiction over crimes committed by their nationals also tend to exhibit a reluctance to extradite their nationals when called upon to do so by the State in whose territory the crime was committed. Indeed, in some instances there may be constitutional prohibitions that prevent the extradition of nationals. The corollary of such a prohibition is that provision must be made in the laws of the enforcing State to prosecute its citizens, even when the crime was committed abroad.

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9 See Cherif Bassiouni, note 1 above.

10 The courts too have developed their own response to the threats posed by international crime. The Privy Council observed in *Liangsiriprasert v. The United States Government* (1991), 92 *Cr.App.R.* 77 at 90, that:

> "Crime is now established on an international scale and the common law must face this new reality. Their Lordships can find nothing in precedent, comity or good sense that should inhibit the common law from regarding as justiciable in England inchoate crimes committed abroad which are intended to result in the commission of criminal offences in England."

Certain States assert nationality-based jurisdiction for more serious crimes. For example, in the United Kingdom, there has been a statutory exception to the territorial principle in the case of murder and manslaughter committed by UK nationals abroad since the middle of the nineteenth century.[11] Box 2.1 offers an American example.

Box 2.1: The United States Military Extraterritorial Jurisdiction Act

In view of the increasing deployment of United States service personnel and their civilian auxiliaries in foreign States in the 'war against terror', it is interesting to note the extraterritorial impact of the United States Military Extraterritorial Jurisdiction Act 2000. This Act establishes federal jurisdiction over felony offences allegedly committed outside of the USA by persons employed by or accompanying the armed forces "if such acts would constitute an offence punishable by imprisonment of over one year if they had been committed within the special maritime and territorial jurisdiction of the United States" (18 USC §§ 3261-3267). US servicemen have been subject to the extraterritorial jurisdiction of military courts for many years. The assertion of nationality-based jurisdiction over non-combatant military personnel was introduced by the Clinton administration to close this long-established *lacuna*, but also in an effort to assist in negotiations with foreign States that either already had US bases on their territory or were about to.

2.3 The principle of passive nationality

In the last decade or so, States have increasingly asserted jurisdiction on the basis of passive nationality, where the enforcing State claims jurisdiction over crimes committed outside its territory when the harm that results from such acts is inflicted upon its citizens. This form of jurisdiction has historically proved controversial and has met with resistance, particularly from the United States.[12] In the *Cuttings* case, the US Secretary of State responded to Mexico's assertion of jurisdiction over a native of Texas for libel by denying "that a citizen of the United Sates can be held under the rules of international law to

11 See section 9, Offences Against the Person Act 1861:

> "Where any murder or manslaughter shall be committed on land out of the United Kingdom, whether within the Queen's dominions or without, and whether the person killed were a subject of Her Majesty or not, every offence committed by any subject of Her Majesty, in respect of any such case, whether the same shall amount to the offence of murder or of manslaughter...may be dealt with, inquired of, tried, determined and punished...in England or Ireland.... Provided, that nothing herein contained shall prevent any person from being tried in any place out of England or Ireland for any murder or manslaughter committed out of England or Ireland, in the same manner as such person might have been tried before the passing of this Act."

12 See Judge Moore's dissenting opinion in the *Lotus Case* (note 7 above, p 92), which argued that the passive personality principle is:

> "at variance not only with the principle of the exclusive jurisdiction of a State over its own territory, but also with the equally well settled principle that a person visiting a foreign country, far from radiating for his protection the jurisdiction of his own country, falls under the dominion of the local law and, except so far as his government may diplomatically intervene in the case of a denial of justice, must look to that law for his protection"

answer in Mexico for an offence committed in the United States simply because the object of that offence happens to be a citizen of Mexico."[13] As recently as 1979, United States Federal Courts rejected the passive personality principle as a jurisdictional basis in ruling that Congress was incompetent to impose criminal sanctions for the murder of a US citizen in a foreign State.[14]

The United States has performed something of an about-turn in the past decade or so. It increasingly asserts jurisdiction over crimes committed by foreigners against its citizens abroad in both criminal and civil cases where acts of terrorism have resulted in the loss of American lives. In 1986 Congress passed the Omnibus Diplomatic Security and Antiterrorism Act, which imposes the death penalty on any individual who, with the requisite terrorist intent "kills a national of the United States, while such national is outside the United States if the killing is murder". There are two possible reasons why lawmakers in the United States have changed their minds as to the utility of passive personality jurisdiction. First, there is the obvious need to protect their nationals living abroad. Second, there is a distrust of criminal justice systems in foreign territorial States, particularly where a State is considered to be a sponsor of terrorism.

Given the *dicta* in the *Lotus Case*, it has been argued that the principle of passive nationality is not recognised as a basis of jurisdiction prescribed under international law,[15] although the United States courts appear to have studiously avoided such debates in recent cases.[16]

2.4 Universal jurisdiction and international crimes

Simply put, universal jurisdiction is the exercise of jurisdiction by a State over a person who is said to have committed a limited category of international crimes, regardless of where the offence took place and irrespective of the nationality of the offender or victim. What distinguishes universal jurisdiction from the other forms of jurisdiction described here is that, for it to be a true expression of the principle, there need be no connection or link between the offender or the offence and the prosecuting or forum State.

2.4.1 The development of universal jurisdiction

Many jurists and writers have claimed that universal jurisdiction has a solid foundation in legal history, dating from seventeenth century laws prohibiting piracy on the high seas. It has also been said that, after 1945, the international community recognised that certain crimes were so abhorrent that they constituted crimes against the law of nations. As such, the perpetrators were enemies of humankind and could be prosecuted by any member of

13 John Bassett Moore, *A Digest of International Law,* para. 01 at 28-42 (1906), excerpted in Daniel G Partan, *The International Law Process* (1992), pp 292-297.

14 *United States v. Columbia – Colella,* 604 F. 2nd 356 (5th Circuit 1979).

15 See the chapter by Rudiger Wolfrum, 'The Decentralised Prosecution of International Offences Through National Courts' in Y Dinstein and M Tabory (eds), *War Crimes in International Law* (1996).

16 See Robinson, 'US Practice Penalising Terrorists Needlessly Undercuts Opposition to the Passive Personality Principle', *Boston University International Law Journal* 487 (Fall 1998).

the international community under the universal jurisdiction principle. Notwithstanding the confidence with which such claims are expressed, the existence of the principle of universal jurisdiction in international law is hotly disputed.

In order to establish whether or not an independent principle of universal jurisdiction exists in relation to certain categories of international crimes, it is necessary to consider the various sources of international law.[17] The legislation and case law of individual States are of particular value in attempting to resolve this dilemma. In this Guide, the emphasis will be on those States that are members of the Commonwealth, although there is valuable material to be found in the domestic criminal justice systems of Belgium, Germany, Spain and the United States that is also included. Also of importance are a number of international conventions, including the Geneva Conventions of 1949 and Protocols, the Genocide and Torture Conventions of 1948 and 1984 and the anti-terrorist conventions of the 1970s and 1980s. To return to the *dicta* in the *Lotus Case,* it is also necessary to ask of these various sources whether there is a rule in international law that prohibits national courts from exercising jurisdiction under the universal model or, alternatively, whether there exists an international law obligation on States to prosecute *jus cogens* crimes as and when they occur, irrespective of any link with the forum State.

Piracy is widely acknowledged as being the first international crime to attract universal jurisdiction. At a time when international law was in its infancy, States exercised jurisdiction over piratical acts committed on the high seas[18] even when there was no connection between the victims or perpetrators of the crime and the prosecuting State. Pirates were considered '*hostes humani generis*', or 'enemies of mankind', as their acts "disrupt commerce and navigation on the high seas" and "[s]uch lawlessness was particularly harmful when intercourse among States occurred primarily by way of the high seas, thus making piracy the concern of all States".[19]

A departure from jurisdictional principles premised on a link between the offence and the prosecuting State was therefore justified on the basis that prosecuting the 'enemies of mankind' using the universal jurisdiction principle was the joint concern of all States.[20]

Apart from the gradual emergence of the universal prohibition of slave trading in the late nineteenth century, universal jurisdiction as a principle in international law does not surface again until after World War II and, in particular, the Geneva Conventions of 1949. These invoked the universal principle as a basis for exercising jurisdiction with a view to safeguarding universal values.

In relation to war crimes, the Geneva Conventions and Protocols are the first in a long line of international conventions that came into force after 1945 and that are cited as evidence of a clear reliance on the principle of universality by States. However, it is equally clear that "no territorial or nationality linkage is envisaged [in the Geneva Conventions]

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17 See Article 38(1) of the Statute of the International Court of Justice.

18 That is, not in the territorial waters of the forum State.

19 Dubner, *The Law of International Sea Piracy* (1980), pp 157-159, quoted in Randall, note 2 above.

20 Cassese, *International Criminal Law* (2003), p 284.

suggesting a true universality principle".[21] Article 49 of Geneva Convention I, Article 50 of Geneva Convention II, Article 129 of Geneva Convention III and Article 146 of Geneva Convention IV all provide:

> "Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or have ordered to have committed,…grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case."

In the original commentaries to the Conventions, it was suggested that the obligation to search for offenders under this provision was limited to an obligation to search only on the territory of the forum State, hinting both at continuity with the orthodox territorial model and the balance that must be achieved between the exercise of national jurisdiction and the interests and territorial integrity of other States. The issue has never been resolved satisfactorily in a court of law as "there has been a remarkably modest corpus of national case law emanating from the jurisdictional possibilities provided in the Geneva Conventions".[22] It has been argued that customary international law "does not warrant the conclusion that universal jurisdiction has been applied in national prosecutions" for grave breaches of the Geneva Conventions, or war crimes in general.[23] Nonetheless, it is generally accepted that there is nothing in international law that prohibits national criminal jurisdictions from invoking the principle of universality when prosecuting war crimes.

The crime of genocide was also a creature of convention. Article VI of the Genocide Convention of 1948 provides:

> "Persons charged with genocide or any of the other acts enumerated in Article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction."

The operative jurisdictional principle in the Genocide Convention was clearly the territorial principle. It was in the minds of the original parties to the treaty that an international penal tribunal would be established shortly to deal with such crimes. Of course, no such tribunal came into existence until the International Criminal Court (ICC) in 1998, and this does not, as we shall see, exercise true universal jurisdiction over the crime of genocide.

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21 See Joint Separate Opinion of Judges Higgins, Kooijmans and Burgenthal in the International Court of Justice, *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium),* ICJ, 14 February 2002, para. 31. Contrast the observation of the dissenting Judges in the *Arrest Warrant Case (DRC v. Belgium)* with that of the Appeals Chamber in *Prosecutor v. Dusko Tadic (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)* 2 October 1995 (case No. IT-94-1-AR72), reprinted in 105 *ILR* 419 (see http://www.un.org/icty/tadic/appeal/decision-e/51002.htm). The Appeals Chamber held that the grave breaches provisions of the 1949 Geneva Conventions established a "system of universal mandatory jurisdiction" (see para. 80 *et seq*).

22 Ibid, para. 32.

23 See Bassiouni, note 1 above, p 117.

Notwithstanding the apparent jurisdictional limits imposed by Article VI of the Genocide Convention, there is evidence from international tribunals and the recent practice of States that the crime of genocide is seen as attracting universal jurisdiction. The International Criminal Tribunal for Rwanda (ICTR) in the case of *Ntuyahaga* held that view.[24] The preponderance of opinion amongst the majority of jurists is that genocide gives rise to universal jurisdiction under customary international law.[25] Certainly, the obligation on State Parties under Article VI of the Genocide Convention to prosecute under the territoriality principle does not bar States from exercising universal jurisdiction over the same acts under customary international law.

There is no equivalent international convention for crimes against humanity, although many writers assert that the universality principle attaches.

There are a number of other international conventions relied upon by those who argue that an independent universal principle of jurisdiction exits in international law. Of particular relevance are those conventions that deal with international terrorist and drug trafficking offences. The majority of these conventions oblige State Parties to exercise jurisdiction extra-territorially, but the relevant provisions of such treaties usually fall short of compelling States to exercise universal jurisdiction over treaty crimes. Usually there is a link of some description between the forum State and the nationality of the offender, the ship or aircraft concerned or the victim. For example, the relevant sections of the Convention for the Unlawful Seizure of Aircraft 1970 provide that State Parties are obliged to take measures against individuals who commit hijacking offences when the offence takes place on board an aircraft registered in the State, the aircraft lands in the State with the offender still on board or the offender is present in the State by some other means (Article 4). Those measures must include prosecuting the accused, wherever the offence was committed, if the decision is taken not to extradite the offender (Article 7).

In a similar vein, the Single Convention on Narcotics and Drugs 1961 provides that drugs offences under the convention shall be prosecuted either by the State on whose territory the offences were committed, regardless of the nationality of the offender, or by the State in whose territory the offender is found "if extradition is not acceptable". It is claimed that these conventions, and many like them, provide further evidence of the existence of the universal jurisdiction principle.[26]

An examination of the status of torture as a crime in international law, and of the conventional instrument that defined it, is particularly helpful in understanding both (1) the relationship between international treaties and national case law and (2) the continuing debate over universal jurisdiction. The Torture Convention 1984 has been the focus of considerable attention, not least in the *Pinochet* case in the House of Lords.[27] The

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24 *Prosecutor v Ntuyahaga,* ICTR Decision on the Prosecutor's Motion to Withdraw the Indictment of 18 March 1999 (case no. 90-40-T).

25 See Theodor Meron, 'International Criminalization of Internal Atrocities, 89 *American Journal of International Law (AJIL)* 569; and Carnegie, 'Jurisdiction over Violations of the Laws and Customs of War', 39 *British Yearbook of International Law (BYIL)* 402.

26 Note, however, the dissenting opinion of Judges Higgins *et al* in *DRC v. Belgium* (note 21 above) who attribute this conclusion to "loose language" and argue that the relevant conventions really exhibit "obligatory territorial jurisdiction over persons, albeit in relation to acts committed elsewhere" (para. 41).

27 See note 16 above.

jurisdiction provisions in the Torture Convention are similar to those in earlier conventions we have looked at. Article 5 of the Convention provides that each State Party is obliged to take measures (which include either prosecuting the offender or extraditing him) when the treaty offences are committed in the territory of the forum State, or where the alleged offender or victim is a national of the forum State. It would appear that the Torture Convention stipulates a combination of territorial, active and passive nationality principles as the preferred basis for the exercise of jurisdiction by State Parties, but there is still some disagreement as to whether this amounts to universal jurisdiction (see Box 2.2, for example).[28]

Box 2.2: A UK Decision on Universal Jurisdiction Concerning Torture

The *Pinochet* case is just one example of where national courts have considered whether they have jurisdiction to try international crimes, said to attract universal jurisdiction. The decision of the House of Lords in that case tends to support the conclusion that no State has exercised universal jurisdiction without reference to national legislation – even where treaties allow for it.[29] In *Pinochet*, the House of Lords decided that, although it had been suggested that torture had been an international crime from the early 1970s when the first of General Pinochet Ugarte's victims claimed that they had been tortured, it was not until the 1984 Convention passed into domestic law by virtue of the Criminal Justice Act 1988 that torture committed extra-territorially could be considered as an extradition crime in the UK.

How have States, particularly those from the Commonwealth, chosen to interpret the international legal obligations placed upon them by the various treaties discussed in this section? An interesting example is the English Geneva Conventions Act of 1957. In certain respects, it could be argued that this Act represents the jurisdictional high water mark of international criminal justice legislation in the UK. Section 1 provides:

> "Any person, whatever his nationality, who, whether in or outside the United Kingdom, commits, or aids, abets or procures the commission by another person of, any such grave breach of any of the scheduled conventions as is referred to in the following articles respectively of those conventions, that is to say … shall be guilty of a felony …."

This certainly looks like universal jurisdiction – or at least something close to it. There does not appear to be any requirement that there be a link between the prosecuting State and the offence, victim or offender. The Act is silent as to whether the offender needs to be present in the UK but, given the virtual impossibility of trying defendants in their absence in the UK, the presence of the offender can be read into the relevant provisions.

28 See Bassiouni, note 1 above, p 124.

29 Ibid, pp 106 and 148.

2.4.2 Recent developments regarding universal jurisdiction

Relevant Commonwealth legislation implementing the Rome Statute of the ICC is dealt with extensively in Part II of this Guide. A review of the implementing legislation in Australia, Canada, New Zealand, South Africa and the UK confirms that all these States have provided for the trial and punishment of the three core crimes of genocide, crimes against humanity and war crimes that have been committed extra-territorially. However, in the majority of cases, some nexus or connection is required with the forum State – usually the presence of the offender in the territory of the prosecuting State – thus arguably falling short of a classical assertion of universal jurisdiction.

This 'conditional' universal jurisdiction (as it has been called)[30] is to be distinguished from the national law in certain European States that asserts universal jurisdiction over certain crimes regardless of whether the offender is in the territory or not. For example, Article 23 of the Law on Judicial Power provides that Spanish courts have jurisdiction over crimes committed outside Spanish territory in circumstances where Spain is obliged to prosecute such crimes under relevant international treaty obligations.[31] In Germany, in a Bill that is still before Parliament (the *Entwurf eines Gesetzes zur Einführung des Völkersrtafgesetzbuches),* a similar unconditional universal jurisdiction model for German courts is proposed:

> "This code governs all the punishable acts listed herein violating public international law, [and] in the case of felonies listed herein [this Code governs] even if the act was committed abroad and does not show any link to [Germany]."

The most controversial exercise of universal jurisdiction unrestrained by any nexus requirement is in recent international criminal prosecutions in Belgium under their Statute of 16 June 1993 (see Box 2.3).[32] This law was broader in scope than any other domestic implementing legislation in terms of the crimes it covered. No link between Belgium and the accused, victims or events was required. In the *Sharon* case heard before the Cour de Cassation in February 2003, the appeal court held that the 1993 law did not even require the accused to be present in Belgium.

Box 2.3: Criminal Prosecutions Under the Belgian Statute of 16 June 1993

Belgium intended that the 1993 law would give effect to various international obligations under the treaties discussed in this chapter, including the Geneva Conventions and the Genocide and Torture Conventions. Several high profile figures were investigated by Belgian investigating magistrates for their alleged involvement in international crimes, including former Iraqi President Saddam Hussein, Cuban President Fidel Castro and former Palestinian Liberation Organization leader Yasser Arafat. The current Israeli Prime Minister Ariel Sharon

30 Cassese, *International Criminal Law* (2003), p 288.

31 Ibid.

32 *Loi du Juin 1993 relative à la répression des infraction graves aux Conventions internationales de Genève du 23 août 1949 et aux Protocoles I et II du 8 juin 1977, additionnels à ces Conventions*

was investigated for his alleged role in the Shabra and Shatila refugee camp massacres in Lebanon in 1982, at the time when he was defence minister. The proceedings were initiated by 23 survivors of the massacres.

In 2001 four Rwandans, including two nuns, were prosecuted for their part in the genocide in that State. All of them were convicted and sentenced to substantial terms of imprisonment – although it should be noted that all defendants were in Belgium at the time of the investigations and prosecutions. The prosecution of the Congolese former foreign minister Abuldaye Yerodia under the 1993 law resulted in the *DRC v. Belgium* case before the International Court of Justice, referred to extensively in this Guide.

However, in the face of mounting international criticism, particularly from Israel and the United States, Belgian legislators took steps to tone down the law. In April 2003 Parliament amended the statute so as to ensure that only federal prosecutors, as opposed to victims' groups, could initiate prosecutions if the crime was alleged to have been committed outside Belgian territory or if the offender was not in Belgium, was not a Belgian national or had lived in Belgium for less than three years. The federal prosecutor was also granted an additional discretion in that he or she could refuse to proceed if:

> "in the interests of the administration of justice and in respect of Belgium's international obligations, this matter should be brought either before international tribunals, or before a tribunal in the place where the acts were committed, or before the tribunals of a State in which the offender is a national or where he may be found, and as long as this tribunal is competent, independent, impartial and fair." [33]

These concessions were apparently insufficient to assuage Belgium's critics, and by August 2003 an entirely new law had come into existence, marking the end of the country's decade-long flirtation with unconditional universal jurisdiction.[34] Now the Belgian courts can only try persons accused of genocide, crimes against humanity and war crimes if the accused or victim is a Belgian national.

The failure of the Belgian experiment does not mean that international law prohibits the exercise of unconditional universal jurisidiction by States. Instead, what it reveals is that other obligations that bind States in international law, as well as the necessity of preserving good relations with other sovereign States, inevitably impose constraints on its exercise.

One obvious limitation is the conventional and customary international law norms that grant immunity to serving Heads of State, senior state officials and diplomats from criminal proceedings in domestic courts, even where the crime is alleged to be an

33 See 42 *International Legal Materials* 749 (2003).

34 See Steven R Ratner, 'Belgium's War Crimes Statute: A Post Mortem', 97 *AJIL,* 890 (2003).

international crime.[35] For instance, the Belgian Cour de Cassation quashed proceedings against Ariel Sharon on the grounds that he was a serving Head of State, and as such enjoyed personal immunity in respect of all acts whether or not committed in an official capacity.

The position with Heads of State and senior government officials after they have left office in relation to acts they performed in an official capacity[36] is less certain, as the immunity they enjoy is different and less absolute. This class of immunity has been considered in a number of recent cases, including *Pinochet* and *DRC v. Belgium*. It is apparent from these various authorities that immunity, whether enjoyed personally or functionally, is a real impediment to those States that would seek to exercise true universal jurisdiction over international crimes.

There are other impediments. To prosecute persons using the unconditional universal jurisdiction model in a State that does not permit trials *in absentia* may inevitably involve arrests executed on the territory of other States. Not only may such actions prove unlawful, but also they create tremendous tensions in the relations between States, as recent United States incursions to arrest suspects in Mexican territory have proved. Less formal constraints also operate. It has been suggested that an informal complementarity exists in relation to the investigation and prosecution of many international crimes in domestic courts, where the crime is already being investigated by another State.

Ultimately, the debate about universal jurisdiction becomes one about broader principles of international law – the equality of States, sovereign immunity and territorial integrity. Our concern is to understand where States stand in international law should they seek to exercise universal jurisdiction over certain recognised international crimes. The answer appears to be that there is no rule in international law that prohibits States from doing so, but that there are very real practical and legal obstacles. These difficulties are particularly acute when there is no requirement for a link or connection between the offender, the offence or the place that the offence was committed and the prosecuting State. The majority of States that purport to exercise universal jurisdiction do so conditionally, in that they demand some form of nexus between the crime and the State for this reason.

3. National Courts and International Crimes

Criminal justice policy is increasingly influenced by global trends in crime control. As such, many recent anti-terrorist initiatives, as well as strategies to combat money laundering and drug trafficking, have their origin in international conventions negotiated and agreed at gatherings of like-minded States.

Many of these conventions create obligations for those States that ratify them. Typically, a State Party must prohibit in its domestic law the conduct that is the subject of the convention and must undertake to prosecute or extradite those who offend against such a prohibition. On occasion, such conventions even prescribe what principle of jurisdiction should attach to particular offences. In other cases, jurisdiction remains an issue for the

35 The topic of immunity is discussed at length elsewhere in this Guide: see Chapter 5 below.

36 So called functional immunity, or immunity *rationae materiae*.

State in question.[37] Jurisdiction is a jealously guarded attribute of sovereignty, and one that is not sacrificed lightly.

As we have seen, conventional law is not the only source of international criminal law. Many States have introduced domestic legislation prohibiting international crimes without any conventional obligation to do so. The War Crimes Acts[38] that passed through the parliaments of a number of Commonwealth States in the late 1980s were not introduced in compliance with international treaty obligations, but were thought to reflect customary international law norms. Although the crimes described in these Acts were international, the jurisdiction was exercised locally, under variants of the active nationality principle.

With no international penal tribunal with universal jurisdiction to deal with international crimes, and absent a 'global sovereign', jurisdiction over individuals alleged to have committed international crimes has been primarily exercised by national courts. Neither the existence of the *ad hoc* tribunals and special courts nor the establishment of the ICC has affected what has been described as the decentralised enforcement of international law.[39] The bulk of international crimes have been, and will continue to be, prosecuted in domestic courts rather than by international tribunals. That is particularly so in light of the complementarity scheme that is a central feature of the Rome Statute of the ICC (discussed further below).

Until the 1980s the prosecution of international crime in either international or domestic courts was a rarity. The International Military Tribunal (IMT) at Nuremberg in 1946 and the *Eichmann* trial in Jerusalem in 1962 are the notable exceptions.

The Israeli Supreme Court, and many international jurists before and since, have claimed that the IMT asserted jurisdiction under the universal principle. The preferred interpretation is that the Allies were merely exercising sovereign powers in the place of a failed sovereign, Germany. Hence in the Judgement of the IMT the following was stated:

> "The Signatory Powers created this Tribunal, defined the law it was going to administer, and made regulations for the proper conduct of the trial. In doing so, they have done together what any of them may have done singly: for it is not to be doubted that any nation has the right to set up special courts to administer the law."[40]

Israel asserted a combination of the passive nationality principle and the universal principle in prosecuting Adolf Eichmann for crimes against the Jewish people, crimes against humanity and war crimes.[41]

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37 See, for example, the Genocide Convention Article VI:

"Persons charged with genocide or any of the other acts enumerated in Article III shall be tried by a competent tribunal of the State in the territory of which the act was committed or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction".

38 Australian War Crimes Amendment Act 1988, War Crimes Act 1991 (United Kingdom), Canadian Criminal Code 1985.

39 Cherif Bassiouni, 'The Theory of International Criminal Law' in *International Criminal Law (3 volumes)* (1999), pp 1-9.

40 IMT (Nuremberg) Judgements and Sentences, 41 *AJIL* 172 (1947) at 216.

41 *The Attorney General v. Adolf Eichmann*, 36 *International Law Reports (ILR)* 5 (1961).

Recent prosecutions for international crimes such as *Sawoniuk*[42] in the English criminal courts under the War Crimes Act 1991 have been under a limited form of active nationality-based jurisdiction. The crimes contemplated by the relevant sections of the Act[43] had not been committed in UK territory at all. Jurisdiction is not even asserted on the basis of the nationality of the perpetrator at the time that the offence was committed, but rather his nationality at the time that the Act came into force. Further, the criminal acts (war crimes not crimes against humanity or genocide) must have occurred within strictly prescribed temporal and geographical limits.

Ten years later, the UK Parliament passed into law the International Criminal Court Act, which represents a further departure from the territorial principle for the English courts. It is now an offence against the English criminal law for a person to commit genocide, a crime against humanity or a war crime. Reflecting an unusual compromise of the territorial and active nationality principles of jurisdiction, the Act "applies to acts committed in England or Wales, or outside the United Kingdom by a United Kingdom national, a United Kingdom resident or a person subject to UK service jurisdiction".[44]

4. The Jurisdiction of International Criminal Tribunals

Towards the end of the last century *ad hoc* tribunals emerged in response to widespread human rights violations committed in Yugoslavia, Rwanda, Sierra Leone and East Timor. These tribunals are limited in jurisdiction and competence. For example, the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY) provides at Article 8 as follows:

> "The territorial jurisdiction of the International Tribunal shall extend to the territory of the former Socialist Federal Republic of Yugoslavia, including its land surface, airspace and territorial waters. The temporal jurisdiction of the International Tribunal shall extend to a period beginning on 1 January 1991."

Hence, the ICTY exercises a territorial-based jurisdiction with certain temporal limitations, albeit that it is an international tribunal that has primacy over the national courts of that territory. The Statute of the ICTR is very similar, save that it adds the active nationality principle into the mix, so that crimes committed by Rwandan citizens outside the recognised territorial boundaries of Rwanda and in the territory of neighbouring States are also subject to the jurisdiction of the Tribunal. Article 7 of the ICTR Statute reads:

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42 *R. v. Anthony Sawoniuk* (2000) Crim. L.R. 506, discussed extensively in Chapter 10 (The United Kingdom).

43 The War Crimes Act 1991 provides that:

" Subject to the provisions of this section, proceedings for murder, manslaughter or culpable homicide may be brought against a person in the United Kingdom irrespective of his nationality at the time of the alleged offence if that offence –

(a) was committed during the period beginning with 1st September 1939 and ending with 5th June 1945 in a place which at the time was part of Germany or under German occupation; and

(b) constituted a violation of the laws and customs of war.

(2) No proceedings shall by virtue of this section be brought against any person unless he was on 8th March 1990, or has subsequently become, a British citizen or resident in the United Kingdom, the Isle of Man or any of the Channel Islands".

44 Discussed below in Chapter 10.

> "The territorial jurisdiction of the International Tribunal for Rwanda shall extend to the territory of Rwanda including its land surface and airspace as well as to the territory of neighbouring States in respect of serious violations of international humanitarian law committed by Rwandan citizens. The temporal jurisdiction of the International Tribunal for Rwanda shall extend to a period beginning on 1 January 1994 and ending on 31 December 1994."

The competence of the Special Court of Sierra Leone differs from its two *ad hoc* predecessors. Its Statute indicates in the very first Article that the Court is concerned with prosecuting those "who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law". Whether or not the Special Court has the jurisdiction to try those who do not bear the greatest responsibility has not been decided. Nonetheless, it was clearly the intention of the UN and the Sierra Leone Government that those who did not fall into such a category, or who cannot be said to have been 'leaders' responsible for "threatening the establishment of and implementation of the peace process", should be tried by the national courts.

Although the Special Court is described in its Statute as having "concurrent jurisdiction" with national courts in Sierra Leone, this principle is subject to an important caveat. The Statute also confirms that, like its *ad hoc* predecessors, the Court has primacy over the national courts, and "at any stage of the procedure, the Special Court may formally request a national court to defer to its competence".

The Court exercises a territorial jurisdiction, but subject to significant modifications. It is restricted temporally, in that it only has jurisdiction to try crimes committed after 30 November 1996. It has the jurisdiction to try crimes committed by peacekeepers, but only if the State of which the accused is a national (the "sending State") is "unwilling or unable genuinely to carry out an investigation or prosecution" and the UN Security Council, on the proposal of "any State", authorises prosecution. As such, peacekeepers who commit international crimes in Sierra Leonean territory can be tried by the Special Court in a manner that is described as "complementing" the jurisdiction of the national courts of the sending State. As we shall see, this principle of 'complementarity' lies at the very heart of the jurisdictional regime of the ICC. Finally, the Special Court only has the power to try persons who were over 15 years old at the time that the offences were alleged to have been committed.

5. The Jurisdiction of the ICC and the Principle of Complementarity

Under the Rome Statute, national courts take priority over the ICC. The ICC can only exercise its jurisdiction "over persons for the most serious international crimes of international concern" and is an institution that is "complementary to national criminal jurisdictions".[45] Even if universal jurisdiction is afforded under the relevant implementing legislation to national courts, the Rome Statute controls whether the ICC is able to exercise such a jurisdiction. The conditions that have to be met before the Court can exercise its competence are set out in Article 12. The Court's jurisdiction, while arguably

45 See Article 1, ICC Statute.

inspired by the notion of universal jurisdiction, is in fact limited to situations where (1) the State where the alleged crime was committed is a party to the Statute (*territoriality*) or (2) the State of which the accused is a national is a party to the Statute (*nationality*). Accordingly, to the extent that universal jurisdiction remains important within the ICC scheme, it is a principle of jurisdiction that remains relevant to national courts only.

The complementarity model works in this way: the ICC cannot exercise jurisdiction over a crime if the same crime is being investigated or prosecuted by a State that has jurisdiction over it or a decision not to prosecute has been taken properly and independently by the appropriate authorities in that State. In other words, such a case would be inadmissible before the Court.[46] Further, the ICC cannot investigate or prosecute a crime if it is not sufficiently serious, or where the accused has already been acquitted or convicted by a fair trial before an independent tribunal in the State concerned.[47]

Cases are only admissible before the Court, and hence the ICC can only exercise its jurisdiction, where the State that has jurisdiction over the same crime is either unwilling or unable genuinely to carry out the investigation or prosecution, or the person accused of the crime has not been prosecuted due to the State being unwilling or unable to genuinely prosecute.[48]

What is meant by 'unwilling and unable' is also spelt out in the Rome Statute. The ICC may determine that a State is unwilling to investigate or prosecute where:

1 The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in Article 5;
2 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;
3 The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner that, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

The Court may determine that a State is unable to investigate those who are alleged to have committed serious international crimes where, owing to a total or partial collapse of the national judicial system in the prosecuting State, "the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings".

It is only where the Security Council refers a case to the ICC (a power reserved for the Council under the Rome Statute in Article 11(2)) that the jurisdiction of the Court can be said to transcend the jurisdiction of a State Party and hence be described as universal. Otherwise, the jurisdiction of the Court is entirely complementary.

46 See Article 17, ICC Statute.

47 See Article 17.1(c) and 20.3, ICC Statute.

48 See Article 17, ICC Statute.

The ICC's system of complementarity entitles us to expect that national criminal justice systems will play an important role in assisting the Court to provide exemplary punishments that will serve to restore the international legal order. As Anne-Marie Slaughter, Dean of the Woodrow Wilson School of Public and International Affairs at Princeton, has pointed out:

> "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."[49]

The ICC will be effective when its very existence operates to encourage domestic institutions to comply with their responsibilities under international humanitarian law to investigate and prosecute all those guilty of international crimes, including peacekeepers. In the words of the ICC Prosecutor:

> "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."[50]

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49 'Not the Court of First Resort', *The Washington Post,* 21 December 2003.

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

Chapter 3

Max du Plessis

ICC Crimes

1 Introduction

Having outlined the institutional framework of the International Criminal Court (ICC) and described the complementarity regime in preceding chapters, in this chapter we analyse those international crimes that might be prosecuted before the ICC or in domestic courts exercising complementary jurisdiction.

We deal in turn with genocide, crimes against humanity and war crimes. The crime of aggression is not dealt with here, notwithstanding the fact that is included as a potential ICC crime in the Rome Statute,[1] as its definition is still in the process of being finalised.[2]

2 Genocide

2.1 History

Genocide involves the intentional mass destruction of entire groups or members of a group. The crime of genocide has been committed throughout history, the twentieth century being no exception. We think especially of the Jews decimated by the Nazis, the Cambodians destroyed by the Khmer Rouge and, more recently, the genocide inflicted by the Hutus on the Tutsis in Rwanda and the genocidal aims of Serbs against Kosovar Albanians in the Former Yugoslavia. The term 'genocide' is a combination of the Latin words *genus* (kind, type, race) and *cide* (to kill) and was coined by Raphael Lemkin writing in response to the events of World War II.[3]

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. 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. It took almost half a decade, with the establishment of the International Criminal Tribunal for the former Yugoslavia

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1 See Article 5(1)(d) and Article 5(2) of the ICC Statute.

2 See William Schabas, 'The Unfinished Work of Defining Aggression: How Many Times Must the Cannonballs Fly Before They Are Forever Banned' in Dominic McGoldrick et al (eds), *The Permanent International Criminal Court – Legal and Policy Issues* (2004).

3 See Ralph Lemkin, *Axis Rule in Occupied Europe* (1944), pp 79-95, cited in Cassese, 'Genocide' in Cassese et al, *The Rome Statute of the International Criminal Court: A Commentary*, Vol. I (2002), p 335; and Ralph Lemkin, 'Genocide as a Crime Under International Law', 41 *American Journal of International Law* (*AJIL)* 145 (1947). See also Kittichaisaree, '*International Criminal Law"* (2001), p 67.

(ICTY) and International Criminal Tribunal for Rwanda (ICTR), before genocide came to be prosecuted again at the international level.[4]

Notwithstanding the small incidence of genocide prosecutions prior to the 1990s, the strengthening of the normative prohibition of genocide, beginning with the Genocide Convention of 1948,[5] has now reached the point where genocide has become regarded as a crime under customary international law[6] and a norm of *jus cogens* (in the sense that the rules prohibiting genocide cannot be derogated from), which imposes *erga omnes* obligations (that is, obligations are laid down on all member States of the international community, and all member States of that community have the right to require that acts of genocide be discontinued).

2.2 Definition

Article 2 of the Genocide Convention of 1948 defines genocide as "any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

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

What this definition reflects is a preoccupation among the drafters of the Convention with the Nazi extermination of the Jews in World War II. Notwithstanding this preoccupation, the definition is no anachronism (at least in formal terms) since it has been replicated in Article 4(2) of the ICTY Statute, Article 2(2) of the ICTR Statute and Article 6 of the ICC Statute.

Genocide is the most serious crime against humanity, as evidenced in the high threshold set for the mental element required for proof of genocide. While other crimes against humanity require the intent to commit the underlying offence (for example, murder, torture or rape), together with the knowledge that the offence is being committed within the context of the targeting of the civilian population as part of a widespread or systematic attack, genocide requires the specific intent to destroy, in whole or in part, a national, ethnic, racial or religious group of persons.

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4 See Kittichaisaree, loc cit. There was at least one *national* prosecution of genocide prior to the ICTY and ICTR's existence, namely, the prosecution of *Eichmann* before the District Court of Jerusalem (1968). Eichmann was tried for crimes against the Jewish people, an offence under Israeli law that incorporated all the elements of the definition of genocide – Cassese, *International Criminal Law* (2003), p 97.

5 UN Convention on the Prevention and Punishment of the Crime of Genocide, 1948 – Article 1 provides that "genocide, whether committed in time of peace or time of war, is a crime under international law".

6 See the International Court of Justice's Advisory Opinion on *Reservations to the Convention on Genocide,* 28 May 1951, *ICJ Reports 1951*, 15, where the Court found that "the principles underlying the Convention are principles which are recognised by civilized nations as binding on States, even without any conventional obligation" (p 24).

2.3 *Actus reus* – genocide

Article 6 of the Rome Statute, following Article 4 of the Genocide Convention, defines the various classes of *actus reus* (wrongful act) falling under the crime of genocide, each of which was helpfully elaborated upon by the ICTR Trial Chamber in *Akayesu*. The classes are as follows:

(i) killing members of a national or ethnic, racial, or religious group (meaning their 'murder', i.e., intentional, voluntary killing[7]);
(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"[8]);
(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]" [9]);
(iv) imposing measures intended to prevent birth within the group (such measures would consist of "sexual mutilation, the practice of sterilisation, forced birth control [and the] separation of the sexes and prohibition of marriage"[10]); or
(v) forcibly transferring children of the group to another group.

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

Genocide can be committed by act or omission (or what might be described as a deliberate failure to act). For example, in *Kambanda*[11] the ICTR found the accused guilty of genocide for his failure to fulfil his duty as Prime Minister of Rwanda to take action to stop ongoing massacres he was aware of, and for his failure to protect children and the population from being massacred after he had been personally asked to do so.

Note also that it is not necessary that the prosecutor be able to establish the exact number of deaths attributable to an act of genocide before the accused can be found guilty of this crime.[12]

It is also clear that genocide may be perpetrated in a limited geographic zone. As the ICTY Trial Chamber concluded in *Krstic*,[13] "the intent to eradicate a group within a geographical area such as the region of a country or even a municipality"[14] could amount to genocide.

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7 *Akayesu* ICTR Trial Chamber, judgment of 2 September 1998 (case no. ICTR 96-4-T), paras. 500-501.

8 Ibid, paras. 502-504.

9 Ibid, paras. 505-506.

10 Ibid, para. 507.

11 *Kambanda*, ICTR Trial Chamber, judgment and sentence of 4 September 1998 (case no. ICTR 97-23-S), para, 40(1)-(4).

12 *Jelisic*, ICTY Trial Chamber, judgment of 14 December 1999 (case no. IT-95-10), para. 60.

13 *Krstic,* ICTY Trial Chamber, decision of 2 August 2001 (case no. IT-98-33-T).

14 Ibid, para. 589.

2.3.1 The victim as group

The victim of the crime of genocide is the group itself and not the individual.[15] What, then, is to be understood by the notion of 'group'? The definition of genocide in the Rome Statute of the ICC provides that genocide is any one of the enumerated acts (see above) 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".[16] In other words, they do not have a choice in the matter of whether they belong to a particular group or not. As such, "more 'mobile' groups which one joins through individual voluntary commitment, such as political and economic groups"[17] are not groups that are protected under the rules against genocide.

The prohibition on genocide, therefore, would not cover a group comprised of, say, homosexuals or members of a political or social organisation – unless membership was confined to a particular tribe, race or nationality, which would mean that the protection for the defined groups under the Genocide Convention would be triggered.

The ICTR Trial Chamber in *Akayesu* has provided the following definition of the four groups that are covered by the genocide definition:

- National group: a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties.
- Ethnical group: one whose members share a common language and culture.
- Racial group: a group distinguished from others by hereditary physical traits frequently identified with geographical areas, irrespective of linguistic, cultural, national or religious factors.
- Religious group: a group whose members share the same religion, denomination or mode of worship, or common beliefs.

What about other 'groups'? The ICTR in *Akayesu* posited that the groups protected against genocide should not be limited to the four groups recognised in the definition of genocide under the Genocide Convention but should include "any stable and permanent group".[18.] On this basis one might include a 'cultural group', since it too could be regarded as a stable and permanent group, membership of which is often not chosen but an automatic consequence of birth. However, as one commentator notes, the pronouncement in *Akayesu* is "likely to have limited impact",[19] since the framers of the Genocide Convention appear to have made exhaustive provision for which types of groups they were thinking of, and those include national, ethnic, racial and religious only.

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15 Kittichaisaree, note 3 above, p 69.

16 *Akayesu*, ICTR Trial Chamber, judgment of 2 September 1998 (case no. ICTR 96-4-T), para. 511.

17 Ibid, para. 511.

18 Ibid, para. 516.

19 Kittichaisaree, note 3 above, p 70.

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. The same view has been expressed by the ICTY Trial Chamber in its ruling in *Krstic*. There it was 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",[20] 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".[21]

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 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.[22]

How is membership of the group determined? In proving to a court that persons belonged to a protected group, two approaches are discernible in the international criminal law jurisprudence. The first approach is objective, in that the court will be concerned with whether it has been shown that in fact the victims belong to one of the protected groups. In their decision in *Rutaganda*,[23] the ICTR Trial Chamber relied on a number of objective factual indicators to find that the Tutsi population at issue in the case was an ethnic group with a distinct identity: every Rwandan citizen was required to carry an identity card proving their ethnic identity as either Hutu, Tutsi or Twa; the Rwandan Constitution and laws in force at the relevant time identified Rwandans by reference to their ethnic group; and there was customary determination of membership of an ethnic group in Rwanda through patrilineal lines.[24]

The second approach is subjective, in that the court considers whether the victims concerned considered themselves, or whether the perpetrator concerned considered the victims, as belonging to one of the protected groups.[25] For example, in *Akayesu*, the ICTR Trial Chamber, in finding that the Tutsi population constituted a protected ethnic group, commented that "all the Rwandan witnesses who appeared before it invariably answered spontaneously and without hesitation the questions of the Prosecutor regarding their ethnic identity".[26]

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20 *Krstic,* para. 580.

21 Ibid.

22 Geoffrey Robertson, *Crimes Against Humanity* (2000), p 230.

23 *Rutaganda*, ICTR Trial Chamber, judgment of 6 December 1999 (case no. ICTR-96-3).

24 Ibid, paras 400-1. See also the objective approach followed by the ICTR Trial Chamber in *Akayesu*, para. 702.

25 As the ICTR Trial Chamber made clear in *Rutuganda*, either the victim is perceived by the perpetrator of genocide as belonging to a group slated for destruction, or the victim may perceive himself as belonging to the said group. See para. 57.

26 *Akayesu*, note 16 above, para. 702. See also the decisions of the ICTY in *Jelisic*, ICTY Trial Chamber, judgment of 14 December 1999 (case no. IT-95-10), para 70-1; and *Krstic*, ICTY Trial Chamber, decision of 2 August 2001 (case no. IT-98-33-T), paras. 556-557 and 559-560.

In practice a combination of the objective and subjective approaches to determine the membership of the group is often relied on.[27]

Is it possible for genocide to include the killing or harming, with the required intent, of only a single individual of a protected group? The ICTR Trial Chamber in *Akayesu* has held that genocide is committed if one of the prohibited acts (killing, causing serious bodily injury, etc) is committed against even one member of a group.[28] While this view does not satisfactorily accord with the text of the norm enunciated in the Genocide Convention,[29] it does nonetheless accord with the Elements of Crimes adopted by the Preparatory Commission for the International Criminal Court in 1999. These guidelines, which "shall assist the Court in the interpretation and application of Articles 6, 7 and 8", stipulate that genocide is committed by the perpetrator performing any of the genocidal acts against "one or more persons", so long as the conduct "took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction".[30]

As such it appears open to a prosecutor to charge a perpetrator with genocide where the act proscribed by Article 6 of the ICC Statute was directed only against one person but the act took place within a manifest pattern of genocidal conduct.

2.4 *Mens rea* - genocide

The mental element (*mens rea*, or guilty mind) of the crime of genocide is what most distinguishes it from other crimes, including crimes against humanity.[31] In the *Jelisic* 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".[32]

What type of intention is required? Both customary and conventional 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'

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27 See for example, *Kayishema and Ruzindana,* ICTR Trial Chamber II, judgment of 21 May 1999 (case no. ICTR-95-1-T), para. 98.

28 Para. 521.

29 The definition of genocide in that Convention, and now taken up in the Rome Statute, is that genocide involves "killing members" or "causing serious bodily or mental harm to members" (hence more than one member) of a protected group.

30 See Elements of Crimes, Article 6(a) and 6(b).

31 A good example of the difference is provided by the crime against humanity of persecution. What distinguishes persecution from genocide is that the perpetrator of persecution selects his victims by reason of their belonging to a specific community, but he does not necessarily seek the destruction of that community as such (Kittichaisaree, note 3 above, p 72). The mental element required for both persecution and genocide may involve discriminatory targeting of victims, but for this targeting to amount to genocide the perpetrator must hold the additional special intent of targeting the victims so as to destroy the group to which they belong.

32 *Jelisic,* para. 66.

victim and carried out for no other reason than that he or she is a member of this specific group. It should thus be clear that 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 should be done to further the genocidal goal of ensuring the group's destruction.[33]

That the mental element required for genocide will be strictly interpreted by a court or tribunal is well evidenced by the ICTY decision in *Jelisic*.[34] In that case the Prosecutor submitted that "an accused need not *seek* the destruction in whole or in part of a group" and that "it suffices that he *knows* that his acts will inevitably, or even only probably, result in the destruction of the group in question".[35] The Trial Chamber rejected this attempt to smuggle in constructive knowledge as a form of intention for genocide. The Chamber stressed that the prosecutor must prove that the accused had 'specific intention' to commit genocide, and that an accused cannot be found guilty of this crime if he himself did not share the goal of destroying in whole or in part a group, even if he knew that he was contributing to or through his acts might be contributing to the partial or total destruction of the group.[36] The Prosecutor attempted to rerun this argument in *Krstic*, but the Trial Chamber once again rejected the argument.

The conclusion therefore seems inescapable: the accused must have committed the underlying offence (killing, causing serious bodily or mental harm, etc) against the victims, with nothing less than the goal of destroying all or part of the group to which the victims belong.[37] Other categories of mental element such as recklessness (*dolus eventualis*) and gross negligence will therefore not suffice to establish genocide.[38]

What does a group 'in whole or in part' mean? Genocide can be committed through the destruction of a large number of the group (i.e. 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 (i.e. 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. A further example is provided by the decision of the ICTY Trial Chamber in *Krstic*, where it found that the defendant's planning and participation in the massacre of Bosnian Muslim men, all of military age, amounted to genocide. According to the tribunal, genocide was proved because, while the rest of the Bosnian Muslim population was being transferred out of the area of Srebrenica, the Bosnian Serb forces "had to be aware of the catastrophic impact that the disappearance of two or three generations of men would have on the survival of a traditionally patriarchal society", and "that the combination of those killings with the forcible transfer of the women, children

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33 *Kayishema and Ruzindana*, ICTR Trial Chamber, judgment of 21 May 1999 (case no. 96-1-T), para. 91.

34 *Jelisic,* ICTY Trial Chamber, sentencing judgment of 14 December 1999 (case no. IT-95-10-A).

35 Ibid, para. 85.

36 Ibid, para. 86.

37 See *Krstic*, para. 571.

38 Cassese, *International Criminal Law* (2003), p 103.

and elderly would inevitably result in the physical disappearance of the Bosnian Muslim population in Srebrenica".[39]

How does one prove the element of intent? The ICTY Appeals Chamber in *Jelisic*[40] has noted that proof 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".[41]

In this regard it is important to take into account the decision of the ICTR Trial Chamber in *Akayesu*. There the tribunal 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, this systematic rape was part of the campaign to mobilise the Hutus against the Tutsis, and the sexual violence was aimed at destroying the spirit, will to live or will to procreate of the Tutsi group.[42]

This approach – of inferring specific intent from words and deeds and of demonstrating it by reference to a pattern of purposeful action – has been affirmed in the ICTR Appeals Chamber decision of *Kayishema and Ruzindana*.[43] The Chamber recognised that "in order to prevent perpetrators from escaping convictions simply because [explicit] manifestations [of criminal intent] are absent, the requisite intent may normally be inferred from relevant facts and circumstances".[44] The Appeals Chamber also made it clear that personal motive – such as, for example, financial gain or vengeance – does not exclude criminal responsibility for genocide if the requisite intention is proved to have existed.[45]

3 Crimes Against Humanity

3.1 History

The notion of 'crimes against humanity' is sweeping and, as we shall see, captures many concerns traditionally associated with international human rights law, including the protection of life, the right not to be tortured and the rights to liberty and bodily integrity. The term was first used in its contemporary sense to condemn as a crime against humanity

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39 *Krstic,* paras. 595-596.

40 *Jelisic (Appeal)*, ICTY Appeals Chamber, judgment of 5 July 2001 (case no. IT-95-10-A).

41 Ibid, para. 47. In *Jelisic*, the ICTY Trial Chamber (judgment of 19 Oct 1999, case no. IT-95-10) held that the requisite intent was found to be lacking, even though the accused had killed Muslim detainees at a detention camp and boasted that he would sterilise Muslim women and prevent Muslim men from procreating. On the facts, Jelisic killed people at the camp randomly, allowed some Muslims (on one occasion an eminent Muslim) to leave the camp and arranged travel passes for others. Therefore, it could not be shown that he had "an affirmed resolve to destroy in whole or in part a group as such" (para. 58).

42 *Akayesu*, para. 732.

43 *Kayishema and Ruzindana,* ICTR Appeals Chamber, judgment of 1 June 2001 (case no. ICTR 95-1-A); see the related discussion by Roman Boed, 'Current Developments in the Jurisprudence of the International Criminal Tribunal for Rwanda', 2 *International Criminal Law Review*, 288-289 (2002).

44 *Kayishema and Ruzindana,* para 159.

45 Ibid, para. 161.

the atrocities committed by the Turkish forces against their own Greek and 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, Russia and the UK to proclaim enthusiastically that all members of the Turkish government would be held responsible together with its agents for the "crimes against humanity and civilisation".[46]

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. It was not at first clear to the Allied prosecutors, however, that such crimes could be prosecuted. Many of those charged with preparing the post-war indictments were unclear whether international law at that time allowed for the prosecution of offences that Germans had perpetrated on their own territory in Germany.[47] After lobbying from Jewish non-governmental organisations (NGOs), however, it was finally agreed that Nazis would be prosecuted for 'internal' atrocities by relying on the notion of crimes against humanity.

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 a war crime.[48]

3.1.1 Developments after World War II

There was a measure of dissatisfaction with the notion of crimes against humanity being limited only to those acts that occurred during an international armed conflict. For example, within weeks of the Nuremberg judgment the UN General Assembly asserted 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*.[49]

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46 After the war there were objections that this was a form of retroactive criminal legislating and no prosecutions took place for the massacre (see Kittichaisaree, note 3 above, pp 85 and 86).

47 In keeping with the classical Westphalian approach to international law, their legal concern was that what a State's armed forces did to its own population was not within the province of international law.

48 William Schabas*, An Introduction to the International Criminal Court* (2001), p 35. In practical terms this nexus meant that only those 'crimes against humanity' were prosecuted that directly affected the interests of other States, either because these criminal acts were connected with a war of aggression or a conspiracy to wage such a war, or because they were bound up with war crimes, namely crimes directed against enemy combatants or enemy civilians (see Antonio Cassese, note 38 above, p 69).

49 On that and other developments that gradually led to the link between crimes against humanity and war being dropped, see Antonio Cassese, 'Crimes against Humanity', p 73 in Cassese et al (eds), *The International Criminal Court: A Commentary*, Vol. I (2002).

Today in international criminal law the nexus between crimes against humanity and war has disappeared, and customary international law prohibits these crimes whether they are committed in time of war or peace.[50] Article 7 of the Rome Statute codifies this position, albeit implicitly (see definition below). There is no mention that the attack must take place in an international armed conflict for it to be a crime against humanity.[51]

3.3 Definition

Article 7(1) of the Rome Statute provides that:

> "For the purpose of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:
>
> - murder;
> - extermination;
> - enslavement;
> - deportation or forcible transfer of population;
> - imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
> - torture;
> - rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation or any other form of sexual violence of comparable gravity;
> - persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender, or other grounds that are universally recognised as impermissible under international law….;
> - enforced disappearances of persons;
> - the crime of apartheid;
> - other inhumane acts of a similar character intentionally causing great suffering or serious injury to body or to mental or physical health."

It is clear, therefore, that when we speak of crimes against humanity under the Rome Statute the category covers actions that have a common set of features:[52]

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;

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50 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 *International Law Review (ILR)* 453, para. 141.

51 However, as Schabas points out, conceivably the argument could be made that in customary international law a nexus is still required, given the number of delegations at the Rome Conference for the drafting of the ICC Statute who argued vigorously that crimes against humanity could only be committed in times of armed conflict (see Schabas, note 48 above, p 36).

52 Cassese, note 38 above, p 64.

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 The victims of the crimes are civilians or, in the case of crimes committed during armed conflict, persons who do not take part (or no longer take part) in armed hostilities.[53]

3.4 *Actus reus* – crimes against humanity

3.4.1 Offences

The *actus reus* of a crime against humanity involves the commission of an attack that is inhumane in nature, causing great suffering or serious injury to body or to mental or physical health. The act must be committed as part of a widespread or systematic attack against members of a civilian population.[54]

The specific acts or classes of offences that make up crimes against humanity under the Rome Statute are set out next:

- *Murder*

Being the intentional killing, whether premeditated or not, of a human being.[55]

- *Extermination*

In it most obvious form, 'extermination' involves mass or large-scale killing.[56] For instance, the ICTR Trial Chamber in *Kayishema and Ruzindana*[57] provides as a hypothetical example a situation where soldiers fire into a crowd of people, killing them all.[58] A real example of extermination as mass or large-scale killing is provided by the ICTY Trial Chamber's decision in *Krstic*:[59]

> "[V]irtually all of the persons killed in the aftermath of the fall of Srebrenica were Bosnian Muslim males of military age. The screening process at Potocari, the gathering of those men at detention sites, their transportation to execution sites, the opportunistic killings of members of the column along the Bratunac-Milici road as they were apprehended, demonstrate beyond any doubt that all of the military aged Bosnian Muslim males that were captured or fell otherwise in the hands of the Serb

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53 The position under customary international law is that the victims of crimes against humanity may also be enemy combatants (see Cassese, note 38 above, p 64).

54 Kittichaisaree, note 3 above, pp 90 and 91.

55 Cassese, note 38 above, p 74.

56 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 Daryl Mundis, 'Current Developments at the *ad hoc* International Criminal Tribunals', 1 *Journal of International Criminal Justice*, 521 (2003).

57 See *Prosecutor v Kayishema and Obed Ruzindana,* 21 May 1999 (case no. ICTR-95-1-T).

58 Ibid, para. 147, n. 49.

59 *Krstic*, ICTY Trial Chamber, decision of 2 August 2001 (case no. IT-98-33-T).

> forces were systematically executed. The result was that the majority of the military aged Bosnian Muslim males who fled Srebrenica in July 1995 were killed. A crime of extermination was committed at Srebrenica."[60]

In addition to mass or large-scale killing, Article 7(2)(b) of the ICC Statute provides that extermination includes the "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". Examples would include the causing of mass death by imprisoning a large number of people and withholding the necessities of life, or by the introduction of a deadly virus into a population and preventing medical care.[61]

In sum then, for the crime of extermination to be established, in addition to the general requirements for a crime against humanity, "there must be evidence that a particular population was targeted and that its members were killed or otherwise subjected to conditions of life calculated to bring about the destruction of a numerically significant part of the population".[62]

- *Enslavement*

According to the ICC Statute, enslavement "means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children." [63] The elements of this crime are best set out in the ICTY Trial Chamber's decision in *Kunarac and others*,[64] and which the Appeals Chamber of the ICTY has confirmed.[65] Indications of enslavement include:

- elements of control and ownership;
- the restriction or control of an individual's autonomy, freedom of choice or freedom of movement (often with the accruing of some gain to the perpetrator);
- the absence of consent or free will on the part of the victim (usually rendered impossible or irrelevant by, for example, fear of violence, deception or false promises, abuse of power, the victim's position of vulnerability, detention or captivity, psychological oppression or socio-economic conditions).

Further indications of enslavement are:

- exploitation;
- the exaction of forced or compulsory labour or service (often without remuneration and involving physical hardship);

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60 Ibid, paras. 504-5.

61 Kittichaisaree, note 1 above, pp 105-106.

62 *Krstic,* para. 503.

63 Article 7(2)(c), ICC Statute.

64 *Kunarac and others*, ICTY Trial Chamber III, judgment of 22 February 2001 (case no. IT-96-23-T), paras. 542-543.

65 See *Prosecutor v Kunarac, Kovac and Vukovic*, ICTY Trial Chamber, judgment of 12 June 2002 (case nos. IT-96-23-A and IT-96-23/1-A), para 119.

- sex;
- prostitution;
- human trafficking.

Two important points need to be made in respect of this offence. The first is that the acquisition or disposal of someone for monetary or other compensation, while a prime example of the exercise of the right of ownership over someone who has been rendered 'servile', is not a requirement for enslavement.[66] The central element of the crime is the exploitation of one or more persons through the exercise of the right of ownership. From this we can derive the second, more general, point, that enslavement, even if tempered by humane treatment, is still slavery. As the US Military Tribunal under Control Council Law No. 10 in *Pohl and Others* made clear:

> "Slaves may be well fed and well clothed and comfortably housed, but they are still slaves if without lawful process they are deprived of their freedom by forceful restraint. … There is no such thing as benevolent slavery."[67]

- *Deportation or forcible transfer of population*

Deportation or forcible transfer of population is defined in the Rome Statute as "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".[68] Deportation is generally understood to mean the forcible transfer of persons from one State to the territory of another State.[69] Forcible transfer, however, relates to the forcible transfer of persons to another location within the same State. The ICC Statute's use of the words 'forcible transfer of population' has therefore updated the original term 'deportation' to express condemnation of what in recent years (witness the events in Rwanda and Yugoslavia) has come to be known as 'ethnic cleansing' within a country's borders.[70]

- *Imprisonment or other severe deprivation of physical liberty*

Article 7(1)(e) of the Rome Statute prohibits "[i]mprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law". Imprisonment as a crime against humanity has been defined by the Trial Chamber of the ICTY in *Kordic and Cerkez*[71] as "arbitrary imprisonment, that is to say, the deprivation of liberty of the individual without due process of law, as part of a widespread or systematic attack

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66 *Kunarac,* para. 542.

67 *Trial of Oswald Pohl and Others*, US Military Tribunal, Nuremberg, Germany, 3 November 1947, Trials of War Criminals (TWC), Vol. V, 958, cited in Kittichaisaree, see note 3 above, p 107.

68 See Article 7(2)(d), ICC Statute.

69 *Krstic,* ICTY Trial Chamber, para. 521. In this case the Trial Chamber found that around 25,000 Bosnian Muslim civilians were forcibly bussed outside the enclave of Srebrenica to other territory. Because the other territory was still within the same State of Bosnia and Herzegovina, the Chamber concluded that the civilians were subject to forcible transfer, and not deportation (paras. 527-532).

70 Schabas, note 48 above, p 38.

71 *Kordic and Cerkez*, ICTY Trial Chamber III, judgment of 26 February 2001 (case no. IT-95-14/2-T), paras. 302-303.

directed against a civilian population". In *Krnojelac*[72] the ICTY Trial Chamber held that the following elements constitute the crime against humanity of imprisonment:

- An individual is deprived of his or her liberty.
- The deprivation of liberty is imposed arbitrarily, that is, no legal basis can be invoked to justify the deprivation of liberty.
- The act or omission by which the individual is deprived of his or her physical liberty is performed by the accused or a person or persons for whom the accused bears criminal responsibility with the intent to deprive the individual arbitrarily of his or her physical liberty or in the reasonable knowledge that his act or omission is likely to cause arbitrary deprivation of physical liberty.[73]

- *Torture*

Article 7(2)(e) of the Rome Statute defines torture as "the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused", except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions.

Under general international law torture is only committed where, amongst other things, a public official was involved, either as the perpetrator or as one of the participants or accomplices.[74] Article 7 of the ICC Statute broadens that definition so that torture may amount to a crime against humanity even if committed by civilians against other civilians without any involvement of public officials or military personnel. Having said that, it should be noted that some sort of involvement of public authorities is required by the Elements of Crimes. The widespread or systematic practice that constitutes the general context of the crime must take place "pursuant to or in furtherance of a State or organisational policy" of torture.[75] The result is this: as long as the single act of torture is part of a widespread or systematic practice (which takes place pursuant to or in furtherance of a State or organisational policy of torture), even torture inflicted by one citizen against another without any participation of a public official is punishable as a crime against humanity.[76]

- *Sexual violence*

This class of offence includes "rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity."[77]

(a) Rape

Until recently, rape was not defined in international criminal law. In *Akayesu* the ICTR spelled out the broad parameters of this crime by saying that rape is "a physical invasion

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72 See Daryl Mundis, 'Current Developments at the *ad hoc* International Criminal Tribunals', 1 *Journal of International Criminal Justice* 197 (2003) at 201.

73 *Krnojelac*, ICTY Trial Chamber II, judgement of 1 March 2002 (case no. IT-97-25-T), para. 115.

74 Cassese, note 49 above, p 374.

75 Elements of Crimes Article7(I)(f).

76 Cassese, note 49 above, p 374.

77 See Article 7(1)(g), ICC Statute.

of a sexual nature, committed under circumstances that are coercive; it may or may not involve sexual intercourse".[78] Note that in the *Akayesu* case the ICTR held that rape could amount to torture when inflicted at the instigation of or with the consent or acquiescence of a public official or person acting in an official capacity.[79]

Further elaboration of the definition of rape was then attempted by the ICTY. In *Furundzija*, after drawing on the principles of criminal law common to the major legal systems of the world, Trial Chamber II concluded that the objective elements of rape were as follows:

> "(i) the sexual penetration, however slight: a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or b) of the mouth of the victim by the penis of the perpetrator; (ii) by coercion or force or threat of force against the victim or a third person."[80]

However, the *Furundzija* definition of rape has been recently rejected by the Appeals Chamber of the ICTY in *Kunarac*. The Trial Chamber in *Kunarac* had elaborated on the element of "coercion, or force, or threat of force" and explained that it may be set out as follows: "sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of a victim's free will, assessed in the context of the surrounding circumstances".[81] The Appeals Chamber has now clarified that force or threat of force, while providing clear evidence of non-consent, is not per se an element of the offence of rape. According to the Appeals Chamber in *Kunarac* the elements of rape in international law include the sexual penetration, however slight, (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator, or (b) the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim.

The Elements of Crimes in the Rome Statute, drafted and adopted prior to the *Kunarac* Appeal, in turn sets out its own requirements in the case of rape. In terms of the Elements of Crimes, the crime against humanity of rape occurs where:

(1) The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body; and,
(2) The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent (because of natural, induced or age-related incapacity); and,
(3) The conduct was committed as part of a widespread or systematic attack directed against a civilian population; and

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78 *Akayesu*, ICTR Trial Chamber I, Judgment of 2 September 1998 (case no. ICTR-96-4-T), para. 597.

79 Ibid.

80 *Furundzija*, ICTY Trial Chamber II, judgment of 10 December 1998 (case no. IT-95-17/1-T), para 185. See *Kunarac and others*, ICTY Trial Chamber III, judgment of 22 February 2001 (case no. IT-96-23-T) para. 460).

81 Ibid.

(4) The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

Ultimately then, under the Rome Statute, the prosecutor will have to show that the rape was committed by force or threat of force or coercion, the obvious implication being that where objectively such circumstances have been proved to have existed, the consent of the victim was necessarily negated or not forthcoming.

(b) Forced pregnancy

This crime is defined in Article 7(2)(f) of the Rome Statute 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". Situations covered by this definition would include those where women are forcibly impregnated and confined so as to force them to bear children of a conquering ethnic group with a view to affecting the ethnic composition of a population, or so as to serve as a medical experiment.[82] However, the definition is not to be interpreted as "affecting national laws relating to pregnancy", with the result that the crime against humanity of forced pregnancy does not restrict the competence of States to regulate birth control and abortion in line with their own domestic principles.[83]

(c) *Sexual violence*

Sexual violence is, according to the ICTR in *Akayesu*, "any act of a sexual nature which is committed on a person under circumstances which are coercive and is not limited to physical invasion of the human body [but] may include acts which do not involve penetration or even physical contact".[84] In that case it was held that the act of undressing a female victim and forcing her to do gymnastics naked in the public courtyard in front of a crowd constituted sexual violence.[85] Note, however, that Article 7(1)(g) of the Rome Statute indicates that such sexual violence can amount to a crime against humanity only where it is "sexual violence of comparable gravity" to rape, sexual slavery, enforced prostitution, forced pregnancy or enforced sterilisation.

■ *Persecution*

Only extreme forms of discrimination amounting to deliberate persecution are to be punished as crimes against humanity. As such, it is defined in Article 7(2)(g) of the Rome Statute as "the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity".

An example of persecution is provided by the ICTY Trial Chamber's decision in *Kupreskic and others*. There it was held that the deliberate and systematic killing of Bosnian Muslim civilians as well as their organised detention and expulsion from the village where the crimes were committed could constitute persecution.[86] The Trial Chamber also found that

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82 Kittichaisaree, note 3 above, p 114, citing Robinson, 93 *AJIL* 53 (1999), n. 63.

83 Kittichaisaree, ibid, p 114.

84 *Akayesu*, para. 598.

85 Ibid, para. 688.

86 *Kupreskic and others*, ICTY Trial Chamber, judgment of 14 January 2000 (case no. IT-95-16-T), para. 629.

because the comprehensive destruction of Bosnian Muslim homes and property was committed on discriminatory grounds, such action amounted to persecution.[87] More recently, the ICTY Trial Chamber in *Krnojelac* has concluded that the crime of persecution consists of an act or omission that:

(i) discriminates in fact and denies or infringes upon a fundamental right laid down in international customary or treat law (the *actus reus*); and

(ii) was carried out deliberately with the intention to discriminate on one of the listed grounds, specifically race, religion or politics (the *mens rea*).[88]

■ *Enforced disappearance*

Under the Rome Statute this crime constitutes "the arrest, detention or abduction of persons by, or with the authorisation, support or acquiescence of, a State or a political organisation, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time."[89]

■ *Apartheid*

Article 7(2)(h) of the ICC Statute defines 'the crime of apartheid' as "inhumane acts of a character similar to [other crimes against humanity], committed in the context of an institutionalised regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining the regime".

It is clear that this crime was included to cover the South African-style imposition of a policy of apartheid, or separateness, and because the definition of apartheid in the ICC Statute closely follows its definition under Article II of the Apartheid Convention of 1973,[90] it may prove useful to consider the Convention's enumerated list of proscribed acts of apartheid for further guidance.[91] These acts include, *inter alia*, the deliberate imposition on a racial group or groups of living conditions calculated to cause its or their physical destruction in whole or in part; legislative and other measures calculated to prevent a racial group or groups from participation in the political, social, economic and cultural life of the country; the deliberate creation of conditions preventing the full development of such a group or groups; and legislative and other measures designed to divide the population along racial lines by the creation of separate ghettos and reserves, the prohibition of mixed marriages, the expropriation of landed property belonging to a particular social group, and so on.

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87 Ibid, paras. 630-631.

88 See Daryl Mundis, note 56 above, p 202.

89 See Article 7(2)(i), ICC Statute.

90 The International Convention on the Suppression and Punishment of the Crime of Apartheid, 30 November 1973.

91 Particularly because the Elements of Crimes for the crime against humanity of apartheid provides little guidance as to what specific actions the crime is intended to proscribe.

- *Other inhumane acts*

These acts are defined in Article 7(1)(k) as 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".

3.4.2 Widespread or systematic attack against a civilian population

Having set out the different classes of offences that may constitute crimes against humanity, it is important to return to the definition of a crime against humanity in Article 7(1) of the Rome Statute. In terms of that definition:

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

From this definition it will be clear that the Rome Statute sets additional, general 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. As the ICTY Appeals Chamber made clear in *Tadic*:

> "The Trial Chamber correctly recognised that crimes which are unrelated to widespread or systematic attacks on a civilian population should not be prosecuted as crimes against humanity. Crimes against humanity are crimes of a special nature to which a greater degree of moral turpitude attaches than to ordinary crimes."

Article 7(2) of the Rome Statute 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 organisational policy to commit such attack."

Various points arise from this:

- The attack is the *event* of which the *enumerated acts* must form part and there may be a combination of acts (for example, murder, rape, torture, etc.) within a single attack.[92]
- The attack may be violent or non-violent (for instance, a non-violent attack may be a policy of apartheid exerted in a way that pressurises the population to act in a particular manner), and the attack need not be a *military* attack.[93]
- The attack may have either *widespread* or *systematic* aspects. A widespread attack is an attack directed against a multiplicity of victims, while a systematic attack is an attack carried out pursuant to a preconceived policy or plan.[94] As such, it is required that the offence concerned be an instance of a repetition of similar crimes or be part

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92 Kittichaisaree, note 3 above, p 94.

93 Schabas, note 48 above, p 36.

94 Kittichaisaree, note 3 above, p 96.

of a string of such crimes (widespread practice), or that it be the manifestation of a policy or a plan drawn up, or inspired by, State authorities or by the leading officials of a *de facto* State-like organisation, or of an organised political group (systematic practice).[95]

- The requirement that the attack have a widespread or systematic nature does not mean that a crime against humanity cannot be perpetrated by an individual who commits only one or two of the designated acts, or who engages in only one such offence against only one or a few civilians. So long as the individual's act or acts are part of a consistent pattern of offences by a number of persons linked to that offender, he or she may be properly charged with crimes against humanity.[96] Cassese proposes the following test to determine whether the necessary threshold is met when an individual is not accused of planning or carrying out a policy of inhumanity, but simply of committing specific atrocities or vicious acts:

  > "one ought to look at these atrocities or acts in their context and verify whether they may be regarded as part of an overall policy or a consistent pattern of inhumanity; or whether they instead constitute isolated or sporadic acts of cruelty and wickedness."[97]

- The 'systematic' nature of the attack, or its 'policy' element, is made explicit in the Rome Statute through the requirement in Article 7(2) that the specific acts must be carried out "pursuant to or in furtherance of a State or organisational policy to commit such attack". The accused's act of murder, torture, etc. must be *pursuant to a policy;* it is the existence of this policy that endows the criminal act with the character of a crime against humanity. The policy need not be country-wide; it may be localised in a particular geographical region.[98] Note also that crimes against humanity can be committed by non-state actors, since Article 7(2) specifically includes the possibility of an act being pursuant to an 'organisational policy' to commit the attack. Crimes against humanity can be committed on behalf of entities with *de facto* control over a territory even if they have no international recognition and they can be committed by a terrorist group or organisation.[99]
- The attack may by an act of omission. In *Kambanda* the ICTR found the accused guilty of crimes against humanity (in addition to the charges of genocide – see genocide notes) for having failed in his duty as Prime Minister of Rwanda to protect the children and population of Rwanda from massacre, especially after having been personally asked to do so.[100]

The second requirement is that the attack must be directed against a *civilian population*. This distinguishes it from many war crimes that may be targeted at both civilians and

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95 Cassese, note 38 above, p 64.

96 As a good example, Kittichaisaree points out that the act of denouncing a Jewish neighbour to the Nazi authorities committed against the background of widespread persecution against the Jews has been held to be a crime against humanity. See Kittichaisaree, note 1 above, p 97, citing *Kupreskic and others*, ICTY Trial Chamber, judgment on 14 January 2000 (case no. IT-95-16-T), para. 550.

97 Cassese, note 49 above, p 361.

98 Kittichasaree, note 3 above, p 99.

99 Ibid, p 98.

100 Ibid, p 94, citing *Kambanda* (case no. ICTR 97-23-S), para. 39(ix).

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.[101]

What is a civilian for the purposes of Article 7(1)? It would appear that 'civilian' must be given a broad definition to cover not only the general population but also members of the armed forces and resistance forces who have become *hors de combat* and laid down their weapons, either because they have been captured or because they have been wounded.[102]

Note that the 'population' element does not mean that the entire population of a given state must be targeted – it is merely intended to indicate the collective nature of crimes against humanity that excludes single or isolated acts punishable as war crimes or crimes against municipal law that do not rise to the level of crimes against humanity.

3.5 *Mens rea* – crimes against humanity

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.[103]

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. In *Kupreskic*, for example, the ICTY Trial Chamber described the mental element for a crime against humanity thus: "[T]he requisite *mens rea* for crimes against humanity appears to be the *intent* to commit the underlying offence, combined with the *knowledge* of the broader context in which that offence occurs".[104]

3.5.1 Knowledge of the broader context

What is to be understood by the requirement of 'knowledge of the broader context'? The perpetrator must *knowingly* commit the crime; that is, he or she must be aware of the broader context in which his or her act occurs. To put it differently, it must be shown that he had knowledge that his underlying offence was *part of a widespread or systematic attack on the civilian population and pursuant to a policy or plan*.[105] If this knowledge is not present, the perpetrator would only have the *mens rea* for an ordinary crime and not a crime against humanity.[106] Without the requisite 'big-picture' intention, he would only

101 Cassese, note 49 above, p 93.

102 Ibid.

103 Schabas, note 48 above, p 37.

104 *Kupreskic and others*, ICTY Trial Chamber, judgment of 14 January 2000 (case no. IT-95-16-T), para. 556.

105 *Tadic,* ICTY Appeals Chamber, judgment of 15 July 1999 (case no. IT-94-1-A), para. 248.

106 Kittichaisaree, note 3 above, p 91.

have the *mens rea* for his individual act and would not have formed the overall intention to associate his individual act with the widespread or systematic attack.

This requirement may be established by, for example, proof of the participation of the perpetrator in the planning, organisation or execution of a large-scale commission of vicious acts of inhumanity.[107] The requisite knowledge could be inferred from, for example, the historical or political circumstances in which the acts occur; the functions of the accused at the time of the crimes; the accused's responsibilities in the political or military hierarchy; the widespread nature and seriousness of the acts committed; and the nature of the crimes committed as well as their notoriety.[108]

What is the extent of the knowledge required? It is not necessary that the accused knew of all the characteristics of the attack or the precise details of the plan or policy of the State or organisation.[109] Where there is an *emerging* widespread or systematic attack against a civilian population, it is enough if the perpetrator intended to *further* such an attack.[110]

At the very least the perpetrator needed to be aware of the possibility that his act was part of the attack and he then took that risk. As the ICTY Trial Chamber explained in *Blaskic*:

> "[t]he accused need not have sought all the elements of the context in which his acts were perpetrated; it suffices that, through the functions he willingly accepted, he knowingly took the risk of participating in the implementation of that context."[111]

In *Blaskic* the accused was charged with persecution against a group on a political basis. He had joined the Croat Defence Council (HVO), which had adopted the policy of discrimination against Muslims with the aim of systematically excluding them from the organs of political life. The HVO took decisions on the organisation of life in the town. Although Blaskic was a general, he had exhibited a political will to join the Council. The Tribunal found that Blaskic was deemed to be aware that the scope of his activities could not be a purely military one and that, through the functions he willingly accepted, he knowingly took the risk of participating in the implementation of the context (of persecution against the Muslims).[112]

3.5.2 Crimes of persecution

In respect of the 'persecution-style' offences that are crimes against humanity, an additional subjective mental element of a persecutory or discriminatory animus is required. This intent must be to subject a person or group to discrimination, ill-treatment

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107 Cassese, note 49, pp 363-364.

108 Kittichaisaree, note 3 above, p 92, citing *Blaskic,* ICTY Trial Chamber, judgment of 3 March 2000 (case no IT-95-14), para. 259.

109 Schabas, note 48 above, p 37; Elements of Crimes, Article 7, para. 2. See also the recent decision of the ICTY Appeals Chamber in *Prosecutor v Kunarac, Kovac and Vukovic*, judgment of 12 June 2002 (case nos. IT-96-23-A and IT-96-23/1-A), where it was affirmed that accused need not be aware of the details of the attack (para. 102).

110 Elements of Crimes, Article 7, para. 2.

111 *Blaskic,* ICTY Trial Chamber, judgment of 3 March 2000 (case no. IT-95-14), para. 251.

112 Kittichaisaree, note 3 above, p 92.

or harassment so as to bring about great suffering or injury to that person or group on religious, political or other such grounds.[113] As such, this additional form of intent amounts to a *special form of intent*, or *dolus specialis*.

3.5.3 Can a crime against humanity be committed negligently?

Because of the gravity of crimes against humanity, and the fact that the underlying classes of offences (murder, extermination, deportation, rape, torture, persecution, etc) are usually associated with a mental element of intention (or at least reckless intent, or *dolus eventualis*) on the part of the perpetrator, it cannot be the case that crimes against humanity can result from a negligent state of mind.[114]

4 War Crimes

4.1 Introduction

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.[115]

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

The 'law of The Hague' is made up of the Hague Conventions of 1868, 1899 and 1907, which generally speaking set out rules regarding the various categories of lawful combatants and regulate the means and methods of warfare in respect of those combatants.[116] The 'law of Geneva', so called because it comprises the four Geneva Conventions of 1949 plus the two Additional Protocols thereto of 1977, regulates the treatment of persons who do not take part in the armed hostilities (such as civilians, the wounded and the sick) and those who used to take part but no longer do (such as prisoners

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113 Cassese, note 38 above, p 82.

114 Cassese, note 49 above, p 364.

115 In Articles 228 to 230 of the Treaty of Versailles Germany recognised the jurisdiction of the Allied Powers to try persons accused of violating the laws and customs of war as well as the obligation to hand over such accused persons to the Allies for that purpose. None of these provisions was implemented due to later German pressure. Instead, Germany proposed to try its own nationals accused of war crimes before the Supreme Court of Leipzig, a proposal that produced mock trials resulting in only 13 convictions out of 901 cases, and with insignificant sentences that ultimately were not executed. See Georges Abi-Saab, *'The concept of "war crimes"'*, pp 102-103 in S Yee and W Tieya (eds), *International Law in the Post-Cold War Area* (2001), pp 99-118.

116 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 they have been supplanted by the Geneva rules, which cover this aspect of humanitarian law in more detail.

of war).[117] 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.

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

4.2 Armed conflict

International humanitarian law finds application during times of armed conflict; that is, war crimes can only be committed in an armed conflict. Similarly, 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.

The first point to note is that war crimes may be committed during either international or internal armed conflicts. Up until 1990 the scope of international responsibility for war crimes was the subject of much confusion. The two major sources of humanitarian law, described above, did not appear to extend international criminal responsibility to those who committed the prohibited acts during times of internal armed conflicts. Put differently, responsibility seemed to be limited to crimes committed during international conflicts. Indeed, even when the Geneva Conventions were updated with the two Additional Protocols in 1977, the drafters made it clear that there could not be 'grave breaches' of the Geneva Conventions during times of non-international armed conflict.

The position has changed (and become clearer) in the light of the jurisprudence of the ICTY. In the *Tadic* case, 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.[118] Through a progressive reading of the ICTY Statute, the judges were able to read this in as a component of the term 'laws and customs of war' associated with the Hague Convention. This progressive reading has, by and large, come to be reflected in Article 8 of the Rome Statute. States Parties to the Rome Statute have now accepted that war crimes' responsibility can be founded in a time of internal as well as international armed conflict. So long as it is linked with the armed conflict, the offence, whether committed by members of the military or civilians, will constitute a war crime. Note that this is true even of offences committed by civilians against other civilians. If, however, no link exists between the offence and the armed conflict, then nothing more than an 'ordinary' offence under the law applicable in the relevant territory has been committed.[119]

117 Cassese, note 38 above, p 48.

118 *Tadic,* ICTY Appeals Chamber, decision of 2 October 1995 (case no. IT-94-1-AR72), paras. 96-136.

119 See the decision of the Swiss Appellate Military Tribunal in *Niyonteze*, judgment of 27 April 2001, available at www.icrc.org/ihl-nat-nsf, and cited in Cassese, note 2 above, p 49.

When, for the purposes of international criminal law, does an armed conflict exist? The test to determine the existence of an armed conflict has been set out by the ICTY. In *Tadic* the ICTY Appeals Chamber said that an armed conflict exists "whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State".[120] Note therefore that an 'armed conflict' is not constituted by mere civil unrest or terrorist activities.

An armed conflict is understood, moreover, to extend beyond the cessation of hostilities until such time as there is a general conclusion of the peace (in the case of an international conflict) or a peaceful settlement (in the case of an internal conflict).[121] In addition, an armed conflict can be said to exist even though no actual fighting is taking place in the particular geographical area where the crime is committed. In *Tadic* the defendant had argued that no armed conflict was taking place at the time at which he was said to have committed war crimes (against Bosnian Muslims and Croats who were detained by Serb forces at a camp in Omarska). In other words, his argument was that an armed conflict exists only in those parts of a State where actual fighting is taking place. The Tribunal rejected this argument and found that there is nothing in the Geneva Conventions that suggests that humanitarian law does not apply to the conditions of detention of prisoners detained away from the scene of fighting.[122] As such, an armed conflict is understood to apply to the whole territory of the warring States (in an international conflict) or to the whole territory under the control of a party to an internal conflict.[123]

4.3 Class of perpetrator

War crimes may be committed by all types of persons: by military personnel against enemy servicemen or civilians or by civilians against either members of the enemy armed forces or enemy civilians. Whatever class of perpetrator is involved for a war crime to have been committed, "a sufficient nexus must be established between the alleged offence and the armed conflict which gives rise to the applicability of international humanitarian law".[124] If during an armed conflict a civilian kills another civilian in a strictly private interpersonal conflict, then no war crime has been committed as the conduct is not associated in any way with the broader context of the armed conflict. Where, however, civilians act on behalf of or with the encouragement of a warring party to commit acts of brutality against, for instance, inmates in a camp belonging to another group that is considered hostile to the warring party, then those acts could constitute war crimes.[125]

120 *Tadic,* paras. 63-64.

121 Kittichaisaree, note 3 above, p 131.

122 See Greenwood 'International Humanitarian Law and the *Tadic* Case', 7 *EJIL* 2 (1996), 265 at 269.

123 Kittichaisaree, note 3 above, p 131.

124 *Tadic*, 7 May 1997, paras. 752 et seq.

125 See in this regard the facts in the *Tadic* case. There the ICTY found at para. 575 that "[t]hose acts clearly occurred with the connivance or permission of the authorities running these camps and indicate that such acts were part of an accepted policy towards prisoners. …Indeed, such treatment effected the objective of the *Republic Srpska* to ethnically cleanse, by means of terror, killings or otherwise, the area controlled by Bosnian Serb forces. Accordingly, those acts were directly connected with the armed conflict."

As a final point, note that crimes committed by servicemen against their own military (whatever their nationality) do not constitute war crimes, although they may nonetheless be punishable under the military law of the relevant army. For example, in the *Pilz* case before the Dutch Special Court of Cassation, it was found that a war crime was not inflicted upon a Dutchman who had enlisted in the German army, was prevented from receiving medical assistance by a German doctor "in abuse of his authority as a superior" and was then shot on the orders of this doctor. The Court held that, by entering the military service of the occupying power, the Dutchman had removed himself from the protection of international law. The offence thus constituted a crime under the internal law of Germany only.[126]

4.4 War crimes under the ICC Statute

4.4.1 When will Article 8 be triggered?

Under customary international law, the distinction between crimes against humanity and genocide on the one hand and war crimes on the other hand is that the former two have a jurisdictional threshold (crimes against humanity are acts committed as part of a widespread and systematic attack; genocide involves the specific intention to destroy in whole or in part a protected group). War crimes, by contrast, can in principle cover even isolated acts committed by individual soldiers or civilians acting without direction from superiors. Having said that, under the Rome Statute the ICC's attention will be directed 'in particular' to those war crimes that are "committed as part of a plan or policy or as part of a large-scale commission of such crimes".[127] This so called 'non-threshold threshold' built into Article 8 ensures that two jurisdictional triggers – (a) that the war crime is committed as part of a plan or policy, or (b) that the war crime is committed alongside other war crimes on a large scale – should ordinarily be met before the ICC will be seized with the case. Note, this jurisdictional threshold is not an additional requirement for the elements of war crimes, but is rather a method used to prevent the ICC from being overburdened with isolated cases.

In respect of these individual or isolated cases the expectation is that, in accordance with Article 17 of the Rome Statute, it will remain the responsibility of the States where any suspected war criminal is found to investigate the case and to prosecute the person concerned.[128] It should also be mentioned that the proviso does *not* rule out the possibility of the ICC exercising jurisdiction over war crimes not committed as part of a plan or policy or as part of a large-scale commission of such crimes. This situation may arise, for example, where the State is unwilling or unable genuinely to carry out the investigation or prosecution of a case that involves an isolated war crime, and the ICC's jurisdiction might thus be triggered.

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126 See Cassese, note 38 above, p 48.

127 Article 8(1), ICC Statute.

128 Michael Bothe, 'War Crimes', p 380 in Cassese, note 49 above.

4.5 *Actus reus* – war crimes

The Rome Statute in Article 8(2) is the first attempt to clearly and comprehensively set out a definition of war crimes. 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 covering war crimes committed during an international armed conflict and the other two covering war crimes committed during an internal armed conflict.

4.5.1 War crimes in times of international armed conflict

- *Grave breaches of the Geneva Conventions*

The Rome Statute begins its listing of war crimes by defining grave breaches of the Geneva Conventions as war crimes (Article 8 (2)(a)). The four Geneva Conventions adopted in 1949 protect different categories of persons. Convention I protects the wounded and sick in land warfare; Convention II protects the wounded, sick and shipwrecked in sea warfare; Convention III protects prisoners of war; and Convention IV protects civilians. In addition, certain property is protected under the Geneva Conventions and the First Additional Protocol.

The 1949 Geneva Conventions introduced the important development of individual criminal responsibility for certain particularly severe violations of the treaties, known as 'grave breaches', committed against 'protected persons' or 'protected objects' provided for in the Conventions as well as the First Additional Protocol. Grave breaches are defined in Articles 50, 51, 130 and 147 of Geneva Conventions I, II, III and IV, respectively, as well as in Article 85 of the First Additional Protocol (see Box 3.1).

Box 3.1: 'Grave Breaches' in the Geneva Conventions

Particularly severe violations of the Geneva Conventions of 1949 are known as 'grave breaches'. According to the Fourth or 'civilian' Convention, grave breaches consist of: wilful killing, torture or inhuman treatment (including biological experimentation), wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial, taking of hostages, and extensive destruction and appropriation of property that is not justified by military necessity and carried out wantonly and unlawfully (Article 147). The other three Geneva Conventions have shorter enumerations but the fundamentals of the definition are the same.

Hand in hand with the idea of this criminal responsibility was the recognition under the Conventions that States were obliged to investigate, prosecute or extradite persons suspected of committing these 'grave breaches', irrespective of their nationality or the place where the crime was committed, giving rise to an obligation *aut dedere aut judicare* (either prosecute or extradite). After 1949 the rules on grave breaches of the Geneva

Conventions were honoured less in their observance than in their breach, and with the exception of the prosecutions that took place under the Statutes of the ICTY and the ICTR in the 1990s, the punitive scheme under the Conventions was very seldom put into effect.

The Rome Statute, of course, is aimed at remedying that defect. It follows the Conventions and provides in Article 8(2)(a) that any of the following acts ('grave breaches') 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.

In respect of the elements of these grave breaches, the following points might be noted.

(a) *Wilful killing*

In relation to wilful killing, such action includes killing that is perpetrated intentionally or recklessly (*dolus eventualis*) in relation to the death of the protected person. It goes without saying that this prohibition covers only protected persons under the Geneva Conventions – a combatant (who has not become a prisoner and is neither sick nor wounded) may lawfully be killed on the battlefield.

(b) *Torture or inhuman treatment*

When it comes to torture or inhuman treatment as a war crime, note the difference between such a war crime under Article 8(2)(a) of the Statute and torture as a crime against humanity under customary international law. Under the latter, torture as defined can only be committed at the instigation of, or with the consent or acquiescence of, an official or a person acting in an official capacity for one of the following purposes – to obtain information or a confession, to punish, to intimidate or for any reason based on discrimination. The ICC Statute, in relation to crimes against humanity, defines torture without the requirement that it involve an official or a person acting in an official capacity and without the requirement that it be committed for a specific purpose.

In relation to war crimes, the Statute has also done away with the official capacity requirement. Nonetheless, the Statute requires that for a war crime to have been committed the torture must be executed for the specific purpose of furthering the war effort. As such, it must be linked to an armed conflict with the purpose of obtaining

information or a confession, or to punish, intimidate or for any reason based on discrimination.[129]

(c) Compelling someone to serve in the forces of a hostile power

Regarding the crime of compelling someone to serve in the forces of a hostile power, the act prohibited is to compel a person who is in the hands of a party of which he or she is not a national to serve in the armed forces of that party. This grave breach is contained in the list of Geneva Conventions III and IV and is therefore aimed at protecting detained persons – under these Conventions being prisoners of war and civilians – from being compelled to serve in the forces of a hostile power.[130]

(d) Unlawful deportation and taking hostages

The grave breaches of unlawful deportation and of taking hostages are breaches contained only in Geneva Convention IV; that is, these crimes as grave breaches under Article 8(2)(a) of the Rome Statute are crimes directed against the civilian population only.

(e) Protected persons or property

The chapeau of Article 8(2)(a) of the Rome Statute provides that grave breaches of the Geneva Conventions of 1949 are the acts enumerated in that provision "against persons or property protected under the provisions of the relevant Geneva Conventions".

In the case of Geneva Conventions I, II and III this means that the targeted persons must be members of the armed forces of a party to the international conflict. With respect to Geneva Convention IV, protected persons are civilians. In both cases there is the requirement that for 'protection' to subsist the persons must be "in the hands of a Party to the conflict or Occupying Power of which they are *not* nationals".

However, flexibility is given to the term 'national'. It does not mean that simply because a person has some nationality link to the party that is holding him or her that he or she therefore does not have protection. A person would still be protected if they were, for example, nationals of the belligerent party but refugees who no longer owed allegiance to or had diplomatic protection from that party. For example, the ICTY Appeals Chamber in *Tadic* regarded Bosnian Muslims as 'protected persons' in relation to their Bosnian Serb captors, even though they were together regarded as nationals of Bosnia and Herzegovina.[131]

The real crux of these persons being so identified as 'protected' is that for some reason or other they are not or are no longer taking a direct or active part in the hostilities. They are combatants who are considered *hors de combat* because of injury, shipwreck or illness, or because they have been taken as prisoners of war, or they are civilians.

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129 See Kittichaisaree, note 3 above, pp 144-145. See also the Elements of Crimes for the war crime of torture. Note that if the person commits torture without the requisite purpose of furthering the war effort, he could still be guilty of a grave breach of the Geneva Conventions under the prohibition in the ICC Statute on "wilfully causing great suffering, or serious injury to body or health" (Article 8(2)(a)(iii)).

130 Michael Bothe, p 394 in Cassese, note 49 above.

131 See *Tadic*, Appeals Judgement, paras. 167-169.

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, among others, may not be destroyed except in cases of military necessity.[132]

(f) Narrowness of application

Lastly, note the narrowness of application. The Geneva Conventions suggest that these 'grave breaches' can only be committed in a time of international armed conflict. The Rome Statute does not suggest otherwise. The Elements of Crimes makes it quite explicit that the 'grave breaches' war crimes are committed in an international armed conflict only. This follows the jurisprudence of the ICTY in *Tadic,* where it was accepted that the grave breaches regime applied only to international armed conflict, even though this was not stated in the Tribunal's Statute.

■ *Other serious violations of the laws and customs applicable in international armed conflict*

Article 8(2)(b) sets out the second category of war crimes, which are explicitly 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 general focus of the crimes under Article 8(2)(b) is on the combatants themselves. As a result, there is no requirement that the crimes must be directed against 'protected persons'. These crimes are a continuation of ancient rules of chivalry reflecting a code of conduct among warriors.[133] Having said that, there are certain rules contained in the list that have as their focus the protection of the civilian population and that are drawn from Additional Protocol I of 1977 of the Geneva Convention.

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

a) Prohibited methods of warfare:

These prohibitions serve to protect, in the first place, the civilian population against armed attacks 'as such'; that is, attacks directed against persons who are civilians,[134] attacks against civilian objects,[135] attacks that violate the principle of proportionality[136] and attacks against undefended places.[137] Civilians are also

132 Kittichaisaree, note 3 above, p 41.

133 Schabas, note 48 above, p 47.

134 Article 8(2)(b)(i).

135 Article 8(2)(b)(ii).

136 Article 8(2)(b)(iii), which prohibits an attack that is intentionally launched in the knowledge that it will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment that would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.

137 Article 8(2)(b)(v), such undefended places being defined as towns, villages, dwellings or buildings that are undefended and that are not military objectives.

protected against 'misuse', for instance, the use of civilians or protected persons as a means to render certain points or areas immune from military operations[138] and the starvation of civilians as a method of warfare are prohibited, as is any attack against objects indispensable to the survival of the civilian population.[139] Secondly, the 'destruction of property' is outlawed in that the destruction or seizing of the enemy's property is considered a war crime unless such destruction or seizure is imperatively demanded by the necessities of war.[140] Thirdly, the improper use of signs and perfidy is rendered a war crime.[141] Fourthly, combatants are protected under this section of the Rome Statute insofar as it is prohibited to kill or wound persons who are *hors de combat*.[142] 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.[143]

b) *Prohibited weapons*

Several of the provisions of Article 8(2)(b) deal with prohibited weapons (for example, poison or poisoned weapons,[144] poisonous gases and all analogous liquids, materials or devices,[145] and dum-dum bullets[146]) and render their use a war crime. Note that the diplomatic realities at the Rome Conference prevented the most obviously damaging weapons, such as nuclear weapons and landmines, from being specifically included in the subsection. Nuclear weapons, for instance, were excluded on the insistence of the nuclear powers that "material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate" be the subject of a comprehensive prohibition included as an annex to the Statute, yet to be prepared.[147] Similarly, the give-and-take of diplomacy meant that other countries then demanded that biological and chemical weapons not be explicitly prohibited. Nevertheless, the use of nuclear weapons will always constitute a violation of humanitarian law, in particular those rules relating to the protection of the civilian

138 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.

139 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".

140 Article 8(2)(b)(xiii). Note that the crime of pillage, outlawed in Article 8(2)(b)(xvi) – and which involves an appropriation of property for private, personal use – must be distinguished from the *official* destruction or seizure of property prohibited under Article 8(2)(b)(xiii).

141 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".

142 Article 8(2)(b)(vi).

143 Article 8(2)(b)(xii), as read with Article 40 of Additional Protocol I of 1977 – see Bothe, p 406, in Cassese, note 49 above.

144 Article 8(2)(b)(xvii).

145 Article 8(2)(b)(xviii).

146 Article 8(2)(b)(xix).

147 See Article 8(2)(b)(xx).

population, and so will be covered by Article 8(2)(b)(i),[148] (ii)[149] or (iv).[150] Likewise, the same arguments can be made in relation to the use of biological weapons.[151] And while not mentioned explicitly, chemical weapons appear to be outlawed under Article 8(2)(b)(xviii).[152]

(c) Child conscription

In addition to the provisions reflecting the Hague rules, there are some 'new crimes' under paragraph (b) that have now been codified by the drafters at Rome. They cover, for instance, the protection of humanitarian and peacekeeping missions[153] and prohibit environmental damage.[154] 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 using them to participate actively in hostilities.[155]

Possibly the most controversial of these 'new crimes', given the Israeli-Palestinian conflict, is that contained in Article 8(2)(b)(viii). In terms of this Article it is a war crime for an Occupying Power to transfer, directly or indirectly, parts of its own civilian population into the territory it occupies, or to deport or transfer all or parts of the population of the occupied territory within or outside this territory.

(d) Sexual crimes

Another development brought about by para. 8(2)(b) 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,[156] enforced sterilisation or any other form of sexual violence also constituting a grave breach of the Geneva Conventions.[157] While the terms 'rape' and 'enforced prostitution' already appear in Geneva Convention IV and Protocol I, the outlawing of 'sexual slavery', 'forced pregnancy' and 'enforced sterilisation' are essentially new crimes. In addition, the broad prohibition of 'sexual

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148 Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities.

149 Intentionally directing attacks against civilian objects, that is, objects that are not military objectives.

150 Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment that would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.

151 See Michael Bothe, in Cassese, note 49 above, pp 396-397. Landmines too might fall foul of the principle laid down by Article 8(2)(b)(iv) inasmuch as the use of landmines in a specific situation might arguably involve "knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects".

152 Michael Bothe, ibid, p 397.

153 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.

154 See Article 8(2)(b)(iv).

155 Article 8(2)(b)(xxvi).

156 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".

157 Article 8(2)(b)(xxii).

violence' serves to catch those acts of a sexual nature that are not covered by the other acts mentioned in the paragraph.

Three criteria arise in relation to proving the crime of 'sexual violence'. (i) the misconduct complained of must involve an act of a sexual nature or causing a person to engage in such acts; (ii) the act must have a violent character (force, threat of force, other forms of coercion or taking advantage of an already existing coercive environment); and (iii) the conduct must be of a gravity comparable to that of a grave breach of the Geneva Conventions (an admittedly imprecise criterion).[158]

4.5.2 War crimes in times of non-international armed conflict

The next two categories of crimes under the Statute apply to non-international armed conflict. These crimes are far more controversial, at least historically. As early as 1949 States were prepared to recognise international legal obligations for war crimes committed between them (i.e. in times of international armed conflict). They were far more reluctant, though, when it came to internal armed conflict or civil war – which they considered to be their own business.

Did that mean that there were no protections in humanitarian law for victims of internal armed conflicts? No, most notably certain protections are set out in 'Common Article 3' of the Geneva Conventions (see Box 3.2).[159] Common Article 3 is the only article that makes reference to non-international armed conflict, and in the *Nicaragua* case[160] the International Court of Justice explained that it serves as a minimum rule of international humanitarian law to be imperatively applied to *all* types of armed conflicts.[161]

Box 3.2: Common Article 3 of the Geneva Conventions

Common Article 3 was a compromise provision included in the Geneva Conventions at the Diplomatic Conference that adopted them in 1949 and is common to and identically worded in all four of them. The Article 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 recognised as indispensable by civilized peoples".

158 See Michael Bothe, p 416, in Cassese, note 49 above.

159 Note that Common Article 3 applies to internal *armed conflicts* only; that is, it does not extend to mere internal strife, civil unrest or terrorist activity – Kittichaisaree, note 3 above, p 189.

160 'Military and Paramilitary Activities in and Against Nicaragua', 27 June 1986, *ICJ Reports* (1986), p 4.

161 Kittichaisaree, note 3 above, p 188.

Common Article 3 has achieved the status of a rule of customary international law, and Additional Protocol II of the Geneva Conventions attempted to expand its scope. Nonetheless, neither contains a provision on grave breaches in relation to non-international armed conflicts. In other words, while Common Article 3 and Protocol II contain primary protections applicable during armed conflicts of an internal nature, no secondary rules were set out stipulating that a violation of these protections would amount to a war crime, which would render the individual perpetrator punishable as such.

We have seen earlier that a momentous change was brought about in this regard by the *Tadic* decision of the ICTY Appeals Chamber. The Tribunal developed the concept of war crimes in times of non-international armed conflict by relying on the scope of application of the 'laws or customs of war' as a category of rules distinct from the 'grave breaches' regime set out under the Geneva Conventions.[162] This jurisprudential development was confirmed through the adoption by the Security Council of the Statute of the ICTR, which expressly recognises violations of Common Article 3 and Additional Protocol II as war crimes punishable under the jurisdiction of the Tribunal.

The ICC Statute reaffirms this trend and we see therefore that paragraphs (c) and (d) of Article 8 apply to non-international armed conflict as contemplated by Common Article 3, while paragraphs (e) and (f) apply to non-international armed conflict as extended in meaning by Additional Protocol II.

- *Violations of Common Article 3 of the Geneva Conventions*

  The criminal acts proscribed by this section are the Common Article 3 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;
  - The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all judicial guarantees that are generally recognised as indispensable.

As one noted commentator has explained, these standards or prohibitions represent a "common denominator of core human rights".[163]

- *Application of the prohibitions*

The prohibitions apply, as has already been explained, to armed conflicts 'not of an international character'. While the protections offered are thus applicable in conflicts of

162 It will be remembered that the Tribunal felt unable to condemn the accused for grave breaches of the Geneva Conventions – breaches that would have allowed the Tribunal to more comfortably punish the accused for war crimes since such breaches entailed at international law the idea of individual criminal responsibility – and accordingly the Tribunal had to consider whether humanitarian law rules beyond the scope of the grave breaches regime entailed individual criminal responsibility. This the Tribunal did by developing the concept of war crimes in non-international armed conflicts on the basis of customary international law rules relating to 'the laws or customs of war'.

163 Schabas, note 48 above, p 52.

an internal nature, 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".[164] Internal disturbances and acts of terrorism that 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 it is a party.[165]

As a consequence, under the ICC Statute during 'internal disturbances and tensions', crimes that would otherwise have been outlawed under the principles of Common Article 3 are punishable as crimes against humanity, not war crimes, before the ICC.[166]

The prohibited acts listed under Article 8(2)(c) of the Rome Statute, like the 'grave breaches' in Article 8(2)(a), are acts that 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".

- *Other serious violations of the laws and customs applicable in armed conflicts not of an international nature*[167]

  Protocol II of 1977 largely serves as the inspiration for the prohibitions contained in Article 8(2)(e) of the Rome Statute. Generally speaking, the prohibitions cover the following acts:

a) *Prohibited methods and means of violence in armed conflict of an internal nature*

   Attacks against the civilian population 'as such' are prohibited as well as against individual civilians not taken direct part in the hostilities.[168]

   In respect of combatants, there is a prohibition on "killing or wounding treacherously a combatant adversary",[169] on declaring that no quarter will be given,[170] or destroying or seizing the property of an adversary unless such destruction or seizure is imperatively demanded by the necessities of the conflict[171] and "pillaging a town or place, even when taken by assault".[172]

164 Article 8(2)(d).

165 See Christopher Greenwood, 'International Humanitarian Law: 2 The Conduct of Hostilities', pp 19-20, paper presented at the *European Training in Higher International Criminal Science Lectures* held at the European University Institute, Florence, 16-27 February 2004.

166 See Schabas, note 48 above, p 51.

167 Article 8(2)(e), ICC Statute.

168 Article 8(2)(e)(i).

169 Article 8(2)(e)(ix).

170 Article 8(2)(e)(x).

171 Article 8(2)(e)(xii).

172 Article 8(2)(e)(v). See the discussion above in note 140 on pillaging and its definition.

b) Prohibited attacks during an internal armed conflict on specially protected persons and objects

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.[173]
- 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 are prohibited so long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict.[174]
- 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.

c) Human rights violations during an internal armed conflict

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 that are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and that 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 sterilisation and any other form of sexual violence also constituting a serious violation of Article 3 common to the Geneva Conventions.
- 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.

■ *Application of the prohibitions*

As with the Common Article 3 war crimes listed in Article 8(2)(c), 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".[175]

However, whereas the line above which the prohibitions in Article 8(2)(c) kick in is arguably very low (any armed conflict that amounts to *more than* an internal disturbance and tension such as riots, isolated and sporadic acts of violence or other acts of a similar

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173 Article 8(2)(e)(ii).

174 Article 8(2)(e)(iii).

175 See the limitation contained in Article 8(2)(f).

nature), the application of the prohibitions in Article 8(2)(e) is more narrowly circumscribed by a positive definition of armed conflict in subparagraph (f). Article 8(2)(f) provides that for the purposes of this category of war crimes an armed conflict exists "whenever there is resort to armed force between States or protracted armed violence between governmental authorities and organised groups or between such groups within a State".[176] As such, for any of the war crimes to be committed listed in this subparagraph, there must be a 'protracted armed conflict' and these hostilities must take place between governmental authorities and 'organised armed groups', which are groups under responsible command and which exercise such control over a part of the territory to enable them to carry out sustained and concerted military operations.[177]

In effect, therefore, the prohibitions will become applicable in civil wars where both sides control tracts of territory. Note that Article 8(2)(f) does not limit application of the prohibitions in subparagraph (e) to protracted armed conflict between governmental authorities and organised armed groups. The Article specifically envisages the application of the prohibitions during armed conflict *between* such organised armed groups, and accordingly the conflicts between dissident groups such as those occurring in Somalia or in Lebanon would be covered, so long as the two rebel forces acquired sufficient control of territory to meet the requirements of Article 8(2)(f).[178]

4.6 *Mens rea* – war crimes

Having set out the broad categories of war crimes under the ICC Statute and how the particular war crimes are constituted, it remains to briefly consider the mental element required for a successful prosecution under Article 8.

According to Article 30 of the Statute, 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.

Quite aside from this general rule regarding the mental element, it should be remembered that a preliminary matter for the prosecutor is to show that the act or omission was perpetrated not just during but in connection with an armed conflict.

The first point to note is that, as we have seen in the discussion of the war crimes under Article 8, certain of the crimes already entail the mental element of intention in their definition. For instance, Article 8(2)(a) on grave breaches includes 'wilful killing', and 'wilfully causing great suffering, or serious injury to body or health'. So too, Articles 8(2)(b) and 8(2)(e), on serious violations of the laws and customs applicable in international

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176 This limitation is drawn from Article 1(1) of Additional Protocol II to the Geneva Conventions. See Christopher Greenwood, note 165 above, p 19.

177 See Michael Bothe, p 423, in Cassese, note 49 above, relying on the wording of Article 1(1) of Protocol II to define the term 'organised group' – the wording of Article 8(2)(f) follows closely the wording of Article 1(1) of Protocol II of 1977.

178 See Michael Bothe, ibid, p 423.

armed conflicts and non-international armed conflicts respectively, proscribe a range of attacks 'intentionally directed' against the civilian population, against specially protected buildings or against humanitarian assistance or peacekeeping missions. Article 8(2)(b) also prohibits 'intentionally' launching an attack in the knowledge that such an attack will, disproportionate to its military advantage, 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, and 'intentionally' using starvation as a method of warfare by depriving civilians of objects indispensable to their survival, including wilfully impeding relief supplies.

It would be a mistake, however, to think that this makes the mental element of intention mentioned in Article 30 superfluous in relation to these categories of war crimes. The reference to intention in the definition of these crimes has an effect when it comes to the mental element relating to 'consequences of such crimes'. With all other war crimes it is enough if the actor had knowledge that the consequences of his conduct would occur in the ordinary course of events. However, where the particular war crime specifically includes intention in the definition, then not only must the actor have intended his unlawful conduct (for example, dropping the bomb, depriving civilians of food), proof must also be canvassed to show that he intended his consequences (for example, hitting the civilian target or causing the starvation of civilians).[179]

Secondly, while the prosecutor has the onus of showing that the threshold for war crimes exists, namely, that the specific war crime was committed in the context of and associated with an armed conflict, this does not mean that the prosecutor must prove that the perpetrator had knowledge – in the sense of legally evaluated knowledge – of whether or not there was an armed conflict, or whether it was international or national. The Elements of Crimes makes clear that "[t]here is only a requirement for the awareness of the factual circumstances that established the existence of an armed conflict that is implicit in the terms 'took place in the context of and was associated with'".[180]

179 See Bothe, ibid, p 389.

180 Elements of Crimes, Article 8, Introduction.

Chapter 4

Kimberly Prost

Co-operation with the ICC: Arrests and Surrender, the Gathering of Evidence and Asset Forfeiture

1 Introduction

The International Criminal Court (ICC) will look to States for assistance in investigating cases and gathering evidence. This co-operation includes arrest and surrender of suspects, and State Parties are obligated to co-operate fully with the Court in investigations and prosecutions of crimes within its jurisdiction. Furthermore, under the ICC Statute States are obligated to respond to requests for 'other' forms of co-operation – in essence, the types of assistance with evidence gathering analogous to mutual legal assistance in criminal matters in State to State practice.

In this chapter, we consider the ICC provisions relating to the arrest and surrender of suspects, other forms of co-operatation to facilitate the gathering of evidence, and the tracing, freezing and forfeiture of assets upon conviction of an accused.

2 Co-operation under the ICC Statute

2.1 General principles

As a general principle the scheme for the arrest and surrender of suspects and the gathering of evidence under the ICC Statute is a co-operative one, involving the active participation of State Parties and, in some cases, non-State Parties and international organisations. The co-operation regime is mostly found in Part 9 of the Statute entitled 'International Co-operation and Judicial Assistance', though there are related provisions in Articles 56, 57 and 59 of the Statute.

Part 9 deals with two subjects: (a) arrest and surrender and (b) other forms of co-operation. It also contains general provisions of relevance to both these forms of co-operation. This regime is modelled on State to State schemes for international co-operation in criminal matters, but there are important differences. These include no grounds of refusal on the part of a State with respect to requests for arrest and surrender by the ICC and very limited grounds of refusal relating to other forms of co-operation.

State Parties to the ICC Statute thus have an obligation to co-operate and to execute requests for arrest and surrender or other forms of co-operation presented by the Court. This is clearly reflected in three Articles in Part 9. Article 86 imposes a general obligation on States to co-operate fully with the Court in the investigation and prosecution of the crimes within its jurisdiction. Articles 89 and 93 mandate that States must comply with requests for arrest and surrender and other forms of co-operation respectively.

Under Article 87 the Court is empowered to obtain assistance from a non-State Party on the basis of an arrangement or agreement or on any other appropriate footing. Similarly the Court may seek information or documents or other forms of assistance from any intergovernmental organisation.

2.2 What happens if a State fails to co-operate with the Court?

The same Article 87 sets out the procedure in situations where a State Party fails to comply with a request from the Court. In such instances the Court can make a finding of non-co-operation and refer the matter to the Assembly of States Parties or, if the case involved was referred by the Security Council, to the Council. Similar referral powers are granted with respect to a non-State Party that has entered into an *ad hoc* arrangement or agreement with the Court and fails to co-operate in respect of requests submitted pursuant to it.

2.3 How are requests transmitted and what are the procedures surrounding them?

Requests from the Court will be sent either through diplomatic channels (Ministries of Foreign Affairs) or via another designated channel. States have the option to decide which channel to use. For example, if there is a central authority for extradition or mutual legal assistance generally (usually this is the Director of Public Prosecutions' office or the Attorney General's chambers of a particular State), this channel may be identified as the relevant channel for requests. Requests may also be transmitted through Interpol or any other appropriate regional organisation (for example, Europol).

2.4 Are there any confidentiality restrictions on requests?

All requests and supporting documents sent by the Court must be kept confidential by the requested State.[1] The only exception is disclosure that must take place for the execution of the request. For example, it would be permissible for the authorities of a State to disclose the material in an application to the domestic court responsible for execution of the warrant,[2] but care must be taken to ensure that any particularly sensitive material is subject to protections that will prevent its general public disclosure through this process.

Of particular concern is information that could prejudice the safety and physical or psychological well-being of any victims, potential witnesses and their families. The importance of this is emphasised in the Statue by the inclusion of a separate paragraph in Article 87(4) on this point. This obligation requires not only protection of the request and supporting documents by the ICC but also additional measures that may be necessary in the execution process (for example, to protect witness identity).

On a related issue, the ICC is also under an obligation to keep confidential any documents or information that it receives except to the extent that the material needs to be disclosed in the course of the investigation or prosecution.

1 Article 87(3), Rome Statute of the ICC. Articles cited in the footnotes in this chapter are from the Statute unless otherwise indicated.

2 Article 87(3).

Further, a State may decide that some material requires additional protection. In these instances the requested State can transmit the documents on a purely confidential basis and the ICC Prosecutor may agree to use them only for the purpose of generating new evidence, unless the State authorities subsequently consent to the use of the documents or information as evidence.[3] These protections may go some way in allowing State authorities to disclose sensitive material to the Court.

The confidentiality restrictions regarding any particular request should be discussed fully with the ICC authorities before any execution or investigative or prosecution action is taken that may result in disclosure on either side.

2.5 What are the arrangements regarding the costs of executing requests from the court?

There are, of course, costs associated with the execution of requests for arrest and surrender or for other forms of co-operation. Article 100 of the ICC Statute regulates the apportionment of such costs. The general rule is that the State bears the costs of expenses incurred in its territory except for:

- costs of or associated with, travel and security of witnesses, experts and temporary transferees;
- costs of translation, interpretation and transcription;
- costs of travel of officials of the Court;
- costs of expert opinion or reports requested by the Court;
- costs of or associated with, the travel of persons being surrendered.

In addition, after consultation, the Court may assume responsibility for the payment of the 'extraordinary costs' arising from a request. State authorities should keep this in mind, as the execution of some requests may involve very high costs or the dedication of significant resources for which some financial assistance may be needed from the Court.

3 The Procedure for Arrest and Surrender of ICC Suspects

Arrest and surrender of suspects to the ICC will be carried out by national authorities in response to requests issued by the Court.

In accordance with Article 89(1), the Court will transmit the request and the necessary support documents and the requested State will be under an obligation to comply with the request, using the procedures for surrender specified under national law.

3.1 Are there grounds on which a request may be refused?

Unlike State to State extradition, there are no grounds of refusal applicable to requests from the Court. However, Article 97 of the ICC Statute acknowledges that there are certain practical scenarios where it may not be possible to proceed with the request. It may be

3 Articles 54(3)(e), 72, 73, 93(4).

that, despite best efforts, the person sought cannot be located or it is determined that he or she has left the jurisdiction. Similarly, the person located in the requested State may turn out not to be the person who is the subject of the warrant. There may also be difficulties with the sufficiency of information provided by the ICC or a conflict with pre-existing international obligations.

Should these types of practical problems be encountered, State authorities would need to consult with the Court without delay to resolve the matter.

3.2 If execution of a request would be in breach of an international obligation, should it proceed?

The issue of conflicting international obligations (outside of competing requests) is addressed in Article 98. This Article has been the subject of much heated debate and considerable academic commentary because of the interpretation and use made of it by the Government of the United States. It is on the basis of this Article that the US has fashioned its proposed bilateral agreements with other States. Under so-called 'Article 98 Agreements', US citizens and other persons connected to the United States will not be surrendered to the ICC for prosecution. Approximately 90 States have entered into these agreements. There are serious concerns about the consistency of the agreements with States Parties' obligations under the Rome Statute and whether they accurately reflect the content and object of Article 98.[4] Police and prosecution authorities may want to check whether there is such an agreement in place for their State. If there is an Article 98 agreement, and a situation arises involving a US citizen or another person covered by the agreement, there should be immediate consultation with authorities in the Foreign Ministry and other government officials to determine how to proceed.

As to the original intention of Article 98, it was included to address situations where a request from the Court would place a State in a position of conflict with its international obligations to other States. The focus of Article 98(1) was requests that might require a violation by the State of diplomatic immunity privileges of another State. The example often given was a request seeking the arrest and surrender of a diplomat. Such a request would result in a conflict between the obligations of the requested State under the Vienna Convention on Diplomatic Relations 1961 and its obligations to the ICC under the Rome Statute. For this reason, Article 98(1) places an obligation on the Court not to proceed with a request in this situation unless it can obtain a waiver of the applicable immunity from the affected State. If a request is received and it appears to raise issues of immunities relating to another State, it would be prudent to consult internally with authorities responsible for foreign affairs. If it appears that in fact the request does fall within the terms of Article 98(1), the matter should be discussed with the ICC.

Article 98(2) was intended to address primarily Status of Forces Agreements (SOFA). Under these military arrangements, forces of one State are 'sent' to another State – for example,

4 See Opinion of James Crawford SC, Philippe Sands QC and Ralphe Wilde, *In the Matter of the Statute of the International Criminal Court and in the Matter of Bilateral Agreements Sought by the United States under Article 98(2) of the Statute*, 5 June 2003. See also Salvatore Zappala, 'The Reaction of the US to the Entry into Force of the ICC Statute: Comments on SC Resolution 1422 (2002) and Article 98 Agreements', 1 *Journal of International Criminal Justice* 1 (2001).

on peacekeeping missions. These agreements accord certain rights and obligations to both the sending and receiving country. Generally a military officer of the sending State cannot be prosecuted or extradited or otherwise removed from the receiving State without the consent of the sending State.

For this reason, Article 98(2) was included to obligate the Court not to proceed with a request that would violate such an international agreement – for example, for the surrender of a military officer present in the requested State under a SOFA – without first obtaining a waiver from the sending State. Again, should State authorities receive a request that appears to fall within the terms of Article 98, consultations should be carried out as soon as possible both internally and with the ICC.

3.3 Do the obligations regarding arrest and surrender apply to domestic government officials and Heads of State or Government?

Article 27 of the Rome Statute makes it clear that the Statute applies equally to all persons regardless of official capacity, with specific reference to Heads of State or Government. Furthermore, no immunities or special procedural laws under domestic or international law bar the Court from proceeding with cases involving such persons.[5] Part 9 of the ICC Statute contains no procedural bar to a request for the arrest and surrender of such a person, and Article 98 is limited to international obligations involving another State. As a result, the obligation to execute requests extends to those relating to Heads of State or Government or any type of official.

The implementation of this obligation in domestic law has posed legal and constitutional challenges for many States. Various legislative and interpretative approaches have been adopted, so State authorities will need to look at their domestic law to see how the issue has been addressed.[6]

3.4 Should the request be executed even if there is a challenge to the admissibility of the case before the ICC or to the jurisdiction of the Court?

It is recognised that challenges may be made to admissibility or jurisdiction, in which case it may be inappropriate for the domestic authorities to execute the request.[7] Most of the relevant domestic legislation addresses this situation.[8] However, execution of the request should proceed unless the Court is formally notified of a challenge to the request and indicates that the State may delay the execution. [9]

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5 Article 27(2).

6 See further Part II of this Guide and the discussion there regarding immunities in terms of the relevant implementation legislation.

7 Article 89(2). For example, a challenge by the accused to the effect that he has already been prosecuted for the offence concerned.

8 See Part II of the Guide.

9 Article 89(2).

3.5 Competing requests for surrender and extradition

The Statute acknowledges that there may be problems with execution of a surrender request by the ICC if the requested State has also received a competing request from another State for the extradition of the person sought by the ICC. Such situations may be very complicated and difficult to resolve given the 'complementary' nature of the Court and its powers to decide on admissibility, outlined in Chapter 2 of this Guide.

Article 90 of the Statute regulates in detail how an authority must manage any competing requests. In some instances, this regime will be reflected in domestic law. In others, it will fall to authorities to directly apply the provisions of Article 90 even though their domestic law is silent on the issue.

3.5.1 How does a State decide on competing requests?

Where, in addition to a request from the ICC for the surrender of a suspect, a request is also received from another State for the same person, related to the same conduct, notice should be given immediately to the ICC of this extradition request.[10] Where the other State involved is also a State Party to the Statute, the request from the ICC will be given priority if the Court has already ruled that the case is admissible, having taken into account in its decision the investigation or prosecution conducted by the State in its competing extradition request.[11] If there is a delay while such a ruling is being considered, the authorities in the requested State may proceed with the consideration of the extradition request up to the point of the actual extradition of the person. That must await the decision of the ICC on the admissibility of the case.[12]

Should the Court find the case inadmissible, the authorities in the requested State would be free to proceed with the request for extradition. If the Court rules on admissibility pursuant to a notice given because of a competing request from a State, and subsequently the extradition does not proceed for whatever reason, the Court must be notified of this as it could prompt reconsideration of the admissibility ruling. It would also be prudent for the requested State to advise the Court of any failed extradition where it is known that the Court has an interest in the person sought for extradition.

3.5.2 What if the request is for the same person and same conduct but from a non-State Party?

The applicable procedure is slightly different where the requesting State is not a Party to the Statute. In those instances, the same notification provisions would apply. If there is no treaty or arrangement in place between the two States creating obligations regarding extradition and the ICC rules the case admissible, again priority must be given to the Court's request.[13] However, if the requested State is under an obligation to extradite to the requesting State and the case is ruled admissible by the ICC, thereby creating a competing

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10 Article 90(1).

11 Article 90(2).

12 Article 90(3).

13 Article 90(4).

obligation, it is for the relevant authorities in the requested State to decide which request will be acceded to. While this is a discretionary decision for the authorities in the requested State, the Statute lists some of the factors to consider, including the dates of the requests (an earlier request is likely to be accorded more weight), the interests of the requesting State in the case and the possibility of subsequent surrender between the Court and that other State.[14]

3.5.3 What if there is an extradition request for the same person but with regard to different conduct?

If a request is received from the ICC and from another State for the same person but for different conduct, the Court will always have priority unless there is a treaty or arrangement in place between the two States imposing an obligation to extradite. In that case, again the authorities in the requested State must decide between the two requests, considering the factors noted above and paying particular attention in this instance to the relative nature and gravity of the conduct for which extradition and surrender are sought.

3.6 What are the procedures to be followed on receipt of a request from the Court for arrest and surrender?

As is the case in State to State extradition, there are two types of requests that may be received – a full request for arrest and surrender or a request for provisional arrest pending the submission of a full request.

While the applicable procedures will vary depending on national law, the steps involved will generally be similar. The first step for any authority (usually prosecution or justice authorities) to whom such a request is sent will be to review the material to ensure that the necessary documentation has been submitted by the ICC.

In the case of provisional arrest, under Article 92 of the ICC Statute the request may be sent using any medium capable of delivering a written record (this can include fax and e-mail transmissions). The request should contain:

- Descriptive information of the person sufficient to identify the person and his or her location;
- A concise statement of the crimes for which the person's arrest is sought and the alleged facts, including if possible date and location of the crime;
- A statement that there is a warrant of arrest or judgment of conviction against the person;
- A statement that a full request for arrest and surrender will follow.

If the documentation is sufficient, in most common law countries it will be necessary to apply to a court for a warrant of arrest to be issued. The type of material to be filed in support and the relevant court will depend on national law. In all States such applications will be made *ex parte*. Once an order is issued, it will fall to law enforcement authorities to locate and verify the identification of the person and to carry out the arrest.

14 Article 90(6).

As is the case in extradition practice, a person arrested provisionally can be held for 60 days pending receipt of the full request, after which he or she must be released if the documentation is not received.[15] This will be without prejudice to the institution of subsequent proceedings if the documents arrive later. Some implementation legislation may give a discretion to the Court to extend the detention if justified in the circumstances.

In the case of a full request for arrest and surrender, the Court must submit:

- Descriptive information of the person and his or her location;
- A copy of the warrant of arrest;
- Such documents, statement or information as may be required by national procedural law.

This latter requirement recognises that in some jurisdictions there will be a requirement for evidence to be submitted in support of the request for arrest and surrender. In extradition practice most common law countries have required first person affidavit evidence in support of a request for arrest and surrender, sufficient to establish a *prima facie* case. While requirements in this regard are gradually being reduced, for some States this is mandated under their constitution. For this reason, Article 91(2)(c) recognises that evidence may be required in support of a request from the Court.

However, there is an exhortation to States to ensure that such requirements are as minimal as possible, not in any instance more onerous than those imposed in extradition and if possible less onerous.[16]

Domestic law will determine what the relevant requirements are, but fortunately much of the legislation adopted by common law countries has eliminated any requirement for evidence to be adduced in support of a request from the ICC.[17] In most instances only minimal factual summaries are required.

3.7 The procedure after arrest

There are specific procedures applicable to a person arrested pursuant to a request from the ICC that should be reflected in domestic law explicitly or available without the need for legislative authority.

Article 59(2) provides that a person arrested shall be brought promptly before a competent judicial authority, who is to determine that the warrant applies to the person (i.e., that the person before the court is the person named in the warrant). The judicial authority is also to consider if the person has been arrested in accordance with proper process and whether his or her rights have been respected. However, if the judge finds any procedural irregularities or a violation of the rights of the person, the ICC Statute does not authorise him or her to take remedial action in relation to such failings. In recognition of this, some

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15 Article 92(3), read with Rule 188 of the Rules of Procedure and Evidence,

16 Article 91(2)(c).

17 See Part II of this Guide and the discussion there of the relevant implementation legislation.

domestic laws specifically prohibit such action by the domestic judge and provide for a report to be submitted back to the ICC.[18] If the applicable legislation is not specific on this point, an argument to that effect should be mounted based on the language of the Statute.

3.7.1 Is there any provision for bail for a person arrested in response to an ICC request?

Article 59(3) recognises the right of a person arrested pursuant to an ICC request to make an application for bail. Again, provision for this will either be explicit under the relevant implementation legislation or available as a matter of course. The test applicable to such bail applications is a high one and probably varies from the normal tests applicable to common crimes under domestic law. The judge needs to be satisfied whether, given the gravity of the alleged crimes, there are urgent and exceptional circumstances to justify release and whether necessary safeguards exist to ensure that the person will be available for surrender.

An important point regarding applications for release is the involvement of the ICC in that process. Article 59(5) mandates that the Court's Pre-Trial Chamber be advised of any such application for bail and be permitted to make recommendations to the domestic judicial authority regarding possible release. The judicial authority must give full consideration to such recommendations, though the Article falls short of mandating that these must be followed. Law enforcement and prosecution authorities need to take all reasonable measures to ensure that notification is given to the ICC in a timely manner and that any recommendations are presented to the domestic court.

If the person is granted bail, the Pre-Trial Chamber may request periodic status reports on the matter from domestic authorities.

3.7.2 What is the relevance of Article 102 of the Statute, which defines 'surrender' and 'extradition'?

Under the ICC Statute, State Parties are obligated to arrest and 'surrender' a person in response to a request. Under Article 102 a clear distinction is drawn between 'surrender' – the delivering up of a person by a State to the ICC – and 'extradition' – the delivering up of a person by one State to another. These definitions were included in the Statute to make it clear that surrender is a distinct process for the ICC that need not employ the usual procedures associated with extradition and that does not import traditional principles such as grounds of refusal that apply in extradition. This point was particularly important for those States with constitutional or policy restrictions on the extradition of nationals. It was also inserted in the Statute to further encourage States to adopt a new and simplified process for surrender, distinct from the complicated existing regimes for extradition.

However, while encouraging a distinct and simple process, the Statute does not mandate the procedure to be employed for the surrender of persons. This is left to national law, and thus the actual surrender process – whether it involves a judicial and executive phase, what material needs to be adduced and the types of appeals or reviews, if any, that will be

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18 See Part II of the Guide.

available – will depend on the domestic implementing legislation within a State. It will be necessary, therefore, to consult the domestic law to determine the details of the procedure to be employed. While the vast majority of common law States have adopted a new simplified procedure for surrender, at least one State has applied its existing extradition regime with amendments to take into account the obligations under the Statute.[19]

3.8 The arrest and surrender regime and 'double jeopardy'

Regardless of national regimes, challenges to arrest and surrender based on the principle of *non bis in idem* (not twice for the same thing, or 'double jeopardy') are of serious concern. As noted previously, the ICC Statute establishes a regime that is complementary to national legal regimes. For this regime to operate effectively, it is for the ICC to make relevant determinations about the admissibility of a case where the matter is being investigated or prosecuted in a State or where there is an issue regarding a previous prosecution. For this reason, Article 89(2) explicitly provides that any challenges brought in a national court on the basis of *non bis in idem* are to be resolved through the Court's determination on the admissibility of the case. Therefore, no such challenges should be adjudicated before a national court, as that could place a State in conflict with its obligations under the Statute. In some countries there will be a specific legislative exclusion on this point, but in others the matter will be need to be argued before the national court.

3.9 The procedure after execution of the request

On the conclusion of the relevant process within the requested State, if the person is ordered surrendered, arrangements need to be made for the physical removal of him or her to the ICC. The ICC authorities should be contacted as soon as possible after the issuance of any final order of surrender to discuss the logistics.

3.9.1 What if the person to be surrendered is being prosecuted domestically for something else or serving a sentence of imprisonment?

In some cases, the person who is sought for surrender to the Court may be the subject of a prosecution or serving a sentence in the requested State for another offence. In those circumstances, the issue needs to be discussed with the ICC to determine how best to proceed. The appropriate course of action will depend on many factors, including the length of any possible delay in surrender, the gravity of the domestic offences and the impact on the ICC case.

In some States, domestic legislation will allow for the 'temporary' surrender of the person for the trial process before the Court. At the conclusion of the trial the person will be returned to the State to serve out his or her domestic sentence and then re-surrendered to the Court if a sentence has been imposed as a result of the ICC proceedings. If the applicable legislation provides for this, temporary surrender may be very useful, particularly in cases where the person is serving a lengthy sentence in the requested state.[20]

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19 See Part II of this Guide.

20 See Part II of this Guide.

3.9.2 Does the Statute address the issue of persons in transit to the ICC?

As in extradition, it may be necessary for a person being surrendered to the ICC, or moved to or from a State of enforcement to serve a sentence, to transit through another State as part of the journey. The Rome Statute obligates States to accept the transit of prisoners through their territory "except where transit through the State would impede or delay the surrender".[21] Some examples of where the exception might apply would be if the person might claim a right to stay in the transit State on the basis of nationality or through a claim for refugee status.

If transit is requested, the ICC will submit the documentation specified in Article 89(3).

3.9.3 Is there a rule of 'speciality' that applies where a person is surrendered to the ICC?

As is the case in State to State extradition, Article 101 of the ICC Statute imposes 'speciality' obligations on the Court where a person is surrendered to it. This means that the person can only be proceeded against, punished or detained for the act or course of conduct that forms the basis of the crime(s) for which he or she was surrendered or for any offences committed post surrender.[22] The Court can seek a waiver of the speciality rule by providing arrest and surrender documents in accordance with Article 91 relating to the new offence. Requested States are encouraged to provide such waivers.

4. Providing Other Assistance to the Court

4.1 Introduction

As with the surrender of suspects, State Parties are obligated to co-operate fully with the Court in investigations and prosecutions of crimes within the jurisdiction of the Court. Under Article 93, States are obligated to respond to requests for 'other' forms of co-operation. The general provisions discussed in section 2 above will also apply to requests for this type of assistance in terms of channels of communication, language, confidentiality, costs and failure to respond.

4.2 What types of assistance are contemplated?

Article 93(1) lists a range of types of assistance drawn from mutual legal assistance instruments. Assistance may be sought in the form of court orders or other compulsory measures to aid the investigation, gather evidence, protect victims and witnesses and locate and freeze proceeds, property, assets and instrumentalities of crime that may be the subject of forfeiture orders (see Box 4.1).

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21 Article 89(3)(a).

22 In the case of offences committed while being surrendered or after surrender, those would most likely be prosecuted by the State authorities in which they were committed unless they constituted offences over which the Court would have jurisdiction.

Box 4.1: Types of Assistance Specified in the ICC Statute

The types of measures the ICC might seek include the following, which are specified in the Statute:

- Identifying persons or locating persons/things;
- Taking statements and testimony of witnesses;
- Production of evidence, including expert opinions and reports;
- Questioning of suspects and persons under investigation;
- Service of documents;
- Facilitating the appearance of witnesses or experts before the Court, including by way of temporary transfer;
- Examination of places and sites;
- Search and seizure;
- Provision of documents;
- Protection of victims and witnesses;
- Identification, tracing and freezing or seizure of assets as proceeds or instrumentalities of crime.

Article 93(1)(l) also provides for any other type of assistance that is not prohibited by the law of the requested State. This means, for example, that the Court might seek assistance such as surveillance or wiretaps, and such a request should be complied with unless the specific measure is prohibited under the law of the State. The forms of co-operation that may be sought are those that would normally arise in the context of any criminal investigation or prosecution. The general principles set out in Article 93 would appear to apply to most States, in particular as to whether court process is required, while execution procedures are governed by general principles of domestic law.

If requests are made for the identification or location of persons or places or other enquiries of this nature, they may be accomplished through investigative activity without the need for any court applications. The same is true of requests for the service of documents.

When it comes to taking statements from witnesses, if the witness concerned is prepared to co-operate on a voluntary basis, it may be that no court order or subpoena will be required. However, if ICC officials are going to travel to the requested State to participate in the proceedings, it may be safer to have the order in place to ensure that the witness is in attendance. In cases where a witness refuses to give a statement or evidence on a voluntary basis, it will be necessary to obtain the relevant court order.

Suspects who are accorded the right against self-incrimination will have to agree to answer questions and cannot be compelled to respond, though in some circumstances it may be possible to compel them to appear but not to answer any questions.

In cases where a witness is asked to travel to testify before the Court or to assist the investigation, the facilitation of such an appearance will not involve any judicial order. Rather, a police or prosecution authority will speak with the witness to encourage attendance though no compulsion or coercive measures should be applied to him or her. Appearance is on a voluntary basis.

The exception where some form of court order might be needed is if the person sought is in custody in the requested State. There are detailed provisions on this form of assistance in Article 93(7) relating to the temporary transfer of a person in custody for purposes of identification or for obtaining testimony or other assistance. This will be an important practical tool for these types of investigations and prosecutions.

In some instances both the requested State and the Court may prosecute different individuals in relation to the same incident. For example, a State may prosecute lesser members of a group involved in an atrocity, while the ICC may be conducting a prosecution against the leader of that group. The ICC may want to have the members of the group testify against the leader. Problems may arise if these individuals are incarcerated within the requested State. Under Article 93(7), domestic authorities will be asked to arrange for the temporary transfer of a person in custody to assist the Court. The person and relevant authorities in the requested State must agree to the transfer, and the Court must undertake to hold the person in custody while he or she is at the seat of the Court and to return him or her after the relevant assistance has been rendered.[23] This procedure will require some form of court order to ensure the person's release from custody in the requested State. It will also involve, on the part of the requested State, police assistance in the arrangements and the physical movement of the person.

Unless it involves a public record, most requests for the production of documents will require judicial authorisation. All search and seizure activity will need a court order.

Protective measures for witnesses can involve police activity or judicial orders. For example, physical protection can be carried out by police authorities while the taking of evidence *in camera* may require a court order. Similarly, the examination of a public site can be done by the local police but the exhumation of a grave site will require court intervention.

4.3 What are the applicable procedures for rendering the assistance?

The domestic law of the requested State will determine how this assistance will be provided, including the applicable procedures for obtaining any compulsory measures (judicial orders) that may be needed to execute a request.[24] Article 93(1) of the ICC Statute recognises that States will use procedures under their own national law to comply with requests. At the same time, Article 88 obligates State Parties to have procedures available under national law for all of the forms of co-operation specified in Part 9. This means that the domestic legislation in each State should set out procedures for providing the listed types of assistance. For example, there should be a process for domestic authorities to obtain a warrant or other type of search order in response to a request from the Court for premises to be entered and searched. In most common law jurisdictions the legislation either applies State to State mutual assistance powers to requests from the Court or alternatively creates a separate regime for assistance of this nature to the Court.

4.4 Are there any special provisions as to how a request should be executed?

The ICC Statute obligates States Parties to incorporate certain provisions for the execution of requests for evidence received from the Court into their own domestic criminal court procedures.

Article 99 mandates that requests for assistance shall be executed in accordance with the procedures of national law but also in the manner specified in the request, unless to do so is prohibited under domestic law. This is an important principle for effective assistance to the Court since the manner in which evidence is gathered can affect its ultimate admissibility in proceedings. For example, if the Court seeks the questioning of a suspect, that person is entitled to be accorded certain rights as specified in Article 55(2), namely a right to be given information, to remain silent, to have legal assistance of choice and to be questioned in the presence of counsel. A proper request for assistance from the Court would specify that these rights must be accorded to the individual prior to any questioning. If those rights are not given it may be that any statement obtained would be inadmissible before the Court or other remedies may flow to the individual as a result. Thus both the laws and practice of State authorities should be aimed at ensuring that the request is executed in the manner specified by the Court.

Article 99(4) is worth mentioning as well. This provision gives certain limited rights to the ICC Prosecutor to conduct investigations independently within a State. Under the structure of Part 9, investigation and evidence gathering will be carried out either by domestic authorities alone in response to a request or through a collaborative effort between domestic authorities and the Office of the Prosecutor. However, there may be instances where the Prosecutor considers that the successful execution of a request will require independent action. The most common example of this would be where there is concern that the presence of national authorities during an interview would inhibit or frighten the witness. Where the action to be carried out in the requested State does not require any court order or compulsory measure (such as voluntary witness interviews or examination of public sites), Article 99(4) provides for direct action. In order to proceed with such a request, the Prosecutor will need to consult with State authorities, though if the State involved is the territorial State for the crimes and the case has been found to be admissible, the Prosecutor cannot execute the request without first having made "all possible consultations" with the requested State.[25]

In all other cases the Prosecutor will consult with and is to agree to any reasonable conditions or address reasonable concerns raised by the authorities in the requested State.[26] However, the ICC Statue stops short of requiring the consent of the State for the direct investigative activity to proceed. Instead, if State authorities have problems with the proposed action, they may simply "consult" with the Court to try and resolve the problem.[27] This vague language was used to achieve a compromise on what was a very

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23 Article 93(7)(b).

24 For detail, see Part II of this Guide.

25 Article 99(4)(a).

26 Article 99(4)(b).

27 Article 99(4)(b).

difficult and sensitive issue during the negotiations at the Rome Conference for the creation of the ICC. The expectation is that, in as far as possible, State authorities will not oppose such activity by the Prosecutor but rather will support and facilitate it as necessary for effective evidence gathering. It is important to note that the national security protections discussed below are also applicable in such cases, so any apparent issues of this nature should be flagged as soon as possible during the consultations.

Finally Article 98 discussed above in relation to arrest and surrender is of relevance to requests for other forms of co-operation as well. A request by the ICC for the requested State to search an embassy or high commission would raise issues of diplomatic immunity accorded to another State. If a request is received and it appears to raise such issues, it would be prudent to consult internally with authorities responsible for foreign affairs. If it appears that in fact the request does fall within the terms of Article 98(1), the matter should be discussed with the Court.

4.5 What will the request for assistance from the Court contain?

Article 96 sets out in detail the information that should be provided by the Court in support of a request for other forms of co-operation. The request must be in writing, but in urgent cases it may be delivered through any medium capable of delivering a written record such as a fax or an e-mail. However, such requests would have to be followed up with the original document.

In summary the request should contain:

- a concise statement of the purpose of the request and the assistance sought, including the legal basis and grounds;
- location and/or identification information;
- a concise statement of the facts;
- the reasons for and details of any particular procedure that needs to be followed in executing the request;
- any other relevant information; and
- such information as may be required under the law of the requested State to execute the request.

This last requirement recognises that different types of information will be needed for a request to be executed in different States, depending on the applicable procedural law. For example, to obtain a search warrant in State A it may be necessary to provide sufficient information to satisfy a domestic court that there are reasonable grounds to suspect that evidence will be found at the location to be searched. In State B it may be sufficient to demonstrate the relevance of the search to the investigation. Authorities will need to look to domestic law for guidance.[28] Because of this variation in practice, it is expected that officials of the ICC Prosecutor's office will consult with domestic authorities prior to submitting a request, in order to determine what legal requirements must be met.

28 See Part II of this Guide for the differences of approach in this area of co-operation.

4.6 Can a request for assistance from the Court be refused?

As was the case with arrest and surrender of suspects, the traditional grounds of refusal that appear in mutual legal assistance treaties are not found in the ICC Statute. However, there are three specific situations where a request may not be executed by the State.

4.6.1 Where the request for assistance is prohibited by domestic law

First, if the Court seeks a type of assistance under Article 93(1)(l) (i.e., that is not otherwise listed in the Article), a State may refuse the assistance where it is prohibited by law. Prior to the requested State refusing such a request, Article 93(5) mandates that its authorities consider whether the assistance can be provided with conditions, at a later date or in an alternative manner, with the agreement of the Prosecutor or the Court. For example, it may be that information obtained through electronic intercepts can be provided with conditions as to its subsequent use in trial proceedings.

4.6.2 Where the request for assistance conflicts with a fundamental principle of law of general application

Second, under Article 93(3) a request for a particular measure of assistance in a specific case may be refused where the execution is prohibited in the requested State on the basis of an existing fundamental legal principle of general application, unless the matter can be otherwise resolved through consultations. This provision was included to ensure that fundamental legal principles would not be contravened through the execution of a request from the Court. The intention was that this protection would be used rarely, if at all. It will apply only where the principle that would be violated meets three conditions.

(a) It must be a pre-existing principle and not something enacted in response to the establishment of the Court.
(b) It must apply generally to all legal proceedings, as opposed to being specific to requests from the Court.
(c) It is not all principles that will support a refusal, but only those which are 'fundamental' in the relevant legal system.

The primary concern in (c) above was the protection of privileges such as the spousal and lawyer/client privileges. At the time the ICC Statute was drafted the Rules of Procedure and Evidence had yet to be crafted, so it was unclear what privileges would be recognised by the Court. Given the broad range of privileges subsequently recognised, it is unlikely that this ground of refusal will be used often in practice.

As indicated above, should the need for refusal arise in a particular case, consultations should take place with the Court to see if there is a way to deliver the assistance sought without violating the applicable principle. Refusal of the request should be a last resort when all alternatives have failed.

If assistance is ultimately declined on the basis of either of these grounds of refusal, the authorities in the State Party will need to give reasons to the Court promptly.

4.6.3 Where the request for assistance concerns the national security of the requested State

The third ground of refusal is the most complex: national security. This was one of the last issues to be resolved under the Statute at the negotiations in Rome because of the sensitive matters involved. A balance needed to be achieved between the Court's interest in access to relevant information and the interest of States in protecting national security information and procedures. While the actual ground of refusal is found in Article 93(4), it is Article 72 that details the procedure to be followed in such cases.

Article 72 is broadly framed to cover all possible scenarios under the Statute where the disclosure of documents or information might, in the opinion of relevant State authorities, prejudice its national security interests. The issue can arise at a number of different stages of any case: during the pursuit of unique investigative opportunities; in the taking of action to preserve evidence under Article 56; during the disclosure of documents at the start of a trial; during the trial itself; or as a result of the execution of a request for assistance from the Court. It may also arise where a person has been requested to give information or evidence, and he or she has either refused to do so or has referred the matter to a State on the ground of national security.

If State authorities are of the opinion that national security interests may be jeopardised, they are obliged first to take all steps possible, in conjunction with the Prosecutor, to try and resolve the matter co-operatively. Examples of steps that could be taken are listed in Article 72(5), including:

- modification or clarification of the request;
- a determination by the Court on relevancy or that the information can be obtained other than through the relevant State;
- obtaining the evidence from a different source; or
- application of conditions or limitations regarding the information.

If none of these measures can be used to resolve the problem, the State authorities must notify the Prosecutor or the Court of the specific reasons for the decision to withhold or refuse the release of the information. However, in recognition of the practical realities, if the disclosure of specific reasons would in and of itself be prejudicial to national interests, this requirement need not be complied with. If exercising this option under paragraph 6, State authorities should still endeavour to provide some explanation to the Court or the Prosecutor as this will be relevant to subsequent proceedings that may arise, as outlined below.

If at this point the Court determines that the evidence is relevant and necessary and the issue arises in the context of a Part 9 request or where a person has refused to testify, there are certain steps open to the Court. First it may request further consultations, which may include *ex parte* hearings *in camera*, to obtain the view of state authorities.

After any such consultations have been exhausted, if the Court is of the view that the invocation of the ground of refusal in Article 93(4) is not in accordance with the obligation

on the State to co-operate, it may refer the matter in accordance with the procedure for non-compliance set out in Article 87(7). In cases that do not involve a Part 9 request for the testimony of an individual, it falls to the Court to decide whether to order disclosure or draw an appropriate inference in the trial process as to the existence or non-existence of a fact.

4.7 How are competing requests for other forms of co-operation to be dealt with?

The first obligation in the face of competing requests for other forms of co-operation is to try and execute both of them. Such competing requests are handled in a slightly different manner than those relating to arrest and surrender, because the nature of evidentiary assistance is such that it may be possible to satisfy both requests (which is not possible in the case of requests for the 'body'). For example, in the case of a request for documents it may be possible to provide certified copies of the relevant material to both the requesting State and the Court. In the case of taking the evidence of a person, a joint interview might be possible or alternatively one request could be postponed and the interviews conducted in sequence. The resolution of the issue will depend on the circumstances but, as this is not much different than what can occur in State to State practice, no doubt a way can be found to execute both requests satisfactorily.

If this should fail for some reason, the competing requests are to be dealt with in accordance with Article 90 outlined earlier in this chapter (section 3.5).

4.8 What if the information or evidence sought is within the control of another State?

In some instances, the Court may seek evidence or information that is actually under the control of another State or an international organisation by virtue of an international agreement. For example, a State may have received evidence or information from another State pursuant to an agreement whereby the lending State retains total control over the information. Should this arise, the authorities in the requested State are entitled to ask the Court to refer its request to the other State or organisation.

4.9 What happens if execution of the request would interfere with a domestic investigation or prosecution?

In some instances the execution of a request may interfere with an ongoing investigation or prosecution in the requested State, unrelated to the matter before the Court.[29] If such a case arises, state authorities should carefully consider if the circumstances of the domestic case are sufficiently serious in terms of the offence and how much interference would result from execution of the request to justify postponing assistance to the Court. They should also consider if the assistance can be provided subject to conditions to avoid the problem. If, however, it is determined that no other solution is possible in the circumstances, the Statute authorises postponement for a period of time agreed with the Court. The period of postponement should be as short as possible; no longer than necessary to complete the investigation or prosecution.

29 Article 94.

4.10 What if the admissibility of the case or the jurisdiction of the Court is challenged?

As with arrest and surrender, in some cases a request may be presented and at the same time or subsequently there may be an admissibility challenge or jurisdiction determination before the Court.[30] If the Court advises the requesting State of such a challenge, state authorities can postpone the execution of the request given that ultimately the ICC may find the case inadmissible, making the execution of the request unnecessary. The one exception would be where the Court has ordered the collection or preservation of evidence pending a decision on admissibility or jurisdiction.

5 Freezing and Forfeiture of Assets

Included in the ICC Statute are powers for the Court, upon conviction, to order the forfeiture of any proceeds derived from the ICC crime and to seek, in advance, the restraint and freezing of assets that may subsequently be the subject of a forfeiture order made by the Court.

Article 77 (2)(b) on Penalties in Part 7 of the ICC Statue provides that the Court may order "a forfeiture of proceeds, property and assets derived directly or indirectly from that crime".

As outlined earlier in this chapter, Article 93(1)(k) allows the Court to request assistance with "the identification, tracing, and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture".

Both provisions recognise that any action taken needs to take into account the rights of *bona fide* third parties.

5.1 What kinds of requests will the Court make regarding assets?

As in normal State to State practice regarding proceeds of crime, three types of requests are possible – requests for tracing and identification, freezing/seizure or forfeiture.

As an initial step, the Court may seek assistance in tracing the assets of a person being proceeded against. A request of this nature will be executed through investigative activity, following up on information provided by the Court. Depending on national legislation, there may be special investigative powers available to track the assets, such as monitoring and production orders. Otherwise normal investigative powers will need to be used to try and trace and locate assets.

As a provisional measure the Court may then seek the freezing/seizure of assets identified to ensure that they will be available for forfeiture should such an order issue on conviction. The ICC Statute does not specifically provide for the Court to issue a freezing or seizure order with respect to assets. However, it is possible that the Pre-Trial Chamber may be empowered to do so under Article 57(3)(a) on application by the Prosecutor.[31] It will

30 Article 95.

31 Article 57(3) provides that, in addition to its other functions under the Statute, the Pre-Trial Chamber may "[a]t the request of the Prosecutor, issue such orders and warrants as may be required for the purposes of an investigation".

depend on whether the Court considers that such orders are "for the purpose of an investigation". If it so decides, the request from the Court may seek, as a form of assistance under Article 93, the "direct enforcement" of the ICC freezing/seizing order by domestic authorities. If national law provides for the registration of such an order and enforcement as if it were a domestic freezing order, then this can be accomplished easily through a simple registration process. The only complication that may arise would be that a court hearing may be necessary should a third party seek to have the assets released. Domestic laws of this nature invariably provide for notification to affected parties with an opportunity to appear to argue for the release of the property in whole or in part, in recognition of the rights of an innocent third party.

However, if national law does not provide for "direct" enforcement,[32] a request for freezing/seizing will need to be executed by obtaining the necessary court order under domestic law. While there will be a variety of procedures depending on the content of national law, this will generally involve an *ex parte* application to a specific court, supported by an affidavit or documentary evidence to demonstrate a set standard for the freezing of assets. The standard will vary in domestic law from establishing that there is a basis to believe the asset is connected to the individual (and may ultimately be determined to be a benefit from crime), to establishing that there is a basis to believe that ultimately a forfeiture order might issue for the criminal property. National laws will need to be examined to determine the appropriate procedures and standards that apply. Again, procedures will be available to protect the rights of *bona fide* third parties.

The final type of assistance that may be sought relates to the actual forfeiture of proceeds of the crimes. Here the Court has a specific power under Article 77 to issue a forfeiture order relating to the proceeds of the crime after conviction, as part of the penalty. Rule 147 of the Rules of Procedure and Evidence provides guidance to the Court as to the basis for such orders. The Court will hear evidence and have an opportunity to consider representations from any *bona fide* third party.

As with other penalties, national legislation should provide for a mechanism through which such orders can "be given effect to" as is mandated by Article 109. Most legislation will provide for the registration of the orders of the Court, followed by enforcement of the order as if it had been issued by a domestic court. In the case of forfeiture orders this will mean that, after registration, property can be physically confiscated or disposed of and converted into moveable form. Where the order cannot be executed directly against the actual property for whatever reason, Article 109 recognises that measures can be applied to allow for the recovery and transmission to the Court of the value of the property.

Once again, most of the domestic legislation will provide for notice to affected parties, either before or after registration, to afford them an opportunity to have their interests in the property excluded from the effect of the forfeiture order. On this point, as noted above,

32 While the Statute requires that States have in place procedures for all the forms of assistance set out in Article 93, 'direct' enforcement of ICC freezing or seizing orders is not amongst the listed forms of assistance. The obligation under Article 93(1)(k) is simply to assist with freezing/seizing but not to do so through the direct enforcement of the ICC order. It is also of note that while Article 109 obligates States to have a power to enforce or give effect to orders of fines and forfeitures, freezing or seizure orders are not mentioned. Rather the only comment on the point is in Article 93(1)(k), which calls for assistance with the freezing or seizure of assets.

third parties with interests in the property may have already had the question of their interests determined by the ICC under Rule 147. It will be important to liaise with the Court and obtain all relevant information about the hearing of the forfeiture matter to guard against duplicative adjudications of the same issues and abuse of process.

If domestic law does not make provision for the registration and direct enforcement of an ICC forfeiture order, then steps would have to be taken to obtain a domestic forfeiture order either under specific ICC powers or applying general proceeds of crime legislation.

5.2 Does the Rome Statute address the freezing and forfeiture of the instrumentalities of crime?

There is an inconsistency in the ICC Statute regarding the instrumentalities of crimes. Under Article 93 the Court may seek assistance with the tracing, freezing or seizing of the instrumentalities of crimes with a view to ultimate forfeiture. This would cover weapons, property and other instrumentalities used to carry out the crimes. However, nowhere is the Court specifically empowered to order the forfeiture of such instrumentalities following freezing or seizure, and it is difficult to imply such a power. Article 77(2) makes reference only to fines and the forfeiture of proceeds, property and assets derived from the crime, not property used in the commission of the relevant crime.

At best it is likely that the Court could seek assistance with forfeiture of instrumentalities from the requested State. Such a request would perforce be executed by a State using domestic law powers of forfeiture based on information provided by the Court.

6 Investigative Assistance by the Court

Earlier in this chapter, we considered the assistance that national authorities will be asked to provide to the Court. The provisions of the ICC Statute are also relevant to national authorities who, acting under the complementarity regime, may be carrying out domestic investigations of ICC crimes or other serious crimes under the national law of the requesting State .

Importantly, Article 93(10) provides for assistance by the Court to national authorities, albeit the Court has the discretion whether to accede to the request or not. Specific types of assistance contemplated include the transmission of statements, documents or other types of evidence, and the questioning of persons detained by the Court.

Authorities carrying out domestic investigations should consider whether the ICC might be in possession of information, evidence or persons of relevance to those investigations. It might be useful to carry out informal discussions with officials at the Court prior to presenting a request to determine what might be available and to identify any possible obstacles to assistance.

In this regard there are protections built into the ICC Statute surrounding the rendering of assistance by the Court. If the documents or information sought were provided by a State, that State must consent to the transmission of the material. If the material sought was provided by a witness or expert, the provisions of the ICC Statute relating to protection of witnesses and victims apply.

Chapter 5

Andreas O'Shea

Doctrines of International Criminal Law

1 Introduction

In this chapter various doctrines that are essential to the proper understanding of international criminal law, from command responsibility to amnesties, are considered. These legal doctrines, which are more or less exclusive to international criminal law, have emerged from the jurisprudence of the international *ad hoc* tribunals, national courts and international legal instruments. They are often linked to the unique nature of the core crimes prosecuted in international tribunals that will form the subject matter of prosecutions in domestic courts under the complementarity regime.

2 Command Responsibility

2.1 Foundation of the doctrine of command responsibility

Command responsibility is a form of liability for or mode of participation in international crimes.[1] It is the responsibility of a person in a position of command for the commission of crimes by those under his command. The term 'superior responsibility' is sometimes used, but it is perhaps less appropriate because command responsibility derives not only from a superior status but also from the duties and control attached to a position of command. In other words, it is the subordinate position rather than merely the inferior status of the main perpetrator of a crime that invokes command responsibility.

Command may be military or civilian. However, the notion of command responsibility has been most often employed in the military context and there are firm indications in the jurisprudence that civilian command responsibility is less easily invoked.[2]

Command responsibility deriving from the giving of orders to commit a crime under international law creates little difficulty in terms of determining liability since the commander has in such cases directly instigated the unlawful conduct. Where command responsibility is most contentious and difficult to determine is in cases of responsibility by virtue of the failure to control the unlawful conduct of subordinates. The term 'command

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1 See generally Antonio Cassese, *International Criminal Law* (2003), pp 207-211; Kriangsak Kittichaisaree, *International Criminal Law* (2001), pp 251-257; Hessler, 'Command Responsibility for War Crimes',82 *Yale Law Journal*, 1274 (1973); William H Parks, 'Command Responsibility for War Crimes', 62 *Military Law Review* 1 (1973); Weston D Burnett, 'Command Responsibility and a Case Study of the Criminal Responsibility of Israeli Military Commanders at Shakila and Sabra', 107 *Military Law Review* 71 (1985).

2 See *Hirota* case, 'Complete Transcripts of the Proceedings of the International Military Tribunal for the Far East', reprinted in R John Pritchard and Sonia Magbanua Zaide (ed), *The Tokyo War Crimes Trials*, Vol. 20 (1981), Garland Publishing: New York and London; *Prosecutor v Akeyesu*, ICTR Trial Chamber judgment of 2 September 1998 (case no. ICTR-96-4); *Prosecutor v Delalic 'Celebici'*, ICTY Appeals Chamber judgment of 20 February 2001 (case no. IT-96-21-T).

responsibility' is in current times often confined to this more controversial aspect of the responsibility of a commander, and it is on this aspect that the following discussion will focus.

The legal basis for the doctrine is customary international law, that is to say, a general State practice accompanied by *opinio juris* (accepted as law: that the practice is done through a sense of legal obligation).[3] The evidence of a customary norm on command responsibility is principally derived from Protocol I to the Geneva Conventions of 1949, with international and national case law[4] as a secondary indication of the state of this customary doctrine.

In terms of Article 87 of Protocol I:

"1 The High Contracting Parties and the Parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their control to prevent and, where necessary, to suppress and report to competent authorities breaches of the Conventions and of this Protocol.

2 In order to prevent and suppress breaches, High Contracting Parties and the Parties to the conflict shall require that, commensurate with their level of responsibility, commanders ensure that members of the armed forces under their command are aware of their obligations under the Conventions and this Protocol.

3 The High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof."

Article 86 sets out the foundation for command responsibility for the war crimes of subordinates:

"1 The High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol which result from a failure to act when under a duty to do so.

2 The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as

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3 See Ian Brownlie, *Principles of Public International Law*, 4th ed (1990), pp 7-11; Andreas O'Shea, *International Law and Organization: A Practical Analysis* (1998), pp 22-23.

4 With respect to national case law there were a series of cases following World War II and pursuant to Control Council Law No. 10, where the doctrine was developed. See e.g. 'Trial of Wilhelm Von Leeb "High Command Case"', 12 *Law Reports of Trials of War Criminals* 1; *Yamashita v Lieutenant General Wilhelm D. Styer,* 327 US 1 (1946); 90 L ed 499; *United States v. Karl Brandt et al,* Vol. II, Trials of War Criminals before the Nürnberg Military Tribunals under Control Council Law No. 10 (1950) (hereinafter TWC) 186; *United States v. Wilhelm List et al*, '*Hostage Case*', Vol. XI, TWC, 1230; *United States v. Soemu Toyoda*, Official Transcript of Record of Trial, p 5005 *et sec*; *Trial of Friedrich Flick et al*, Vol. VI, TWC, 1187; *The Government Commissioner of the General Tribunal of the Military Government for the French Zone of Occupation in Germany v. Herman Roechling and Others*, Indictment and Judgement of the General Tribunal of the Military Government of the French Zone of Occupation in Germany, Vol. XIV, TWC, Appendix B, 1061; *United States v. Oswald Pohl et al*, Vol. V, TWC, 958.

> the case may be, if they knew or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach."

This contains a direction to States to sanction any failure to act that resulted in a grave breach of the Geneva Conventions.[5] There is further the establishment of a principle of command responsibility to the effect that where a superior was aware or ought in the circumstances to have been aware from information available to him that a breach was being or about to be committed, he will be responsible for the failure to take all feasible measures within his power to prevent or repress the breach. Further, while Article 87 appears to focus on the duties of commanders, as opposed to policy makers, Article 86 by its reference to 'superiors' rather than 'commanders' makes no such distinction, or for that matter any distinction, between civilian and military superiors. On the other hand, it also endorses the fact that the mere position of command or superiority does not in itself imply command responsibility.

The principle of command responsibility for superiors as encapsulated in Article 86 therefore contains three essential elements: (1) there must be a superior-subordinate relationship; (2) there must be a degree of knowledge, actual or constructive, of the wrongdoing or potential wrongdoing of the subordinate; and (3) the superior must have failed to act in relation to this wrongdoing. These three basic limbs to command responsibility have been retained in subsequent formulations in the Statutes of the International Criminal Tribunals for the former Yugoslavia and Rwanda (ICTY and ICTR), the Special Court for Sierra Leone and the International Criminal Court (ICC).[6]

These courts all incorporate the general principle of law (known by the maxim *nullum crimen sine lege)* that a person should not be punished without the pre-existence of a law that was foreseeable and accessible, i.e., that statutes should not apply retroactively. It results from this principle that a form of liability, like a crime, must be not only envisaged in the Statute of the Court but reflected in general international law.[7] In the case of command responsibility it is founded in customary international law in that it has been retained in widely representative international instruments and implemented by international and national courts to the extent that one can speak of a general state practice accompanied by *opinio juris*.

The understanding of this form of liability under customary law has been developed through the jurisprudence of the ICTY and ICTR. In particular, some clarity has been reached with respect to the three essential elements – subordination, knowledge and failure to act – and the application of command responsibility to civilian commanders and to internal as well as international armed conflicts.

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5 See the discussion in Chapter 3 above regarding war crimes and grave breaches of the Geneva Conventions.

6 Statute of the ICTY, Article 7(3); Statute of the ICTR, Article 6(3); Special Court for Sierra Leone, Article 6(3); Statute of the ICC, Article 28.

7 See *Prosecutor v Tadic*, Appeals Chamber Judgment of 15 July 1999, esp. at para. 226.

2.2 The application of command responsibility under the ICC Statute

The Statute of the ICC incorporates the most advanced and detailed exposition of the concept of command responsibility to date. Thus, Article 28 reads:

> "In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:
>
> (a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the court committed by forces under his or her effective command or control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:
>
> (i) That military commander or person either knew or, owing to circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
>
> (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.
>
> (b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:
>
> (i) The superior knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
>
> (ii) The crimes concerned activities that were within the effective responsibility and control of the superior;
>
> (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or suppress their commission or to submit the matter to the competent authorities for investigation and prosecution."

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

The reference to "crimes within the jurisdiction of the Court" establishes that the doctrine of command responsibility is in principle capable of being applied to any of those crimes, not only war crimes. Since such crimes are defined in a manner that includes crimes

committed in the context of internal conflicts, in principle the Statute permits the application of the doctrine to crimes committed in internal as well as international conflicts. The application of the doctrine of command responsibility to internal conflicts has already been confirmed by the ICTY.[8]

However, there might still be scope for an argument to the effect that the ICC Statute was intended to incorporate crimes already established under customary international law and in that sense must be interpreted in a manner that is consistent with the pre-existing law. Whether command responsibility can be applied to all crimes and internal conflicts arguably still depends not only on the plain meaning of the Statute, but also on its interpretation in the light of the state of customary international law prior to its adoption – as reflected, *inter alia*, in the jurisprudence of *ad hoc* tribunals. The same can be said with regard to the basic elements of command responsibility; that is, knowledge, subordination and failure to act. It is therefore worth considering each of these points in the light of the specific ICC provision in the context of previous jurisprudence.

2.2.1 Knowledge

Article 28 draws a distinction between the test for knowledge when dealing with a military commander and that for a civilian superior. In relation to a civilian superior, it is clear from the provision that such superior must possess a certain degree of knowledge even if there is not actual knowledge of the offences of subordinates. Thus it must be established that the civilian superior "knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes". The rationale of the Statute's distinction with respect to civilian commanders is emphasised in the ICTR Trial Chamber in the case of *Kayishema* in accepting that one should not "demand a *prima facie* duty on a non-military commander to be seized of every activity of all persons under his or her control".[9] The Trial Chamber drew inspiration from the Rome Statute of the ICC in so deciding.

The responsibility of the military commander should be much easier to establish since he must have actual or constructive knowledge in the sense that he should have known, having regard to the circumstances pertaining at the time. The jurisprudence itself on this point – running from World War II decisions through the modern interpretations of the ICTY and the ICTR – is, however, far from consistent or capable of general application. In the arena of the *ad hoc* tribunals there remains considerable doubt as to the line to be drawn between civilian and military commanders. The debate lies between the application of a public policy oriented approach, emphasising the price for neglect of important duties, and a recognition of the moral imperative in finding guilt for serious criminal offences, carrying an insistence on genuine personal dereliction.

Given that the ICC Statute requires a clear indication of offences by civilian leaders before they can incur responsibility, the debate in the *ad hoc* tribunals over the appropriate test of knowledge is likely to carry over into the exclusive arena of the military commander. The

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8 See *Prosecutor v Hadzihasanovic et al,* ICTY Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003 (case no. IT-01-47).

9 *Prosecutor v Kayishema*, ICTR Trial Chamber judgment of 21 May 1995 (case no. ICTR-95-1), para. 227.

test of 'should have known' is likely to draw significant inspiration from the analysis of the expression 'had reason to know' in the jurisprudence of these tribunals. Although the latter is potentially narrower, the *mens rea* (guilty mind or wrongful intention) requirement is likely to force the debate over what constitutes 'should have known' into the same general parameters as the analysis of what constitutes 'had reason to know'.

The interpretative difficulty in the *ad hoc* tribunals arises out of the phrase in Article 6(3) of the ICTR Statute and Article 7(3) of the ICTY Statute that the commander cannot escape responsibility where he "knew or had reason to know" that offences were being committed or were about to be committed. An expansive view of the expression 'reason to know' is adopted in the cases of *Bagilishema* before the ICTR[10] and *Blaskic* before the ICTY.[11] According to the Trial Chamber in *Bagilishema*, an accused possesses or will be imputed the *mens rea* of command responsibility if:

> "He or she had actual knowledge, established through direct or circumstantial evidence, that his or her subordinates were about to commit, were committing, or had committed, a crime under the Statutes"; or,
>
> "He or she had information which put him or her on notice of the risk of such offences by indicating the need for additional investigation in order to ascertain whether such offences were about to be committed, were being committed, or had been committed by subordinates"; or
>
> "The absence of knowledge is the result of negligence in the discharge of the superior's duties; that is, where the superior failed to exercise the means available to him or her to learn of the offences, and under the circumstances he or she should have known."[12]

The second limb of this analysis already broadens the net by referring to notice of risk, as opposed to notice of offences. It is unclear what level of risk is envisaged, but one might expect on the basis of this test reliance on the movement of information about matters that do not have any direct relation to an offence but that offer indications of very general criminal propensity, such as the character of a person or a history of racial tension. This removes command responsibility out of the realm of criminality and into the arena of negligence.

The third limb of the test then expressly endorses negligence as a basis for liability and even removes the necessity of any mental link to the offence, since all the commander must do to fall foul of this test is to neglect his normal duties as a commander as set out in international humanitarian law or even the national regulations governing his command. This view is also reflected in the Trial Chamber's conclusions on the point in *Blaskic*, where it was said:

> "The Trial Chamber finds that if a commander has exercised due diligence in the fulfilment of his duties yet lacks knowledge that crimes are about to be or have been committed, such lack of knowledge cannot be held against him. However, taking into

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10 See *Prosecutor v Bagilishema*, ICTR Trial Chamber judgment of 7 June 2001 (case no. ICTR-95-1).

11 See *Prosecutor v Blaskic*, ICTY Trial Chamber judgment of 3 March 2000 (case no. IT-95-14).

12 *Prosecutor v Bagilishema*, note 10 above, para. 46.

> account his particular position of command and the circumstances prevailing at the time, such ignorance cannot be a defence where the absence of knowledge is the result of negligence in the discharge of his duties: this commander had reason to know within the meaning of the Statute."[13]

This line was not followed by other Chambers, which have recognised the need to establish genuine criminal *mens rea*, as against mere negligence in the conduct of one's duties. In *Celebici*, the Appeals Chamber correctly observed that:

> "Neglect of a duty to acquire such knowledge, however, does not feature in the provision as a separate offence, and a superior is not therefore liable under the provision for such failures but only for failing to take the necessary and reasonable measures to prevent or to punish."[14]

The Appeals Chamber goes on to opine that the "argument that a breach of duty of a superior to remain constantly informed of his subordinates [sic] actions will necessarily result in *criminal* liability comes close to the imposition of criminal liability on a strict or negligence basis".[15] The idea that this should occur for the most serious crimes on the planet committed by persons other than the accused flies in the face of general principles of criminal law, especially those pertaining to the liability of those other than the principle perpetrator. This is properly evoked in the ICTR's first judgment, where the Trial Chamber states:

> "That it is necessary to recall that criminal intent is the moral element required for any crime and that, where the objective is to ascertain the individual criminal responsibility of a person accused of crimes falling within the jurisdiction of the Chamber, such as genocide, crimes against humanity and violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II thereto, it is certainly proper to ensure that there has been malicious intent, or, at least, ensure that negligence was so serious as to be tantamount to acquiescence or even malicious intent."[16]

In order for negligence to reach this level of seriousness so as to be properly classified as criminal, it should involve the possession of information by the accused that would cause any reasonable person to suspect the commission of offences. This would more suitably be described as recklessness than negligence. It is the Trial Chamber in the *Celebici* case that provides the more legally sound and the most favourable explanation to the accused of the phrase 'reason to know'. According to this Trial Chamber:

> "A superior can be held criminally responsible only if some specific information was in fact available to him which would provide notice of offences committed by his subordinates. This information need not be such that it by itself was sufficient to compel the conclusion of the existence of such crimes. It is sufficient that the superior

13 *Prosecutor v Blaskic*, note 11 above, para. 332.

14 See Appeal Chamber decision, note 2 above, para. 226.

15 Ibid.

16 See *Prosecutor v Akeyesu*, note 2 above, para. 489.

> was put on further inquiry by the information, or, in other words, that it indicated the need for additional investigation in order to ascertain whether offences were being committed or about to be committed by his subordinates."[17]

If a commander is aware of a factual basis for suspecting that international crimes are in the process of being committed or are about to be committed, then a deliberate failure to verify the true position one way or another is a clear form of criminal dereliction that can be said to be tantamount to knowledge. The prosecution in *Celebici* interpreted the Trial Chamber's finding to mean that the commander must have information *on subordinate offences* in his actual possession. Information might relate to factual circumstances indicating a real likelihood of the commission of offences without actually revealing the offences. The Appeals Chamber, in rejecting the prosecution's understanding of the Trial Chamber's judgment, elasticised the test by focusing on the concept of 'actual possession' and dismissing any requirement of it. Thus, it stated that:

> "A showing that a superior had some general information in his possession, which would put him on notice of possible unlawful acts by his subordinates would be sufficient to prove that he 'had reason to know'."[18]

The combination of the words 'general information' and 'possible' leaves a wide-open window as to the nature of the information available to the accused. The Chamber is internally inconsistent in its final conclusion on the matter when it states that "a superior will be criminally responsible through the principles of superior responsibility only if information was available to him which *would have put him on notice of offences* committed by subordinates".[19] However, it seems clear from the examples that it provides that the former formulation most faithfully represents the Appeal Chamber's opinion on the matter. So, it states:

> "This information does not need to provide specific information about unlawful acts committed or about to be committed. For instance, a military commander who has received information that some of the soldiers under his command have a violent or unstable character, or have been drinking prior to being sent on a mission, may be considered as having the required knowledge."[20]

This perhaps takes the doctrine of command responsibility too far. Reservations on the Appeal Chamber's findings aside, it is suggested that the line taken in the *Celebici* judgments is to be preferred, on the basis of legal and policy considerations, to the wholesale acceptance of negligence as a standard. Most importantly it most closely reflects the position in terms of customary international law. The customary position is reflected in Additional Protocol I of the Geneva Conventions, which expressly uses the words "information which should have enabled them to conclude in the circumstances at the time".

2.2.2 Superior-subordinate relationship

17 See *Prosecutor v Delalic et al, 'Celebici'*, note 2 above, para. 393.

18 See Appeal Chamber judgment, note 2 above, para. 238.

19 Ibid, para. 241.

20 Ibid, para. 238.

The case law of the ICTY and the ICTR has developed some founding principles in relation to the question of the superior-subordinate relationship. These will have an important impact on the approach of the ICC to this question.

The position adopted in the ICC Statute, namely, that the doctrine of command responsibility applies not only to military commanders but *can* also apply to civilian commanders, has been established in a number of cases. In the Rwanda tribunal, this issue has been settled in the cases of *Akayesu*,[21] who was a bourgmestre, *Bagilishema*,[22] another bourgmestre, *Kayishema*,[23] a prefect and *Musema*,[24] the director of a tea factory. In *Musema*, the Trial Chamber held in no uncertain terms that:

> "The definition of individual criminal responsibility, as provided under Article 6(3) of the Statute, applies not only to the military but also to persons exercising civilian authority as superiors."[25]

The matter was not re-visited in the Appeals Chamber. In *Akayesu*, the first case to be concluded before the ICTR, a bourgmestre was found guilty under Article 6(3) of the Rwanda Statute, enshrining the principle of command responsibility. The question was not raised before the Appeals Chamber, but the Trial Chamber observed that "the application of the principle of responsibility, enshrined in Article 6(3), to civilians remains contentious".[26] Accordingly, the Trial Chamber, far from giving *carte blanche* to the extension of the doctrine to superiors, stated:

> "Against this background, the Chamber holds that it is appropriate to assess on a case by case basis the power of authority actually devolved upon the Accused in order to determine whether or not he had power to take all necessary and reasonable measures to prevent the commission of the alleged crimes or to punish the perpetrators thereof."[27]

Likewise, in the case of *Bagilishema*, it was noted that "the broadening of the case-law of command responsibility to include civilians, has proceeded with caution".[28] This echoes the sentiments of Judge Röling in his dissenting opinion in the case of *Hirota*, the foreign minister of Japan during World War II, where the learned judge indicated that:

> "Generally speaking, a Tribunal should be very careful in holding civil government officials responsible for the behaviour of the army in the field. Moreover, the Tribunal is here to apply the general principles of law as they exist with relation to the responsibility for omissions' [sic]. Considerations of both law and policy, of both justice

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21 *Prosecutor v Akayesu*, ICTR Trial Chamber judgment of 2 September 1998 (case no. ICTR-96-4).

22 *Prosecutor v Bagilishema*, ICTR Trial Chamber judgment of 7 June 2001 (case no. ICTR-95-1).

23 *Prosecutor v Kayishema*, ICTR Trial Chamber judgment of 29 May 1999; AC judgment of 1 June 2001 (case no. ICTR-95-1).

24 *Prosecutor v Musema*, ICTR Trial Chamber judgment of 27 January 2000 (case no. ICTR-96-13).

25 Ibid, para. 148.

26 *Prosecutor v Akayesu*, note 2 above, para. 491.

27 Idem.

28 See note 10 above, para. 40.

> and expediency, indicate that this responsibility should be recognised in a very restricted sense."[29]

While the case of *Kayishema* went to appeal, the issue of the applicability of the doctrine to civilian superiors was not specifically raised. The only other case where the Appeals Chamber has addressed the question of command responsibility is the *Celebici* case,[30] decided before the ICTY. In that case, the Appeals Chamber gave the strongest affirmation yet of the applicability of the doctrine of command responsibility to civilian leaders:

> "'Command', a term which does not seem to present particular controversy in interpretation, normally means powers that attach to a military superior, whilst the term 'control', which has a wider meaning, may encompass powers wielded by civilian leaders. In this respect, the Appeals Chamber does not consider that the rule is controversial that civilian leaders may incur responsibility in relation to acts committed by their subordinates or other persons under their effective control."[31]

This notwithstanding, and despite the lack of express distinction in the ICC Statute on the issue of subordination, there would appear to be some scope left for distinguishing between the position of a military and a civilian commander for the purpose of the question of subordination in the application of the concept of command responsibility. Whereas the Appeals Chamber in *Celebici* clearly places its stamp of approval on civilian command responsibility, it does not specifically discount that there might be such a distinction. It is the Appeals Chamber's treatment of the next important and inter-related point concerning the *de jure* or *de facto* nature of authority required that sheds some light on where the distinction might lie.

The tribunals have established that authority may be *de jure* or *de facto,* and that the essential question in each case is whether the accused had effective control over the action of subordinates, in the sense of the material ability to prevent or punish the commission of crimes. This authority is what is envisaged in the concept of 'command' in command responsibility. For example, Mucic was the civilian commander of the Celebici prison camp. The defence argued in that case that the Trial Chamber had erred in finding Mucic to be a *de facto* superior for the purposes of Article 7(3) of the Statute of the ICTY, dealing with command responsibility. The Appeals Chamber upheld the Trial Chamber's conclusion that "the term 'superior' is sufficiently broad to encompass a position of authority based on the existence of *de facto* powers of control".[32] The Appeals Chamber added that "the showing of effective control is required in cases involving both *de jure* and *de facto* superiors".[33]

The Appeals Chamber in *Celebici* further held that:

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29 See *Hirota* case, note 2 above.

30 *Prosecutor v Delalic et al*, 'Celebici Camp', note 2 above.

31 Ibid, para. 196.

32 See Appeal Chamber judgment, ibid, para. 195.

33 Ibid, para. 196.

> "The concept of effective *control* over the subordinate – in the sense of a material ability to prevent or punish criminal conduct, however that control is exercised – is the threshold to be reached in establishing a superior-subordinate relationship for the purpose of Article 7(3) of the Statute."[34]

The Trial Chamber in the same case also put this point quite firmly when it indicated that "the factor that determines liability for this type of criminal responsibility is the actual possession or non-possession, of powers of control over the actions of subordinates". Again, the Appeals Chamber endorsed the Trial Chamber's opinion that:

> "[I]t is necessary that the superior have effective control over the persons committing the underlying violations of international humanitarian law, in the sense of having the material ability to prevent and punish the commission of these offences."[35]

Similarly, the Trial Chamber in *Aleksovski* observed that:

> "The decisive criterion in determining who is a superior according to customary international law is not only the accused's formal legal status but also his ability, as demonstrated by his duties and competence, to exercise control."[36]

This accords with the International Committee of the Red Cross' interpretation of customary international law as reflected in Article 86 of the 1977 Additional Protocol I to the Geneva Conventions of 1949. The Commentary reads:

> "… we are concerned only with the superior who has a personal responsibility with regard to the perpetrator of the acts concerned because the latter, being his subordinate, is under his control. The direct link which must exist between the superior and the subordinate clearly follows from the duty to act laid down in paragraph 1. Furthermore only that superior is normally in the position of having information enabling him to conclude in the circumstances at the time that the subordinate has committed or is going to commit a breach. However it should not be concluded from this that the provision only concerns the commander under whose direct orders the subordinate is placed. The concept of the superior is broader and should be seen in terms of hierarchy encompassing the concept of control."[37]

This raises interesting questions with regard to the authority of a government minister, whose functions are usually more in the nature of policy-making and execution of laws through policy directives than in controlling the actions of subordinates. The president of a nation is a notable exception in that he is often expressed to be the commander-in-chief of the armed forces and can take an active part in controlling the activities of the armies on the field in time of war or state of emergency. While control of the actions of subordinates is the relevant criterion for a finding of the exercise of command, there is

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34 Ibid, para. 256.

35 See *Prosecutor v Delalic 'Celebici'*, note 41 above, para. 378.

36 See *Prosecutor v Aleksovski*, Trial Chamber judgment of 25 June 1999 (case no. IT-95-14/1), para. 76.

37 See *ICRC Commentary, Additional Protocols* (1958), p 3544.

scope for considerable argument around the extent to which an ordinary minister can have command responsibility in the absence of the issuance of orders. The position of a minister is clearly, in this respect, distinguishable from other officials such as the commander, bourgmestre or prefect.

However, there are indications that the tribunals might broaden the notion of command responsibility even further than outlined in the *Celebici* judgments. Two particular passages are to the point. First, in the *Blaskic* decision, the Trial Chamber of the ICTY, while asserting that "[w]hat counts is his [the accused's] material ability",[38] indicated that this may entail "submitting reports to the competent authorities in order for proper measures to be taken".[39] One would not require control over the actions of subordinates in order to possess this kind of material ability. Secondly, in *Bagilishema*, an ICTR Trial Chamber said the following:

> "Article 6(3) incorporates the customary law doctrine of command responsibility. This doctrine is predicated upon the power of the superior to control *or influence* the acts of subordinates." [my emphasis][40]

Both of these statements must be considered to be *obiter dictum* (a judicial opinion that has only incidental bearing on the case in question and is therefore not binding) since in both cases, the one involving a general and the other a bourgmestre, it was found that the accused possessed effective control over the activities of subordinates. It is in any event submitted that these statements were incorrect. On the one hand it is suggested that an international tribunal cannot move outside the parameters of applicable treaties or customary international law. The customary principle of command responsibility is that reflected in Protocol I and this expressly addresses 'subordinates'. Article 86, dealing with command responsibility, must be read in the context of Article 87, which speaks of the duties of 'commanders' in relation to the acts of 'subordinates or other persons under their control'.

Apart from the questionable extension of command responsibility beyond the bounds of customary law, there is considerable force in the reasoning of the Appeals Chamber in *Celebici*, which rejects any notion of substantial influence as the sole basis for liability. As a matter of principle and policy, such an extension has the danger of destroying the clear lines of accountability that are essential to any military or police operation being conducted efficiently. It renders anyone in a position of influence potentially accountable. This further makes international criminal law an unmanageable tool since it would put in the dock a mass of individuals for any individual war crime.

In *Celebici*, the prosecution argued for a principle of substantial influence as a basis for liability. The reaction of the Trial Chamber was to reject any such notion in the following terms:

38 *Prosecutor v Blaskic*, note 11 above, at para. 302.

39 Ibid.

40 See note 10 above, at para. 37.

> "The view of the Prosecution that a person may, in the absence of a subordinate unit through which authority is exercised, incur responsibility for the exercise of a superior authority seems to the Trial Chamber a novel proposition clearly at variance with the principle of command responsibility. The law does not know of a universal superior without a corresponding subordinate. The doctrine of command responsibility is clearly articulated and anchored on the relationship between superior and subordinate, and the responsibility of the commander for actions of members of his troops. It is a species of vicarious responsibility through which military discipline is regulated and ensured. This is why a subordinate unit of the superior or commander is a *sine qua non* for superior responsibility."[41]

The Appeals Chamber, after examining the World War II case law, similarly rejected the suggested threshold of substantial influence:

> "This latter standard appears to envisage a lower threshold of control than an effective control threshold; indeed, it is clear that in its natural sense the concept of 'substantial influence' entails any necessary notion of control at all …It is clear, however, that substantial influence as a means of control in any sense which falls short of the possession of material abilities to prevent subordinate offences or to punish subordinate offenders, lacks sufficient support in State practice and judicial decisions."[42]

Furthermore, control must not be too remote. The Appeals Chamber in *Celebici* agreed with the Trial Chamber's proposition that:

> "While the Trial Chamber must at all times be alive to the realities of any given situation and be prepared to pierce such veils of formalism that may shield those individuals carrying the greatest responsibility for heinous acts, great care must be taken lest an injustice be committed in holding individuals responsible for acts of others in situations where the link of control is absent or too remote."[43]

De jure authority with respect to the actions of inferiors does not always mean *de jure* authority over such individuals amounting to control and subordination. Indeed, it has been recognised that even *de jure* authority over inferiors does not necessarily imply effective control and therefore subordination. In *Celebici*, the Appeals Chamber noted that:

> "In general, the possession of *de jure* power in itself may not suffice for the finding of command responsibility if it does not manifest in effective control, although a court may presume that possession of such power *prima facie* results in effective control unless proof to the contrary is produced."[44]

41 See *Prosecutor v Delalic 'Celebici'*, ICTY Trial Chamber judgment of 16 November 1998 (case no. IT-96-21-T), para. 647.

42 See Appeal Chamber judgment, note 2 above, para. 257.

43 Ibid, para. 197.

44 Ibid.

It should be added that by the term *de jure* power is meant independent power over subordinates that can, in the absence of other factors, be effectively exercised. It is suggested that where power is jointly exercised and cannot be independently exercised as control, it cannot be presumed that one individual acting independently but forming only one constituent part of the joint body could exercise control effectively.

2.2.3 Failure to act – necessary and reasonable measures to prevent or punish

The third and final requirement for command responsibility for the independent actions of a subordinate is the failure to take necessary and reasonable measures to prevent or punish the principal perpetrator. The question relating to what measures are necessary and reasonable is intimately connected with the question whether the accused had the material ability to prevent and punish the offences and therefore the effective control essential for a superior-subordinate relationship. So, in *Blaskic*, the Trial Chamber held that:

> "Accordingly, it is a commander's degree of effective control, his material ability, which will guide the Trial Chamber in determining whether he took the reasonable measures required either to prevent the crime or punish the perpetrator."[45]

There is little guidance in the case law as to whether the test for what is reasonable and necessary is objective or subjective, or whether one is concerned with *all* necessary and reasonable measures that could be taken or simply *any* necessary and reasonable measures. In *Celebici* the Trial Chamber noted that:

> "… any evaluation of the action taken by a superior to determine whether this duty has been met is so inextricably linked to the facts of each particular situation that any attempt to formulate a general standard *in abstracto* would not be meaningful."[46]

Nonetheless, the Chamber stated that the "legal duty which rests upon all individuals in positions of superior authority requires them to take *all* necessary and reasonable measures …" [emphasis added].[47] It further described such measures to be those "that are within his material capacity". Even the question of what is in a person's material capacity should be looked at from a subjective perspective in some degree, since the superior may have to make difficult judgments on this weighing up of various factors, including the value of and risk to his own life. This means that the use of the word 'all' needs to be treated with caution since 'all' might ultimately mean any measures that the accused reasonably judged to be necessary and possible in the circumstances.

It is suggested that, as a matter of policy, great care should be taken in judging the actions of a person in a situation of complete chaos, as is the hallmark of armed conflict and a breakdown of law and order. If the person has tried his best in the circumstances and can show some evidence of his contribution to restoring order, however minor, that, in principal, should be sufficient to exempt him from individual criminal responsibility,

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45 See *Prosecutor v Blaskic*, note 11 above, para. 335.

46 *Prosecutor v Delalic et al 'Celebici'*, note 41 above, para. 394.

47 Ibid.

providing it is not a sham. Indeed, no decision has yet attempted to put the tribunal in the shoes of the accused and list the specific measures that ought to have been taken and rejected the magnitude of the positive measures actually taken by the accused. Where the point has been significant the tribunal has rejected the position of the defence on the basis that no measures were taken at all. Thus, the ICTR Trial Chamber in *Kayishema* remarked that:

> "No evidence was adduced that he attempted to prevent the atrocities that he knew were about to occur and which were within his power to prevent."[48]

While this indicates an openness to the nature of the measures to be taken, the reference to proof from the defence of such measures is a dangerous supposition and inconsistent with the ICTY's stance on the question of causation. There may be cases where the superior's intervention clearly would have made absolutely no difference. As the Trial Chamber noted in the *Celebici* case, "international law cannot oblige a superior to perform the impossible".[49]

On causation, while the ICTY rejects the proposition that specific proof of causation must be tendered by the prosecution, it recognises that "a necessary causal nexus may be considered to be inherent in the requirement of crimes committed by subordinates and the superior's failure to take measures within his powers to prevent them".[50] Therefore, if there was no causal connection, then by definition there were no measures that were necessary and reasonable to prevent or punish the crimes.

This simultaneous rejection of the requirement of causation and recognition of an inherent causal link also supports the proposition that a defendant need only show that some necessary and reasonable measures were taken in order to avoid liability as a commander. If it had to be shown that the commander had taken *all* possible measures, then the prosecution should, as a consequence, have to show what was not done that should have been done, and would not be able to prove the necessary and reasonable nature of those measures without establishing causation.

3 Superior Orders

3.1 The background to the doctrine of superior orders

The history of the doctrine of superior orders has been traced to the early references to the laws of war as manifested in the writings of Augustine, Grotius and Vitoria.[51] The earliest example of an international criminal court, the trial of Peter Von Hagenbach in 1474 in Germany for offences against the "laws of God and Man", involved a plea of superior orders that failed. Yet, there has never been a clear agreement in the practice of States on the extent to which an accused might rely on it as a ground for excluding responsibility for the commission of a crime under international law.

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48 *Prosecutor v Kayishema*, note 9 above, para. 513.

49 *Prosecutor v Delalic et al 'Celebici'*, note 41 above, para. 395.

50 Ibid, para. 399.

51 See Green, *Superior Orders in National and International Law* (1976), pp 5-6.

A prominent example of a successful plea of superior orders is provided in the post World War I jurisprudence. In the case of *Dover Castle,* where the accused genuinely believed that the execution of an order was part of a lawful reprisal, this plea led to his acquittal.[52] The opposite result was found in the case of *Llandovery Castle* on the basis that the order was manifestly unlawful.[53]

The founding instruments of the Nuremberg Tribunal, the Human Rights Court for East Timor and the Special Court for Sierra Leone all expressly exclude the possibility of relying on superior orders to exclude responsibility. However, they permit reliance on it in mitigation of sentence. Thus, Article 6(4) of the Statute of the Special Court for Sierra Leone provides that:

> "The fact that an accused person acted pursuant to an order of a government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the Special Court determines that justice so requires."

This is modelled on the Nuremberg Charter, and in the Nuremberg judgment the International Military Tribunal not only confirmed the position that the doctrine could not exclude responsibility but also qualified the circumstances when it could be relied upon in mitigation of sentence. The trials conducted pursuant to Control Council Law No 10 acknowledged the possibility of superior orders excluding responsibility in very limited circumstances.[54]

The Statutes of the ICTY and ICTR do not specify the position with respect to superior orders. In the *Erdemovic* case the matter was briefly discussed in the separate opinions of the Judges, and there was a divergence of view between those who rejected the defence of superior orders and those who regarded it as a conditional defence.[55]

3.2 Superior orders under the Rome Statute

The Statute of the ICC provides for the possibility of a defence of superior orders under strict and to some extent novel conditions. It does not, however, follow up on the judgment in Nuremberg by elaborating on the circumstances under which the doctrine may serve as a basis for mitigation of sentence. Article 33 states:

"1 The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:

(a) The person was under a legal obligation to obey orders of the Government or the superior in question;

52 (1922) *American Journal of International Law (AJIL)* 704 et sec.

53 (1922) *AJIL* 708 et sec.

54 See the *Einsatzgruppen* case, the *Hostages* case and the *High Command* case (note 4 above).

55 See *Prosecutor v Erdemovic*, joint separate opinion of Judges Vohrah and McDonald; separate opinion of Judge Cassese.

(b) The person did not know that the order was unlawful; and

(c) The order was not manifestly unlawful.

2. For the purpose of this article orders to commit genocide or crimes against humanity are manifestly unlawful."

The conditions for superior orders relieving a person of responsibility as set out in this provision reflect the deep controversy around this issue. At the Rome Conference there was a clear division between States that wished to maintain a strict interpretation excluding any manner of defence of superior orders and States that wished to retain a conditional position. Furthermore, the distinction between war crimes on the one hand and crimes against humanity on the other underscores not only the stigma attached to the latter crimes but also the concern that certain States had for the position of their own soldiers.

The conditions under (b) and (c) of Article 33(1), according to which a person must not have known that the order was unlawful and that it should not be manifestly unlawful, represent the classical formulation of the doctrine according to the school of thought that superior orders should amount to a defence in limited circumstances.

The condition that the person must have been under a legal obligation to follow orders excludes the possibility of the employment of this excuse where instructions are given in a private capacity. In the context of the application of international criminal law, this can be politically problematic because it creates, potentially at least, a more restrictive regime for rebel or liberation movements than that for governments.

According to one interpretation, rebels could not be following orders pursuant to a legal obligation since no national or international law requires that they follow the orders of a rebel leader who has no status under the national law of a State. Yet, international law does not outlaw all liberation movements and in fact arguably condones them in the context of the enforcement of the right to self-determination. There is therefore scope for the argument that 'legal obligation' must be interpreted as including the rules of an organisation to which a person belongs in his or her capacity as a fighter.

4 Immunity from Prosecution

4.1 Introduction

The ability of States to conduct international relations freely depends on the notion of sovereign equality. A necessary corollary of this is the principle that one State should not infringe on the jurisdiction of other States. Also, since States are equal the national courts of one State cannot determine a dispute between them. Thus, States have immunity from the jurisdiction of the national courts of foreign States and this necessarily extends to those limited individuals representing the persona of the State in its international activities, such as Heads of State and foreign ministers. This form of immunity is known as 'sovereign immunity'.

Similarly, the internal organs of a State should refrain from interfering in the State's international relations. Thus, the domestic law of many States recognise a principle of Act

of State; that is, acts that amount to inter-State interaction. These acts are generally excluded from the scrutiny of national courts, whether the acts of the home State or a foreign State. This domestic law principle is a question of admissibility rather than immunity from jurisdiction, but it needs to be mentioned since it complements the international principle of sovereign immunity as an effective bar to prosecution.

Another complementary principle to sovereign immunity is that of diplomatic immunity, which protects the serving representatives of States from prosecution during office and in exercise of their official functions after the termination of their office.

This area has seen a developing attempt to limit immunity from prosecution for crimes against international law.

4.2 Sovereign immunity

Traditionally sovereign immunity is absolute, in the sense that the State could never be subject to the jurisdiction of a foreign State. However, just as the facilitation of international relations justifies immunity, it has also led to the development of restrictions on immunity. In the inter-State sphere, a distinction developed between acts of government (*jure imperii*), subject to immunity, and acts of a commercial nature (*jure gestionis*). This distinction facilitates international trade since it enables governments to enter into commercial arrangements under workable conditions. Such a distinction has not developed in the inter-State sphere in relation to violations of international law, even those most serious violations such as the violations of *jus cogens* or crimes against international law. There is virtually no State practice to examine in relation to the commission of international crimes by States, because of the real practical difficulty of understanding how a State can commit a crime or what the consequences are.

There is, however, a degree of State practice on the commission of crimes against international law by Heads of State and other State representatives, and this is where the problem of sovereign immunity becomes intricate and politically sensitive. The reason for this is that it is well established that the doctrine of sovereign immunity applies not just to the State but to the Head of State and other state representatives.

The doctrine of sovereign immunity emerged at a time when the Head of State was a sovereign and the distinction between the Head of State and the State itself was therefore a fine one. The subsequent proliferation of republics and democracies justifies a clear distinction between the State itself and its leaders. Another significant development in international law since the early crystallisation of norms on sovereign immunity has been the progression of the international legal order from one purely for the facilitation of inter-State relations to one in which there are global imperatives, as well as individual expectations and accountability to the international community through norms of humanitarian law, human rights and international criminal law. These areas of law have made important strides in the last 55 years. This has brought into question the absolute nature of sovereign immunity.

4.3 Diplomatic immunity

Whereas sovereign immunity applies to the State and those who manifest the *persona* of the State and require absolute immunity for the effective relations between States, diplomatic immunity is a potentially more restrictive form of immunity applicable to diplomats on official State business. The principles of diplomatic immunity have been codified in the Vienna Convention on Diplomatic Relations of 1961. Diplomats only have immunity *ratione personae* (personal immunity on account of their status) while in office, and only have immunity *ratione materiae* (functional immunity that attaches to their actions) for acts performed as part of their official functions once their status as diplomats has ceased. This immunity does not apply to private acts while in office once the diplomatic status has ceased. Even this restrictive form of immunity is brought into question in relation to crimes against international law because of the subsequent developments in international humanitarian, human rights and international criminal law, although the applicable principles remain far from clear or settled.

4.4 Developing restrictions on immunity for crimes against international law

The International Military Tribunal at Nuremberg imposed a significant restriction on the immunity of State representatives where such representatives were accused of crimes against international law. It was pointed out in the judgment of the Tribunal that crimes are "committed by men and not by abstract entities and that only by punishing men could international law be effectively enforced". It went on to hold that immunities normally applicable could not be relied on for crimes under international law.

This principle was adopted in the Statutes of the *ad hoc* tribunals. Thus, Article 7(2) of the ICTY and Article 6(2) of the ICTR provide respectively that:

> "The official position of any accused person, whether as Head of State or government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment."

This principle was acknowledged at the national level by the English House of Lords in two majority decisions with extensive and disparate reasoning. In the case of *Pinochet Ugarte* the House of Lords held that, while Heads of State benefited from immunity with respect to their person and their acts, this immunity could not apply to a former Head of State with respect to the crime of torture.[56] The principle and majority reasoning behind this decision was that torture could not be said to constitute an official function of a Head of State. However, if the person were still a Head of State then he would continue to benefit from immunity even for torture because the immunity is *ratione personae* as opposed to *ratione materiae*.

56 *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (Amnesty International and Others Intervening),* 1 AC 61 (2000); *R v Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (No 3),* 1 AC 147 (2000).

In the case of *Democratic Republic of Congo v Belgium*,[57] the International Court of Justice (ICJ) had occasion to rule on the question of the applicability of immunity to a serving state representative, and in particular a Minister of Foreign Affairs (see Box 5.1). The majority of the Court held that the Minister benefited from absolute immunity from the criminal jurisdiction of foreign States while in office.

Box 5.1: The Immunity of a Serving State Representative: *DRC v Belgium*

Belgium had issued an international arrest warrant against Abdulaye Yerodia Ndombasi, the Minister of Foreign Affairs of the Democratic Republic of Congo, pursuant to a law of 1993 on the punishment of grave breaches of international humanitarian law. Although Yerodia Ndombasi was no longer Minister by the time the case was heard by the International Court of Justice, he had been at the time the proceedings were filed and this was the factual basis upon which the case was decided. Since the injury was to the State and not to the individual, the Court rejected the submission that the dispute had become without object. It was held that the international arrest warrant issued by Belgium violated that country's international obligations under customary international law relating to immunity. This immunity was considered to be essential for the conduct of relations between States.

The Court noted that the position might differ in an international criminal court or tribunal. This *obiter dictum* viewpoint is open to question. The jurisdiction of an international court is premised on the understanding that it is exercising collectively a jurisdiction that individual States are entitled to exercise individually. That being the case, the restrictions applicable in national courts should be equally applicable in international courts, save where a home State's participation in the international court can be seen as a waiver of State immunity.

The majority did not consider it necessary to address the issue of whether Belgium could properly exercise universal jurisdiction since there was immunity from that jurisdiction. Other judges felt that the question of immunity could not be addressed without addressing the question of jurisdiction since the immunity was premised on the validity of the exercise of jurisdiction and was therefore intricately interconnected with it.

The Court distinguished the situation of international criminal courts by observing:

> "An incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction. Examples include the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda, established pursuant to Security Council

57 *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)* of 14 February 2002, http://www.icj-cij.org.

> resolutions under Chapter VII of the United Nations Charter, and the future International Criminal Court created by the 1998 Rome Statute."[58]

This *obiter dictum* was applied by the Appeals Chamber of the Special Court for Sierra Leone in the case of *Prosecutor v Charles Ghankay Taylor*.[59] In this case, the Prosecutor of the Special Court for Sierra Leone issued an indictment and warrant of arrest for Charles Taylor, while he was still President of Liberia, for crimes against humanity and grave breaches of the Geneva Conventions committed within the territory of Sierra Leone. Charles Taylor claimed immunity from jurisdiction on the basis that he was President. The Government of Liberia did not waive immunity and supported his assertion.

The Special Court held that since it could be classified as an international criminal court, an incumbent Head of State could not claim immunity from its jurisdiction. Applying the *DRC v. Belgium* dictum, it held that a distinction could be drawn between national courts, whose adjudication on the conduct of another State might infringe the principle of sovereign equality of States, and international courts, where the principle of equality of States had no relevance. Thus, it explained:

> "A reason for the distinction, in this regard, between national courts and international courts, though not immediately evident, would appear due to the fact that the principle that one sovereign State does not adjudicate on the conduct of another State; the principle of State immunity derives from the equality of sovereign States and therefore has no relevance to international criminal tribunals which are not organs of a State but derive their mandate from the international community."[60]

The finding that the principle of sovereign equality of States has no relevance to international criminal courts is questionable since, as the International Military Tribunal at Nuremberg pointed out, such courts are merely a collective exercise of jurisdiction that each of the States involved in the exercise are entitled to exercise individually. It is no less an infringement of the principle of the sovereign equality of States for several States to collectively exercise judicial jurisdiction over the conduct of another State than for one State to do so. It is only permissible to speak of respect for sovereign equality if the State whose conduct is questioned has itself consented to the exercise of the jurisdiction. There might be an argument that Liberia had done so by becoming a member of the United Nations and therefore impliedly consenting to any proper exercise of power by that body, including the conclusion of a treaty for the setting up of a court.

However, to assert that the principle of sovereign equality of States has no relevance to the exercise of jurisdiction by an international criminal court takes the point too far. The principle could, for example, be invoked by a non-State Party to the Statute of the ICC in the event that the Court purported to exercise jurisdiction over one of its nationals.

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58 Ibid, para. 61.

59 See *Prosecutor v Charles Ghankay Taylor*, Decision on Immunity from Jurisdiction of 31 May 2004 (case no. SCSL-2003-01-I).

60 Ibid, para. 51.

The strongest argument for distinguishing international criminal courts lies in the terms of the constituent instruments of these courts, which arguably exclude the possibility of immunity from jurisdiction. This creates for those States deemed to have consented to such an instrument an exception to the general rule, providing one can properly interpret the terms as extending to established principles of immunity. Thus, the Appeals Chamber of the Special Court for Sierra Leone relied principally on its own Statute,[61] which provides in Article 6(2) that:

> "The official position of any accused persons, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment".

This principle is also set out in the Statutes of the *ad hoc* tribunals for the former Yugoslavia and Rwanda, as well as the Nuremberg Charter and the Statute of the ICC. While these provisions would appear to exclude State immunity as a basis for excluding jurisdiction, those of the *ad hoc* tribunals do not expressly do so. In principal, the issue of criminal responsibility is a separate one from the issue of jurisdiction. A provision negating the possibility of relying on one's official status to relieve one from criminal responsibility still serves the purpose of ensuring that national provisions protecting the Head of State or other high ranking officials from prosecution may not be invoked as a defence. It makes clear that the international principle that an individual's acts are not to be considered his own if attributable to the State does not apply with respect to international crimes. Therefore, without an express reference to immunity from jurisdiction, there remains a cogent argument to the effect that States would not purport to revoke well-established immunities under customary international law without expressly doing so. Such was part of the reasoning of the minority in the *Pinochet* case. This potential hole has been plugged in the Statute of the ICC as is explained below.

4.5 Immunity under the ICC Statute

The question of immunity is directly dealt with, and far more comprehensively than ever before, in Article 27(2) of the Statute of the ICC. This provides that:

> "The Statute shall apply equally to all persons without distinction based on official capacity. In particular, official capacity as a Head of State or a Government, a member of a government or parliament, an elected representative or government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
>
> Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the court from exercising its jurisdiction over such a person."

The first and last sentences effectively exclude any argument by an accused that seeks to assert sovereign, diplomatic or other immunity for crimes under international law. The

61 Ibid, paras. 43-44.

Statute therefore endorses a firm distinction between national criminal proceedings and those before the ICC for the purposes of the doctrine of State immunity and its relevance to the application of international criminal law. It affirms a clear intention on the part of the States Parties to the Statute to create or confirm an exception to any pre-existing customary or treaty principles of State immunity in the international criminal context.

This article of the Statute does not, however, confirm any intention on the part of non-State Parties to endorse any exception to their right to State immunity. It follows that notwithstanding this provision there is still scope for argument in the case of nationals of non-State Parties who may find themselves before the ICC. The Statute is only binding on State Parties and requires a connection to a State Party for the exercise of jurisdiction. One such connection is territoriality, namely, that the crime was committed on the territory of a State Party. Accordingly, it is possible for the national of a non-State Party to be tried for an ICC offence where that offence was committed on the territory of a State Party. Given the clear terms of Article 27(2), the extent to which an argument of State immunity could succeed for the national of a non-State Party would depend upon the extent to which the Court recognises its ability to challenge the terms of its own constituent instrument for the purpose of determining its jurisdiction.

This is an area of some difficulty with no settled approach. The Appeals Chamber of the ICTY, in the case of *Prosecutor v Tadic*, acknowledged its power to determine the lawfulness of the establishment of the Tribunal on the basis of the principle of jurisdiction to determine jurisdiction. In the case of *Prosecutor v Karemera et al*,[62] the Appeals Chamber of the ICTR distinguished between (1) a preliminary motion challenging jurisdiction, in the sense of the indictment not referring to a situation for which the Tribunal had jurisdiction, and (2) challenging the grant of jurisdiction itself. By a majority, the Tribunal rejected the admissibility of a preliminary motion challenging its jurisdiction to apply the doctrine of joint criminal enterprise to internal as opposed to international armed conflicts. The implication of this finding is that the Tribunal may only examine whether it has jurisdiction under its Statute for the purpose of preliminary motions, but may not scrutinise the very grant of jurisdiction by the Statute.

The Special Court for Sierra Leone took the line that it "cannot ignore whatever the Statute directs or permits or empowers it to do unless such provisions are void as being in conflict with a peremptory norm of general international law".[63] This is a fairly restrictive approach. There is a cogent argument for asserting an implied term in the founding treaty or other constituent instrument of an international criminal court to the effect that the Court may review the legality of its own Statute in the light of public international law. This is implied from the direction to apply principles of international criminal law founded on international law outside the treaties or statutes themselves and the purpose of creating peace and reconciliation, which depends upon the credibility and legitimacy of the process.

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62 *Prosecutor v Karemera et al*, Decision on Nzirorera's Preliminary Motion on Lack of Jurisdiction, June 2004 (case no. ICTR-98-44-I).

63 See *Prosecutor v Charles Ghankay Taylor*, Decision on Immunity from Jurisdiction, above, para. 43.

5 Amnesties

5.1 The practice of amnesty

An unusual feature of transitional societies is the fact that punishment and amnesty, two opposite solutions to dealing with past offences, have been adopted with equal fervour and sometimes even together.[64] Amnesty is immunity in law from either criminal or civil legal consequences, or from both, for wrongs committed in the past in a political context. The choice of amnesty is largely governed by the recognition of a political reality that reconciliation and advancement can only be obtained through forgiveness and oblivion. Amnesties have been a feature of post-conflict resolutions since time immemorial. In 1286 BCE the pharaoh Rameses II concluded a peace treaty with the Hittites following the battle of Kadesh that appears to have employed an amnesty. Later the Athenians gave amnesty to most of the Spartans after their draconian rule following the Peloponessian war, hence the Greek origin of the word. In the European wars amnesty was to become a regular feature of peace treaties. The Treaty of Westphalia set the trend in 1648 after the Thirty Years War, which required nothing less than "a perpetual Oblivion, Amnesty, or Pardon of all that has been committed since the beginning of these Troubles…".[65] While the practice is rife in European history, in non-European conflicts, also, amnesty has featured from time to time. In South Africa this is well illustrated by the Treaty of Vereeniging of 1902 ending the hostilities between the burgher (Boer) forces and Britain.[66]

Recent history has seen the frequent adoption of amnesties in response to the aftermath of internal conflict. Transitional societies of the twentieth century have employed amnesties in Argentina, Chile, Croatia, El Salvador, Haiti, Lesotho, Peru, Republica Srpska, Sierra Leone, South Africa, Uganda, Uruguay and Zimbabwe. Amnesties frequently begin as a matter of political necessity to facilitate transition and peace and are subsequently explained to the population in terms of reconciliation, forgiveness and truth. This is not to say that the latter objectives are not served, but they rarely constitute the initial impetus for a solution that is not actually preferred by the new emerging government at the time of the handing over of the reigns of power. Rather, it is initially perceived as a necessary evil and later hailed as a tool for reconciliation as if the outcome had been carefully planned. That amnesty is often an unavoidable consequence of a hard-won peace is illustrated by the circumstances surrounding its introduction in particular societies (see Box 5.2).

64 See generally this author: Andreas O'Shea, *Amnesty for Crime in International Law and Practice*, Kluwer Law International (2002).

65 *http://www.yale.edu/lawweb/avalon/westphal.htm*

66 Arnold Toynbee, *Major Peace Treaties of Modern History, Vol. 1: 1648-1967* (1967), p 1146.

67 For the details of the amnesty law, see Robert J Quinn, 'Will the Rule of Law End? Challenging Grants of Amnesty for the Human Rights Violations of a Prior Regime: Chile's New Model', 62 *Fordham Law Review* 905 at 906 (1994).

68 See Zalaquet, 'Chile' in Boraine, Levy and Scheffer (eds), *Dealing with the past: truth and reconciliation in South Africa*, 2nd edition (1997), pp 47-53.

69 Law 15.737 of 8 March 1985, reproduced in Kritz, *Transitional Justice: How Emerging Democracies Reckon With Former Regimes* (1995), Vol III, *Laws, Rulings and Reports*, p 808.

Box 5.2: Amnesties in Chile, Uruguay and Argentina

In Chile, it was the former regime itself that enshrined the amnesty[67] and the new government simply did nothing to remove it.[68] After a 16-year military dictatorship (1973-1989) under General Augusto Pinochet, change had come about as a result of a plebiscite introduced by the former government but the military remained strong and influential.

Although in Uruguay the amnesty law[69] was introduced by the emergent government rather than the former regime, it was clearly also perceived to be a political necessity in the prevailing circumstances. President Sanguinetti was forced to renege on his campaign promise of justice despite a brief attempt at instigating criminal proceedings against former military officials. Again here, there had been 10 years of military dictatorship and change only came through a plebiscite and agreement.[70] The military remained a powerful threat.

The case of Argentina was a little different in that, although the country had been subjected to seven years of military dictatorship when President Alfonsin took office in December 1983, the army was weak after suffering a military and moral defeat in the Falklands War against the British a year and a half before. That defeat was followed by the resignation of President Galtieri on 17 June 1982.[71] Accordingly, there was a more sustained attempt at prosecuting the military. The new President issued a decree ordering the prosecution of high-ranking military officers and, on 27 December 1983, Congress repealed the amnesty law that had been introduced by the previous regime. Trials were instituted before the Supreme Council of the Armed Forces. This notwithstanding, on 29 December 1986, three years into the emerging democracy, the *ley de puncto final* or full stop law was passed imposing a 60-day deadline on the institution of criminal proceedings. Ultimately, pressure from the army resulted in the passing of the 'due obedience' law on 4 June 1987. This created a presumption of innocence deriving from the inability to disobey orders and was tantamount to an amnesty, which were finally granted unconditionally to certain individuals in 1989 and 1990 through the mechanism of presidential pardons.[72]

5.2 International criminal law and amnesty

Amnesty, like immunity, is potentially a bar to the international criminal process taking its normal course. It is an ante-thesis to punishment. In that sense it is both an aspect of and a potential parameter to the application of international criminal law. The conflict between amnesty and punishment lies in the fact that amnesty constitutes "immunity in law from either criminal or civil legal consequences, or from both, for wrongs committed

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70 See Kritz, note 69 above, Vol II, *Country Studies*, pp 383-384.

71 Ibid, pp 332-333.

72 See Decree 1002/89 of 6 October 1989 and Decree 2741/90 of 29 December 1990, both reproduced in Kritz, note 69 above, Vol III, *Laws, Rulings and Reports*, pp 529 and 531 respectively.

in the past in a political context".[73] A perpetrator cannot be simultaneously punished and amnestied for the same offence, although he may be punished in part and amnestied from the remainder of his sentence.

Amnesty and punishment have different objectives, and the extent to which they may be reconciled is a matter of some controversy. Thus, the main objectives of punishment may be stated to be retribution, denunciation, deterrence and reform, while the major objectives of amnesty are transition, peace, reconciliation, forgiveness and truth. Each mechanism pretends to achieve elements of the other's aims, but the emphasis is clearly different. Interestingly, the objectives of amnesty have in the international context been employed to justify punishment, as is illustrated by the establishment of *ad hoc* tribunals such as the ICTY, ICTR and Special Court for Sierra Leone. However, the efforts to harmonise the processes for punitive and restorative justice are in their very early stages.[74]

International criminal law has the effect of limiting amnesty because the State possesses a positive obligation to prosecute certain – some have argued all – crimes under international law, a notion essentially inconsistent with that of amnesty.

A number of treaties have included an obligation to prosecute or extradite international offenders, encapsulated in the maxim *aut dedere aut judicare*. In the context of war crimes, the four Geneva Conventions of 1949 provide in differently numbered articles for a duty to find and punish or extradite those guilty of grave breaches of the Conventions. Treaties dealing with other international crimes also incorporate a duty to prosecute. One may mention here the International Convention on the Prevention and Punishment of the Crime of Genocide of 1948, the International Convention against Torture of 1984 and the International Convention for the Prevention and Suppression of the Crime of Apartheid of 1979. The duty to prosecute grave breaches of the Geneva Conventions, genocide and torture has, like their prohibition, reached customary status.[75] Additionally, there are crimes under customary law that have not been the subject of a general codified duty to prosecute, but for which there is a duty to prosecute under custom. These include piracy, slavery, crimes against humanity and violations of the laws and customs of war.

However, there is no treaty that contains in its substantive provisions an unambiguous duty to prosecute all crimes under international law in all circumstances. Only the preamble to the Statute of the ICC provides that:

> "…it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes."

Since this is a provision in a preamble, it cannot be taken as creating such an obligation but does constitute *opinio juris* of the existence of such an obligation under customary international law. One can perhaps confirm from this that there is an emerging general

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73 See Andreas O'Shea, *Amnesty for Crime in International Law and Practice* (2002), pp 1-2.

74 Ibid, pp 294-336.

75 Ibid, pp 229-251.

duty to prosecute all international crimes, but it is doubtful whether it has yet crystallised from a general State practice. At most, it can be said that the majority of the serious and systematic violations of human rights and international humanitarian law are subject to a duty to prosecute in general international law by virtue of the combination of customary rules in relation to specific offences. Essentially, this covers all those international crimes under customary international law.

Another question that may arise is to what extent an amnesty may limit the ability to punish an individual on the international plane. The conflict between punishment and amnesty is most recently and prominently illustrated by the express rejection of amnesty in the Statute of the Special Court for Sierra Leone,[76] notwithstanding the Lomé Agreement in which combatants are granted unconditional amnesty for events prior to that agreement but covered by the jurisdiction of the Special Court (see Box 5.3). Since disarmament and the Truth and Reconciliation Commission were given effect by virtue of the provisions of the Lomé Accord, there is a strong argument for the proposition that this was an agreement that had not yet been terminated. The earlier amnesty in the Abidjan Accord is unaffected simply because the jurisdiction of the Court does not extend that far back, creating a political anomaly in the treatment of the atrocities of the past.

Box 5.3: The Decision of the Special Court of Sierra Leone on Amnesty

The Special Court for Sierra Leone has the peculiarity that the amnesty is contained in a bilateral agreement preceding the agreement establishing the Court and that one of the parties to the conflict, that is the Government of Sierra Leone, is both a principal party to the agreement establishing the Court and also a principal party to the previous bilateral agreement providing for amnesty. This may raise serious questions, particularly regarding any representations that may have been made at the time of disarmament, about political good faith and the credibility of mechanisms for transitional justice in future conflicts.

While the Special Court becomes busy with indictments against former members of the Revolutionary United Front (RUF),[77] armed conflicts in the Democratic Republic of Congo and neighbouring Côte D'Ivoire are the subject of negotiations that undoubtedly incorporate discussions on amnesty. Similarly, while rebels stood at the door of Monrovia, the capital of Liberia, President Charles Taylor agreed to cease military operations against them while peace negotiations were conducted.[78] This was a matter of days after the Special Court for Sierra Leone had indicted him and the Prosecutor had issued a statement calling on all States to bring him to justice. There was every indication that President Taylor was still very much in

76 Article 10 of the Statute of the Special Court for Sierra Leone.

77 At the time of writing there are five detainees, including four members of the RUF and one member of the government. Another three indictments have been issued. Fadoh Sankoh, the RUF leader is apparently mentally ill and the subject of a psychiatric report.

78 See CNN World News, 11 June 2003.

control, and the express exclusion of amnesty in the Special Court Statute might very well have impacted on how he handled the negotiations.

In its Decision on the Amnesty under the Lome Accord,[79] the Special Court rejected arguments to the effect that it would be an abuse of process to continue with proceedings in the face of an internationally valid amnesty. The Appeals Chamber held that the Lome Accord was not a treaty, that amnesty for international crimes was not enforceable on the international level and that Article 10 of the Statute of the Court, providing for the non-relevance of amnesty to the proceedings, trumped any attempt to rely on such amnesty.

In one sense it would seem correct that negotiating parties should not be allowed to frustrate international justice. The important difference between the ICC and the Special Court for Sierra Leone is that the former is founded on a widely representative agreement with no specific agenda in relation to any particular conflict. Furthermore, since it does not have jurisdiction over offences taking place before the treaty's entry into force,[80] it is unlikely to lead to the violation of an amnesty concluded prior to this.

The Statute of the ICC does not expressly allow for exemption from prosecution on the basis of amnesty. The international community is not bound by any individual State's exercise of political judgment and this is reflected in the Statute. The jurisdiction of the Court may be initiated in several ways that can all potentially ignore the existence of an amnesty, whether part of a national law or a bilateral agreement. The principle of 'complementarity', whereby the Court cedes to national jurisdiction, except where that jurisdiction is ineffective, is expressed in a way that confirms that amnesty will not deprive the Court of its jurisdiction. Thus, the Court retains jurisdiction if the national authorities of a State are "unwilling or unable genuinely" to investigate or prosecute the offence.[81]

An amnesty endorsed through a national law would effectively render a State either unwilling or genuinely unable to proceed with a prosecution. The context and object and purpose of the treaty would suggest that an investigation must be understood as an investigation for the purposes of prosecution, as opposed to some investigation for the purpose of a truth and reconciliation process.

However, the interests of peace and reconciliation, which underlie the rationale for amnesty, raise the question whether there might not be circumstances where the interests of States in granting immunity from prosecution as the price for peace should not be reconciled with the interests of the international community in ensuring the punishment of international offences.

79 *Decision on Challenge to Jurisdiction: Lomé Accord Amnesty*, 13 March 2004, SCSL (AC).

80 See Article 11 of the Statute of the ICC.

81 Article 17 of the Statute of the ICC.

The South African model of transitional justice, at least in its design if not in its implementation, further illustrates how amnesty can be genuinely directed at enhancing, rather than violating, human rights. With respect to the ICC, although no express mechanism exists for accommodating the long-term interests in respecting amnesties in restricted circumstances, there are certain aspects of the operation of the Court that allow for this possibility. These tools of reconciliation are, however, far from ideal because they provide for very little control or predictability as to when and in what circumstances amnesties will be tolerated, or who will have the power to decide. The crimes committed under apartheid escape the censure of the ICC since they were committed before the Statute's entry into force. However, future societies (of States that are party to the ICC Statute) cannot confidently emulate the South African amnesty process until clearer provisions exist on the legitimacy of conditional amnesty.

The UN Security Council possesses the power to delay a prosecution, which could be done in the interests of preserving peace. The international community resisted giving the Council, let alone its permanent members, complete control over proceedings before the Court. However, the Council is granted a limited power of control in that it can halt a prosecution for a period of 12 months.[82] The resolution to halt a prosecution would require nine affirmative votes out of the fifteen members of the Council.[83] In principle, this power cannot be exercised except as a measure for the maintenance of international peace and security acting under Chapter VII of the United Nations Charter. Therefore, the Council must be satisfied that the prosecution of an individual beneficiary of an amnesty would constitute a threat to international peace and security. Unfortunately, any decision of the Council would be influenced by political factors and not subject to any guiding principles or requirement of consistency. One other obvious weakness in this mechanism is the ability of one permanent member to utilise the veto to prevent the respect of an amnesty even where it is in the interests of peace and reconciliation in the opinion of all the other members of the Council.[84] This mechanism has already been employed to prevent the prosecution of US military in operations abroad.

The Prosecutor also has the discretionary power to determine whether a prosecution should proceed. This power could arguably be applied to delay or terminate a prosecution in the light of an amnesty. According to Article 53(1) of the Statute of the ICC:

> "The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under the Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether: …
>
> (c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice."

82 Article 16 of the Statute of the ICC.

83 Article 27(3).

84 The halting of a prosecution is likely to be treated as a non-procedural matter for the purposes of the voting procedure of the Security Council under Article 27(3).

There are difficulties associated with this approach. In particular, the Prosecutor is not an appropriate person to decide such fundamental issues of international peace and security.[85]

The possibilities for the reconciliation of the ICC with transitional arrangements demonstrate that the door is not closed on amnesties for the maintenance of peace. However, on a current reading of the Statute the scope for this is extremely limited. There would appear to be a need for the international community to address the issue of amnesties head on with a view to developing principles that can be harmonised with international criminal law.

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85 A more structured and predictable approach, it is suggested, would entail the conclusion of a Protocol to the Statute of the ICC, which would attempt to reconcile the interests of national reconciliation with that of the international rule of law. This would provide express guidance in the form of binding obligations upon States. Amnesties for certain categories of serious international crimes would be prohibited, except where an agreement is reached between the State and the United Nations, after the State had demonstrated that the interests of international peace and security were seriously threatened by the prospect of prosecution or civil liability. A proposed draft protocol, providing such a mechanism, is annexed to the current author's work on amnesty. However, in terms of this draft protocol it is further provided in relation to international offences generally that:

> An amnesty shall not include within its scope immunity from prosecution for serious violations of human rights or other serious international crimes other than those listed in Article 3, except in so far as there is, in all the circumstances, otherwise no reasonable prospect of achieving a peaceful transition. This provision is without prejudice to any other international obligations on a State.

This places the burden on the State to justify its position legally and politically having regard to the actual reality of the political situation. Here it can make an independent assessment of its legal position, but where listed serious international crimes are in question, the State determines the position in association with the UN, and there it has a heavy onus in establishing the difficulties and persuading the world of the reasonableness and necessity of its position.

See in this regard Article 4 of the Draft Protocol to the Statute of the ICC on the Proper Limitations to Municipal Amnesties Promulgated in Times of Transition, O'Shea, *Amnesty for Crime in International Law and Practice* (2002), Appendix, p 332.

Part II – The ICC Statute and Commonwealth States

Chapter 6

Jessica Howard and Timothy L H McCormack

Australia

1 Domestic Prosecutions of International Crimes Prior to the Implementing Legislation

1.1 Prosecutions under customary and conventional international law

It is established doctrine that international law does not become part of Australian Law, in the sense of creating either justiciable rights or enforcable penalties, in the absence of implementing legislation. This fundamental principle does not preclude international law influencing the development of Australian Law in the absence of implementing legislation. However, Australian courts have consistently held that, irrespective of the source of an international legal obligation – custom, treaty or even UN Security Council Resolution – the failure of Parliament to enact legislation to implement Australia's international obligations precludes resort to those obligations either for domestic legal redress or as a source of legal authority.

The High Court of Australia articulated the general principle in 1936 in *Burgess; Ex Parte Henry.*[1] Since then the principle has been reaffirmed in a succession of cases: (1) in relation to treaties to which Australia is a party;[2] (2) in relation to customary international law obligations binding on Australia;[3] and (3) in relation to UN Security Council Resolutions binding on Australia pursuant to Article 25(1) of the UN Charter.[4] The general principle has never been challenged and has also consistently been affirmed in those

1 55 *Commonwealth Law Reports* (CLR) 608 (1936).

2 For example, in *Simsek v. MacPhee,* 148 *CLR* 626 (1982), Australia had ratified both the Refugee Convention and its Protocol but had no legislation to implement obligations pursuant to either instrument. Accordingly the plaintiff, Simsek, was unable to challenge the denial of the benefits he claimed Australia was obliged to extend to him under these two instruments.

3 For example, in *Polites v. Commonwealth,* 70 *CLR* 60 (1945), Polites was precluded from the protection of a clear customary law rule prohibiting the conscription of foreign nationals into military service. An unambiguous legislative provision to the contrary prevailed in the absence of legislation giving effect to the customary rule.

4 For example, in *Bradley v. Commonwealth,* 128 *CLR* 557 (1973), the Post-Master General was not entitled to rely on Security Council Resolutions calling on Member States to impose sanctions on Rhodesia to terminate mail and telecommunications services to the Sydney office of the Rhodesian Information Service. The failure of Parliament to implement legislation to give effect to Australia's obligations rendered the action illegal. Since this decision of the High Court, the Australian Government has systematically adopted enabling legislation to implement sanctions regimes in Australian domestic law.

cases where Parliament has enacted implementing legislation to give effect to international obligations.[5] In *Simsek v Macphee*, for example, Stephen J traced the rationale for the general principle to the separation of executive and legislative powers under the Westminster system of government:

> "in our constitutional system treaties are matters for the Executive, involving the exercise of prerogative power, whereas it is for Parliament, and not for the Executive to make or alter municipal law." [6]

According to the Separation of Powers doctrine, Parliament, as the house of the elected representatives of the people, is paramount. Accordingly, if Parliament chooses not to implement Australia's international legal obligations, irrespective of the reason for that omission, it is not for the courts to consider the international obligations part of Australian law. Similarly, if Parliament chooses to exercise its constitutional authority to enact legislation unambiguously inconsistent with an international legal obligation owed by Australia, it is not for the courts of this country to override Parliament's explicit intention. As mentioned above, however, international law can, and increasingly does, have an influence on the development of Australian law apart from the enactment of implementing legislation to give domestic legal effect to international legal obligations.

There are currently three different ways in which international law can have such an effect:

(1) It is an established principle of statutory interpretation that the legislature does not intend to violate fundamental norms of human rights or principles of international law,[7] though, as mentioned above, a clearly expressed intention to do so will be valid.[8] In situations of statutory ambiguity, courts are permitted to have regard to extrinsic materials, including treaties or other international instruments referred to in the Act, in order to resolve the ambiguity or to prevent a manifestly absurd result.[9]

(2) Developments in international law can assist courts in determining the content of the common law of Australia. According to Brennan J in *Mabo v Queensland [No. 2]*:

> "The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law..."[10]

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5 See, for example, *Chow Hung Ching v R*, 77 *CLR* 449 (1948) at 478; *Bradley v Commonwealth*, 128 *CLR* 557 (1973) at 582; *Simsek v MacPhee*, 148 *CLR* 636 (1982) at 641-2; *Koowarta v Bjelke-Petersen*, 153 *CLR* 168 (1982) at 211-212, 224-225; *Kioa v West*, 159 *CLR* 550 (1985) at 570; *Dietrich v R*, 177 *CLR* 292 (1992), at 305.

6 *Simsek*, per Stephen J at 642.

7 *Polites* pp 68-69 per Latham C J; *Minister for Immigration and Ethnic Affairs v. Teoh,* 183 *CLR* 273 (1995) at 287-288 per Mason C J and Deane J; *Chu Kheng Lim v Minister for Immigration*, 176 *CLR* 1 (1992), at 38.

8 *Polites* at 67-73 per Latham C J; p 77 per Dixon J; and pp 80-1 per Williams J.

9 Section 15 AB(1) and (2), *Acts Interpretation Act (1901).*

10 *Mabo v. Queensland [No. 2]*, 175 *CLR* 1 (1992) at 42.

The decision of the High Court in the *Mabo* case was particularly significant because it recognised, for the first time in Australian legal history, that a 200-year-old rule of the common law of Australia was wrong. Indigenous title to land had never been recognised under Australian law because of the legal fiction that title to land was vested in the British Crown on the basis that Australia was uninhabited – or *terra nullius* – at the time of British settlement. Most importantly for the purpose of this discussion, Brennan J was heavily influenced by developments in international human rights law, the international law of acquisition of territory and the international legal recognition of indigenous title to land to inform his view of the need to alter the Australian common law.[11] Judges in other decisions have also demonstrated a willingness to look to international law to determine the content of the Australian common law.[12]

(3) The High Court has demonstrated a willingness to give some effect to Australia's treaty obligations that have not been implemented into domestic law. In *Minister for Immigration and Ethnic Affairs v Teoh*[13] the High Court was required to consider the effect of a treaty that Australia had ratified but that had not been the subject of domestic implementing legislation – in that particular case, the UN Convention on the Rights of the Child.[14] The High Court stated that an unincorporated treaty may give rise to a 'legitimate expectation' on the part of a person that an administrative decision maker, required to exercise a statutory discretion concerning that person, would do so in conformity with a convention that Australia had ratified, notwithstanding that there was no domestic legislation in place.[15] The Court stressed that the legitimate expectation could be displaced by legislation or by 'executive indications to the contrary', and that the right was properly viewed as one to have the treaty considered, rather than a justiciable right that the treaty obligation be applied.[16]

Consistent with the foregoing discussion, there has never been a prosecution of an alleged international crime in Australia on the basis of either customary or conventional international law. Furthermore, any such prosecution could not occur without a fundamental shift in Australian law – an unlikely event in the foreseeable future. Australian courts have no jurisdiction in respect of the crimes in the ICC Statute by virtue solely of the status of those crimes at international law or even by virtue of Australia's ratification of the Statute.[17]

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11 Gerry Simpson, 'Mabo, International Law, Terra Nullius and the Stories of Settlement: An Unresolved Jurisprudence',19 *Melbourne University Law Review* 195 (1993).

12 See, for example, on the content of the common law right to a fair trial, P Kirby in *Jago v. District Court of New South Wales*, 12 *New South Wales Law Review (NSWLR)* 558 (1988); also, the High Court in *Dietrich v. The Queen,* 177 *CLR* 292 (1992).

13 183 *CLR* 273 (1995).

14 Convention on the Rights of the Child (entered into force Sept. 2, 1990), G.A. Res. 44/25 (Annex), U.N. GAOR, 44th Sess., Supp. No. 49, at 166, U.N. Doc. A/RES/44.49 (1990).

15 *Teoh* at 289-92 per Mason C J and Deane J.

16 At 291, per Mason C J and Deane J. See also, Rosalie Balkin, 'International Law and Domestic Law' in *Public International Law: An Australian Perspective* (1997), p 137.

17 Either at customary international law or pursuant to treaty – both the Rome Statute itself and/or the instruments on which it was based, such as the Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 *U.N.T.S.* 277 (entered into force 12 January 1951); CMD.

1.2 Prosecutions under other domestic or international legal provisions

Prior to the enactment of Australia's implementing legislation for the Rome Statute, the international crimes of genocide and crimes against humanity did not exist as crimes in their own right in Australian domestic criminal law.[18] The international crimes of torture and hostage-taking, both of which can constitute crimes against humanity, have been implemented into Australian criminal law on the basis of Australia's multilateral treaty obligations in respect of the two crimes, but there have been no prosecutions under either legislative enactment.[19] Similarly, grave breaches of the four Geneva Conventions of 1949 and of Additional Protocol I of 1977 also constitute domestic crimes in Australia by virtue of the Geneva Conventions Act 1957 but again no prosecutions have ever been undertaken pursuant to that legislation.

The only prosecutions of international crimes in Australia have all been initiated pursuant to the War Crimes Act 1945. The legislation was initially drafted to facilitate the Australian trials of Axis defendants for alleged atrocities during the course of World War II against Australian prisoners of war and, in some cases, against civilians in foreign occupied territory. Most of the victorious Allied nations followed on from the Nuremberg and Tokyo tribunals with national 'subsidiary' trials against either German or Japanese defendants, and Australia was no exception. In a relatively little-known but important chapter of Australia's legal military history, Australian military tribunals conducted 300 war crimes trials in nine different locations against a total of 952 Japanese defendants between November 1945 and April 1951.[20] Death sentences were confirmed against 148 defendants.[21]

The same War Crimes Act was substantially amended (actually almost repealed in its entirety and substituted with new provisions) and utilised again in the early 1990s. Media reports had identified several alleged former Nazis living peacefully in Australia[22] and the

18 For a more detailed discussion of this *lacunae* see Katherine L Doherty and Timothy L H McCormack, 'Complementarity as a Catalyst for Comprehensive Domestic Penal Legislation' 5 *University of California, Davis Journal of International Law and Policy* 147 (1999) at 164-169.

19 In relation to torture, for example, the Crimes (Torture) Act 1988 implements Australia's obligations under the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (G.A. Res. 39/46 (Annex), U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1985)) and gives Australian courts universal jurisdiction over alleged acts of torture perpetrated anywhere in the world by individuals who are subsequently present in Australia. Similarly, the Crimes (Hostages) Act 1989 implements Australia's obligations pursuant to the International Convention against the Taking of Hostages (G.A. Res. 34/146, 34th Sess., (1979), 18 I.L.M. 1456) and penalises acts of hostage-taking in Australia, on Australian ships or aircraft, perpetrated by Australian nationals anywhere or committed by non-nationals anywhere in the world where such non-nationals are subsequently present in Australia.

20 A total of 807 individuals were prosecuted but some of them were prosecuted in more than one trial – hence the different figure of 952 defendants.

21 Because some defendants were awarded the death penalty in more than one case and because two individuals died in custody, the actual number of defendants executed was 137. Michael Carrel, 'The Legal Basis for Australia's War Crimes Trials Against Japanese Defendants', unpublished LLM paper (copy on file with the author) citing the Australian Army's Directorate of Prisoners of War and Internees, *War Crimes Trials: Japanese War Criminals Charged Under the War Crimes Act 1945 by Australian Military Authorities* (1958).

22 Mark Aarons, *Sanctuary: Nazi Fugitives in Australia* (1989).

Government responded with a national enquiry into the situation. The Menzies Report identified a list of 70 residents of Australia all alleged to have committed war crimes in the course of World War II[23] and the Government established a War Crimes Special Investigations Unit. The War Crimes Act 1945 was amended to allow Australian criminal courts to try those now residing in Australia for alleged war crimes committed in Europe during World War II. The Government claimed to be committed to prosecuting anyone allegedly responsible for war crimes. However, the temporal and geographic limitations imposed were intended to minimise the chance of prosecutions of returned Australian servicemen and women, the majority of whom had served in the Pacific Theatre of the War. The real targets of the legislation were former Nazis now living in Australia.

Three separate proceedings were instituted pursuant to the legislation after the Special Investigations Unit had investigated several cases. The defendants were Ivan Polyukhovich, Michael Berezowsky and Heinrich Wagner.[24] Polyukhovich was the only defendant to reach the trial stage of proceedings, but his indictment was quashed in the Supreme Court of South Australia for lack of evidence. Berezowsky was subjected to committal proceedings ultimately dismissed on the basis of the deciding magistrate's fear of an unfair trial if proceedings progressed. Wagner suffered a heart attack in the course of committal proceedings and the proceedings were terminated.[25]

Apart from these somewhat frustrating war crimes trial proceedings, Australia has not initiated any other prosecutions of international crimes. There have been relatively recent extradition proceedings brought by Latvia against Konrads Kalejs for his alleged World War II involvement in the Latvian Arajs Kommando Unit. There have also been a succession of recent decisions involving the rejection of applications for refugee status on the basis of the so-called 'Exclusion Clause' of the Refugee Convention – Article 1(F) – that there are grounds for believing that the applicant committed a war crime, crime against humanity or act of genocide.[26] However, all of these experiences involve procedural claims against particular individuals for their forcible transfer from Australia and none of them have involved criminal prosecutions.

2 Implementing Legislation

2.1 Title

Australia's implementing legislation is comprised of two separate legislative enactments entitled:

- International Criminal Court Act 2002 – hereafter ICC Act 2002

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23 Andrew Menzies, *Review of Material Relating to the Entry of Suspected War Criminals Into Australia* (1987).

24 For a detailed discussion of the specific proceedings against all three defendants, see Gillian Triggs, 'Australia's War Crimes Trials: All Pity Choked' in Timothy L H McCormack and Gerry J Simpson, *The Law of War Crimes: National and International Approaches* (1997), pp 130-134.

25 Ibid.

26 See, for example, Timothy L H McCormack, 'Australia' in 'Correspondents' Reports', 3 *Yearbook of International Humanitarian Law* 414-419 (2000); and 'Australia' in 'Correspondents' Reports' (2001) 4 *Yearbook of International Humanitarian Law* (in press).

- International Criminal Court (Consequential Amendments) Act 2002 – hereafter ICC (Consequential Amendments) Act 2002 – sub-titled "An Act to Amend the Criminal Code Act 1995 and Certain Other Acts in Consequence of the Enactment of the International Criminal Court Act 2002, and for Other Purposes".

2.2 When in force

Both Acts received the Royal Assent on 27 June 2002 and, in part, became Australian Law the following day. The implementation of the ICC crimes into the existing Criminal Code Act 1995 took effect on the day the Statute entered into force for Australia: 1 July 2002.

2.3 Government departments involved

The Federal Attorney-General's Department had initial responsibility for the drafting of the legislation. Officers from that Department consulted with the Department of Foreign Affairs and Trade and with the Department of Defence to ensure that other relevant Government Departments were satisfied both with the legislative approach as well as with detailed provisions. The Attorney-General's Department also liaised with the Office of Parliamentary Counsel – the office ultimately responsible for the final drafting of the legislation.

2.4 Amendments to existing domestic legislation

The ICC (Consequential Amendments) Act 2002 involves 91 pages of text with a total of three prefatory sections and 163 additional provisions in seven separate schedules to the Act. Each of these schedules contains the provisions to amend a different existing Act of Parliament. Schedules 2-7 contain a combined total of 10 provisions and all the other 153 provisions – the overwhelming bulk of the legislation – are contained in Schedule 1 of the Act. The existing Acts amended by the new legislation are as follows:

- *Schedule 1* amends the Criminal Code Act 1995 by adding an entire new Division (No. 268) entitled 'Genocide, Crimes Against Humanity, War Crimes and Crimes Against the Administration of the Justice of the International Criminal Court'. The Schedule includes 124 new sections in 10 different subdivisions of the new Division and constitutes the overwhelming bulk of the entire Act. Schedule 1 also incorporates 27 new entries into the definitions section of the Criminal Code Act 1995 necessitated by the provisions of the new Division 268. The incorporation of the Rome Statute crimes into the Criminal Code Act 1995 will be discussed in more detail below.

- *Schedule 2* amends the Director of Public Prosecutions Act 1983 with a single procedural amendment: the addition of the ICC Act 2002 as one of the enumerated legislative enactments for which the Director of Public Prosecutions undertakes proceedings.

- *Schedule 3* amends the Geneva Conventions Act 1957 by repealing Part II of that Act. Part II gives Australian courts jurisdiction over the domestic crimes of grave breaches of any of the four Geneva Conventions of 1949 or of Additional Protocol I of 1977 in the context of international armed conflicts. That legislative enactment is now superfluous given the scope of the new Division 268 of the Criminal Code Act 1995. However, it is important to recognise that, by virtue of the provisions of the Acts Interpretation Act 1901, Part II of the Geneva Conventions Act 1957 continues to operate in respect of alleged grave breaches occurring between 1957 when the

legislation entered into force and 2002 when the ICC (Consequential Amendments) Act 2002 took effect.

- *Schedule 4* amends the Migration Act 1958 with two minor procedural additions of the ICC Act 2002 in enumerated lists of relevant legislation.
- *Schedule 5* amends the Mutual Assistance in Criminal Matters Act 1987 by extending the application of the existing legislation from 'foreign countries' to now include the ICC.
- *Schedule 6* amends the Telecommunications (Interception) Act 1979 to authorise interceptory measures in certain specified proceedings under the ICC Act 2002.
- *Schedule 7* amends the Witness Protection Act 1994 by adding a new substantive provision allowing for the possible inclusion of a person in a national witness protection programme at the request of the ICC.

3 Co-operation with the International Criminal Court

The ICC Act 2002 includes comprehensive and detailed provisions on co-operation with the Court. A request for co-operation by the ICC to Australia, in respect of an investigation or prosecution, may include:

- assistance in connection with the arrest and surrender to the ICC of a person;
- identification of the whereabouts of a person or items;
- the taking of evidence;
- the questioning of any persons the subject of investigation or prosecution;
- service of documents;
- temporary transfer of prisoners to the ICC;
- site examinations;
- the execution of searches and seizures;
- provision of records and documents;
- protection of victims or witnesses;
- preservation of evidence; and
- identification, tracing and freezing of the proceeds of crimes.[27]

Furthermore, the ICC Act 2002 authorises the provision of any other assistance intended to facilitate the investigation and prosecution of crimes within the ICC's jurisdiction, so long as that assistance is not prohibited under Australian law.[28] The ICC Act 2002 also allows for the provision of 'informal assistance' (e.g. police to police); such forms of assistance need not comply with the ICC Act 2002.[29]

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27 Section 7(1)(a)(i)-(xii), *International Criminal Court Act 2002*. Unless otherwise noted, section numbers in the footnotes refer to this act.

28 Section 7(1)(b).

29 Section 7(2).

Unless urgent, requests for co-operation are to be made in writing to the Attorney-General of Australia or through the International Criminal Police Organisation (or its regional equivalent).[30] Requests must be executed in accordance with the ICC Act 2002[31] and any problems must be communicated and discussed with the ICC without delay.[32]

3.1 Arrest and surrender

The provisions on arrest and surrender are contained in Part 3 of the ICC Act 2002. Where the ICC Pre-Trial Chamber[33] has issued a warrant of arrest, requests for arrest and surrender of that person by Australia must be accompanied by certain specified information, including information describing the person sought, their probable location and an authenticated copy of the warrant.[34] Where the request relates to a person already convicted, the request must be supported by authenticated copies of the warrant of arrest, the judgement of conviction and the sentence imposed (if any).[35] Requests for the provisional arrest of a person must be supported by identification and location information, statements of the crimes for which the person is sought, the facts allegedly constituting those crimes, and the existence of an arrest warrant or judgment of conviction.[36] A further requirement of a request for provisional arrest is a statement that a request for surrender of the person will follow.[37]

3.1.1 Procedure for arrest

Upon the receipt by the Attorney-General of a complete request for arrest and surrender of a person by the ICC, the Attorney-General *may* notify any magistrate, by written notice in the prescribed form, that the request has been received.[38] The decision whether to notify a magistrate about a request from the ICC must not be made unless the Attorney-General has, in his or her absolute discretion, signed a certificate that it is appropriate to act on the request.[39] It is important to note that the decision to exercise this discretion is a non-compellable one and the decision itself is non-reviewable. The rationale for requiring the Attorney-General to issue a certificate as a pre-condition for the initiation of proceedings is to safeguard the primacy of Australia's national jurisdiction over the ICC under the complementarity regime.

This unfettered discretion on the part of the Attorney-General is, of course, potentially open to abuse if the Government decides to use the non-issuance of a certificate to shield an Australian national from prosecution. It is hoped that such abuse will not occur but if it

30 Section 8.

31 Section 10.

32 Section 11.

33 Article 58, ICC Statute.

34 Section 17.

35 Section 18.

36 Section 19.

37 Section 19(e).

38 Section 20. The notice (and any other notices given by the Attorney-General) must be in accordance with the 'statutory form', which is prescribed in the regulations.

39 Section 22.

does at some future stage it will be for the ICC to declare that such action on the part of the Australian Government is inconsistent with Australia's obligations arising under the ICC Statute.

The warrant of arrest or judgment of conviction issued by the ICC must accompany the written notice issued by the Attorney-General to the magistrate. Upon receipt of such notice, the magistrate *must* issue a warrant for the person's arrest on behalf of the ICC, and must notify the Attorney-General once this warrant has been issued.[40] The procedure for the issuing of a warrant for provisional arrest is identical, save for the fact that the Attorney-General's written notice need not be accompanied by any other documentation.[41]

Once an arrest warrant is issued, it authorises police officers to enter premises to arrest the person named in the warrant, where there are reasonable grounds to suspect that the person is there, and to use "such force as is necessary and reasonable in the circumstances".[42] At the time of an arrest, the person arrested must be informed of the crime in respect of which s/he is being arrested, in general terms.[43] The Act authorises the searching of arrested persons[44] (ordinary, frisk and strip searches), and of the arrested person's premises where there are reasonable grounds to believe that there are seizable items or evidentiary materials on the premises.[45] Police officers may also apply to a magistrate for search warrants where there are reasonable grounds for suspecting that evidential material relating to the crimes in the arrest warrant may be in a particular place, or held by a particular person.[46]

Once arrested, the person under arrest must be given a written notice that specifies the crime within the jurisdiction of the ICC of which the person is accused and that describes the conduct allegedly constituting that crime. As soon as practicable after arrest, the person must be brought before a magistrate in order for the magistrate to determine that the person arrested is the person named in the warrant and that the arrest was made in accordance with the Act.[47] If the magistrate is satisfied about these matters, the person is to be remanded in custody unless there are special circumstances justifying remand on bail.[48] If the magistrate is not satisfied as to either of these matters, the person must be released from custody; such an order for release does not prevent the issuing of further arrest warrants in respect of that person.[49]

In deciding whether to grant bail, the magistrate must consider the gravity of the alleged crimes, whether there are urgent and exceptional circumstances warranting the granting

40 Section 20(3), (4).

41 Section 21.

42 Section 129. For further details on what constitutes 'necessary and reasonable' force, see section 130.

43 Section 131.

44 Sections 132, 133 and 135.

45 Section 134.

46 Section 27. For further details on search warrants, see also Part 6 of the Act.

47 Section 23.

48 Section 23(4), (5).

49 Section 23(3).

of bail and whether necessary safeguards exist to ensure that Australia can meet its obligation to surrender the person to the ICC.[50] Where an application for bail is made, the Attorney-General must notify the ICC and must pass on to the magistrate deciding the application any recommendations made by the ICC. An application for bail may be made by the person arrested or upon the direction of the Attorney-General.[51] If the person is released on bail, the Attorney-General must provide periodic reports to the ICC on the person's bail status.[52]

Where a person has been remanded in custody or on bail for a period of 60 days and a request for surrender has not been received, the Attorney-General must direct a magistrate to order the release of the person.[53] Where a person was arrested under the provisional arrest procedure, s/he must be brought before a magistrate if s/he has been held on remand for 60 days and has not yet received notice of a duly completed formal request for arrest by the ICC. Unless such a notice is likely to be received within a reasonable period of time, the magistrate must order the release of the person.[54]

3.1.2 Procedure for surrender

Where a person has been remanded pursuant to an arrest warrant, the Attorney-General may issue a warrant, in the prescribed statutory form, for the surrender of that person to the ICC.[55] A surrender warrant must not be issued unless the Attorney-General has, in his or her absolute discretion, certified that it is appropriate to do so.[56] Where the person the subject of the request is imprisoned due to the commission of a different offence in Australia, the Attorney-General, after consulting with the ICC, may do one of two things: either (1) issue a surrender warrant to take effect at the end of the term of imprisonment or (2) surrender the person to the ICC on a temporary basis.[57] It should be noted that Australia's extensive requirements on extradition (Extradition Act 1988) are not required to be met in respect of a request for surrender to the ICC.[58]

Once a surrender warrant has been issued, the person the subject of the warrant must be remanded in custody until the warrant is executed, even where the person was previously on bail.[59] The surrender warrant must authorise the transfer of the person into the custody of an authorised officer of the ICC and their transport to a place specified by the ICC, which may be outside Australia.[60] Surrender warrants are only valid if executed in accordance with their terms.[61]

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50 Section 23(6).

51 See, e.g., section 25(1)(b).

52 Section 24.

53 Section 25(1)(a).

54 Section 26.

55 Section 28(1).

56 Section 29.

57 Section 30.

58 Section 31(3).

59 Section 42.

60 Section 43.

61 Section 44.

Refusal of request for surrender

The Attorney-General can refuse a request for surrender in certain, precisely defined circumstances. Where the ICC has determined that the case is inadmissible,[62] the request for surrender *must* be refused.

Where there are competing requests from the ICC and from a foreign State that is a Party to the ICC Statute, the Attorney-General must determine, in accordance with section 38, whether to surrender or extradite the person. Priority must be given to the ICC request if:

- the ICC has made a determination that the case is admissible and that determination considers the investigation or prosecution conducted by the foreign country requesting extradition; or
- The ICC makes such a determination after notification of the foreign country's extradition request.[63]

If no such determination has been made then the procedure for extradition of the person may be commenced; however, the person cannot be extradited until the ICC determines that the case is inadmissible.[64]

Where there are competing requests from the ICC (for surrender) and a foreign State that is *not* a Party to the ICC Statute (for extradition), either (1) relating to the same conduct as that contained in the surrender warrant,[65] or (2) relating to the same person but different conduct from that contained in the surrender warrant[66], *and* (3) Australia has concluded an extradition agreement with the foreign country, the Attorney-General must determine whether to surrender or extradite the person and may refuse the surrender request.[67] In reaching this decision, the Attorney-General must consider 'all relevant matters', including the respective dates of the requests, the interests of the foreign country (including the nationality of the victims and perpetrator) and the possibility for future surrender to the ICC by the foreign country.[68]

Where the extradition request is from a non-State Party to the Rome Statute, with whom Australia has not concluded any formal extradition arrangements, priority must be given

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62 Section 33(4) (where the ICC determines case is inadmissible under Article 20 of the Rome Statute, namely, that the person has previously been convicted, acquitted or tried in respect of the relevant conduct by the ICC or another Court); section 35(3) (where a person is being, or has been, investigated or prosecuted in Australia in relation to the relevant conduct and the ICC has determined that the case is inadmissible); and section 36(3) (where the ICC considers an admissibility challenge under Article 18 or 19 of the Rome Statute and determines that the case is inadmissible).

63 Section 38(2).

64 Section 38(3). This limitation does not apply if the ICC does not make its determination on an expedited basis: section 38(4).

65 Section 31(a), in conjunction with section 39(6).

66 Section 31(2)(b), in conjunction with section 40(3).

67 Section 31(2).

68 Section 39(7) in relation to the same conduct, section 40(4) in relation to different conduct. An additional requirement in section 40(4) is that the Attorney-General give special consideration to the relative nature and gravity of the conduct for which surrender and extradition are sought.

to the ICC request.[69] Where the competing requests relate to the same conduct, extradition proceedings may be commenced, but cannot be completed until the ICC determines that the case is inadmissible.[70] There is no such limitation on the extradition process where the competing requests relate to the same person but in respect of different conduct.

The execution of a request for surrender may be postponed where the ICC is determining the admissibility of the case;[71] where the request would interfere with an ongoing investigation in Australia involving the same person but different conduct to that contained in the request;[72] or, the request involves a conflict with Australia's international obligations (e.g. Article 98 agreements).[73] All decisions must be communicated to the ICC.[74]

3.1.3 Constitutional and human rights concerns

The Australian Constitution provides very limited guarantees of individual rights, and those that do exist are largely irrelevant in this context.

Limited protection of individual rights is provided by the common law, particularly the requirement that administrative decision-making comply with the requirements of natural justice. On some matters, the Attorney-General would be required to comply with this requirement. However, in relation to those matters where the decision made is at the absolute discretion of the Attorney-General, it is possible that the accused may not be accorded procedural fairness because the Attorney-General's decision is non-reviewable by Australian courts.

The provisions on arrest and surrender contain clear safeguards against indefinite and arbitrary detention, including the requirement to bring an arrested person before a magistrate after 60 days of detention. The Australian common law provides a remedy to any person unlawfully detained – the writ of *habeas corpus* – and this remedy is not excluded by the ICC Act 2002. However, it appears unlikely that the remedy would ever need to be relied upon.

There are clear guidelines on the circumstances in which force may be used and limits are set on the use of force. In the main, the degree of force used must be reasonable, necessary and proportionate to the situation at hand. As noted above, the ICC Act 2002 authorises various kinds of searches, including personal searches. Again, the powers granted appear to be subject to sufficient safeguards.

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69 Section 39(2), section 40(2).

70 Section 39. This limitation does not apply if the ICC does not make its determination on an expedited basis: section 39(5).

71 Section 32.

72 Section 34.

73 Section 12.

74 See, for example, section 41.

3.2 Other forms of assistance

3.2.1 Forms of assistance pursuant to Article 93

Part 4 of the ICC Act 2002 authorises the giving of assistance to the ICC, as required by Article 93 of the ICC Statute.[75] Part 4 establishes comprehensive procedures for the provision of assistance to the ICC in:

- identifying or locating persons or things;
- the taking of evidence or production of documents/articles;
- the questioning of a person being investigated or prosecuted by the ICC;
- the service of documents;
- facilitating the voluntary appearance of witnesses or experts before the ICC;
- the temporary transfer of prisoners to the ICC;
- examination of places or sites;
- the search and seizure of evidentiary material;
- the provision of records/documents;
- protecting victims and witnesses;
- preserving evidence; and
- identifying, tracing, freezing and seizing of proceeds of crimes within the jurisdiction of the ICC.

A request for co-operation from the ICC must contain, or be supported by, certain documentation, depending on the nature of the request.[76] Generally, a request will need to be supported by a concise statement of the purpose of the request and the assistance required, together with as much detailed information as possible to assist in the fulfilment of the request. Requests for assistance are to be dealt with in the same way regardless of whether they are to assist the Court, the prosecution or the defence.[77]

Section 51 of the ICC Act 2002 authorises the Attorney-General to refuse to provide assistance to the ICC in certain circumstances. Where the request relates to information or documents provided to Australia on a confidential basis by a third party foreign country, intergovernmental organisation or international organisation, and the third party does not consent to disclosure, the Attorney-General *must* refuse the ICC's request.[78]

The Attorney-General may refuse a request where there are competing requests for assistance from the ICC and a foreign country[79] or where it is necessary in order to protect

75 See sections 49-106.

76 See section 50(1).

77 Section 105.

78 Section 51(1), in conjunction with section 142.

79 Sections 51(2)(b) and (c), in conjunction with section 56 and subsections 59(4) and 60(3).

Australia's national security interests.[80] Part 8 details the way in which national security issues are to be dealt with.[81] Where a request for co-operation from the ICC appears to relate to the disclosure of information or documents that would, in the Attorney-General's opinion, prejudice Australia's national security interests, the Attorney-General must consult with the ICC according to the procedure contained in Article 72 (5) of the ICC Statute.[82] If, after this process, the Attorney-General decides that there are no means or conditions under which the information or documents could be disclosed without prejudice to Australia's interests, the ICC must be notified, in accordance with Article 72 (6) of the ICC Statute.[83]

3.2.2 Obligations outside the mutual assistance context

Part 5 of the ICC Act 2002 contains measures to facilitate the ICC sitting and exercising its functions and powers in Australia. The ICC is authorised to sit in Australia for the purpose of performing its functions under the ICC Statute or the Rules of Procedure and Evidence, including taking evidence, conducting or continuing a proceeding, giving judgment or reviewing a sentence.[84]

3.2.3 Enforcement of sentences

The provisions regarding enforcement in Australia of sentences imposed by the ICC are contained in Part 12 of the ICC Act 2002. The Attorney-General may notify the ICC that Australia agrees to act as a State of enforcement, allowing ICC prisoners to serve their sentences in Australia, subject to certain enforcement conditions.[85] Australia can withdraw this agreement at any time by notifying the ICC.[86] The enforcement conditions may include a requirement that the prisoner consent in writing to serving the sentence in Australia, that appropriate ministerial consent is first obtained, that any appeal avenues available to the prisoner have been exhausted, or that at least six months of the prisoner's sentence remains to be served at the time of transfer.[87]

If the ICC imposes a sentence on a prisoner and, acting under Article 103 of the ICC Statute, designates Australia as the place in which the sentence is to be served, the Attorney-General must then consider whether to accept the designation.[88] Before accepting, the Attorney-General must determine which Australian state is to 'host' the prisoner, and obtain the consent of that state. The designation may be accepted if the ICC has agreed to the enforcement conditions (if any), the 'host' state has consented and,

80 Section 51(2)(a).

81 Sections 144-149.

82 Section 148.

83 Section 149.

84 Section 108.

85 Section 160(1).

86 Section 161.

87 Section 160(2).

88 Section 162.

where the prisoner is not an Australian citizen, the Immigration Minister has consented to the prisoner serving their sentence in Australia.[89]

In order to facilitate the transfer of an ICC prisoner to Australia to serve their sentence, the Attorney-General is required to issue a warrant for transfer to Australia.[90] The warrant for transfer must comply with certain statutory conditions.[91]

Once an ICC prisoner has been transferred to Australia, the Attorney-General may determine that the sentence of imprisonment imposed by the ICC be enforced on the prisoner.[92] The sentence enforced must not be harsher, in legal terms, than that imposed by the ICC and cannot be longer in duration.[93] The Attorney-General may only give a direction reducing a sentence in accordance with a decision of the ICC under Article 110 of the ICC Statute.[94] Once a prisoner as been transferred to Australia, no appeal or review lies in Australia against the sentence of imprisonment imposed by the ICC.[95]

ICC prisoners held in Australia have the right to communicate on a confidential basis with the ICC, without impediment from any person. A judge or other member of staff of the ICC is authorised to visit an ICC prisoner.

4 Incorporating the Crimes

4.1 Measure and extent of incorporation

The amendment of the Criminal Code Act 1995 with the addition of an entirely new division of crimes represents an unprecedented initiative in the national implementation of international criminal law in Australia, both in breadth of scope and level of detail. This new legislation comprehensively covers all the crimes within Articles 6, 7 and 8 of the ICC Statute and is significantly more extensive than any previous Australian legislation. The general approach of the legislation is to include a separate legislative provision for each of the distinct offences provided for in Articles 6-8 of the Statute, following closely the approach adopted in the Elements of Crimes negotiated after the opening for signature of the ICC Statute.

This approach of a separate provision for each individual offence, specifying the precise elements of the separate crimes, is entirely consistent with the overall approach already adopted in the Criminal Code Act 1995. The most recent substantial amendment to the Criminal Code Act 1995 prior to the current legislation was the Criminal Code Amendment (United Nations and Associated Personnel) Act 2000 implementing Australia's obligations as a State Party to the Convention on the Safety of United Nations and Associated

89 Section 164.

90 Section 165.

91 Section 166.

92 Section 168.

93 Section 169.

94 Section 170(2).

95 Section 171.

Personnel into Australian domestic law. The newly added Division 71 of the Criminal Code Act 1995 entitled 'Offences Against United Nations and Associated Personnel' reflects exactly the same approach as that adopted in Schedule 1 of the ICC (Consequential Amendments) Act 2002. This approach involves the enumeration of the precise elements that must be proved beyond reasonable doubt as well as facilitating the identification of a maximum penalty for each separate offence. Although it creates an unwieldy and complicated impression, this does have the advantage of introducing certainty into the criminal trial process for all the parties involved – prosecution, defence and the judiciary. The detailed Australian approach is apparently unique among implementing legislation to date of States Parties to the ICC Statute.[96]

4.1.1 Genocide

Subdivision B of the new Division 268 of the Criminal Code Act 1995 replicates precisely the five separate offences of genocide in the Elements of Crimes. The specific elements in each also mirror those contained in the Elements of Crimes (albeit in slightly different order) with one major exception. The legislation does not include the requirement, which applies to each separate offence of genocide in the Elements of Crimes, that "the conduct took place in the context of a manifest pattern of similar conduct directed against that [targeted] group or was conduct that could itself effect such destruction". The omission of this specific element altogether will make it easier for an Australian Court to convict an individual of the crime of genocide than it will be for the ICC. It may well be the case that, in most instances of alleged genocide, this quantitative requirement will be satisfied. However, the possibility remains that in some cases this quantitative context may be difficult to prove and the drafting decision to omit this additional requirement is to be welcomed.

Subdivision B constitutes the first introduction of genocide as a crime in its own right into Australian criminal law. There has been an intense public debate in Australia over several years about the lack of any explicit criminalisation of genocide in Australian law – particularly in the context of revelations about successive governments' policies of forcibly removing indigenous Australian children from their own families to be placed into white foster families or white institutions.[97] A Member of the Australian Democrats – a minority party with limited members in the Australian Parliament – tabled a draft Private Member's Bill to criminalise genocide in response to the awareness of this gap in Australian Criminal Law.[98] That proposed legislation did not receive sufficient parliamentary support from either of the major political parties and is now rendered otiose on the enactment of Subdivision B of Schedule 1 of the ICC (Consequential Amendments) Act 2002 – at least in respect of alleged acts of genocide occurring post 1 July 2002.

96 See, for example, Matthias Neuner (ed), *National Legislation Incorporating International Crimes: Approaches of Civil and Common Law Countries* (2003).

97 For a detailed account of this debate, including an analysis of the jurisprudence of Australian Courts on the place of genocide as a crime under Australian Law, see Timothy L H McCormack and Sue Robertson, 'Jurisdictional Aspects of the Statute for the New International Criminal Court', 23 *Melbourne University Law Review* 635 (1999) at 649-651.

98 The draft Bill was tabled in 1999 by Senator Brian Greig as the Anti-Genocide Bill 1999 (see www.law.mq.edu.au/Units/law309/bill). The explanatory sub-title of the Bill was 'A Bill for an Act to give effect to the Convention on the Prevention and Punishment of the Crime of Genocide and for related purposes'.

4.1.2 Crimes against humanity

Subdivision C of the Criminal Code Act mirrors the Elements of Crimes in relation to both the specific offences themselves (16 separate crimes against humanity) and the individual elements of each offence. Again there is one departure in the Australian Act from the approach in the Elements of Crimes, but in this Subdivision that departure is not a variation on the specific elements of each offence in the Elements of Crimes. Rather, in relation to crimes against humanity, the Act faithfully replicates each individual element for each of the separate crimes against humanity (although here, as with Subdivision B, the order of the specific elements as enumerated in the Elements of Crimes is altered).

The single point of departure in relation to crimes against humanity in the Act arises in Section 268.21 – the crime against humanity of forced disappearance of persons. The proposed Australian legislation splits the crime into two options (268.21(1) and (2)). Section 268.21(1) criminalises the conduct of the perpetrator in arresting, detaining or abducting persons with the support of the government or a political organisation and only requires the government or the organisation to refuse to acknowledge the deprivation of freedom. Consequently, it is not an element of this offence for the accused themselves to have either refused to have acknowledged, or known of a refusal to have acknowledged, the deprivation of freedom – an element that is required to prove the offence under the Elements of Crimes. Section 268.21(2), however, also criminalises the refusal to acknowledge the deprivation of freedom where the individual accused did not themselves conduct the arrest, detention or abduction but did know of it taking place. This extension of the scope of the crime against humanity beyond the limits imposed by the Elements of Crimes is welcome, although it must be conceded that the conduct captured by Section 268.21(2) would be covered by the provisions of the ICC Statute on participation in the commission of the offence.

Perhaps one of the most graphic examples of the faithfulness of the Australian legislation in following the Statute relates to the crime against humanity of torture. It is well known that in the negotiation of the text of Article 7(1)(f) of the ICC Statute, delegations intentionally departed from the restrictive terms of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in defining the crime. As defined in Article 7(2)(e), the perpetrator is not required to inflict the severe physical or mental pain or suffering for a particular specified purpose. The Elements of Crimes reflect this liberated approach to the definition of the crime against humanity of torture.

By contrast, delegations did not explicitly refer to the limitations of the customary law definition of the international crime of torture when negotiating the war crime of torture in either Article 8(2)(a)(ii) or Article 8(2)(c)(i). Consequently, the Elements of Crimes replicate the Convention Against Torture requirement of a specific purpose for the infliction of severe pain or suffering as an element of this war crime. The Australian Act reflects this disparity of approach. Section 268.13 – the crime against humanity of torture – removes the requirement of a specific purpose for the infliction of severe pain or suffering while Sections 268.25 and 268.73 – the war crime of torture in an international armed conflict and in a non-international armed conflict respectively – maintain the requirement of a specific purpose on the part of the perpetrator. Section 268.13 thus departs from the existing legislative definition of the crime of torture in Section 3 of the Crimes (Torture) Act 1988, which implements Australia's international obligations as a State Party to the

Convention Against Torture. This departure is only explicable on the basis of faithfulness to the ICC Statute, in this case Article 7(2)(e), and to the Elements of Crimes.

As with Subdivision B on genocide, Subdivision C constitutes the first introduction of crimes against humanity as a distinct category of crime in its own right into Australian domestic law. Section 17 of the War Crimes Act 1945 (as amended in 1989) permits a defence to responsibility for a war crime if the alleged conduct was "permitted by the laws, customs and usages of war" and did not constitute a 'crime against humanity' at the time such alleged conduct occurred. This is the only previously existing Australian legislative reference to the distinct category of 'crimes against humanity'. The War Crimes Act 1945 does not define the category and certainly does not create a separate category of crimes against humanity under Australian domestic criminal law.

4.1.3 War crimes

Subdivisions D, E, F and G faithfully replicate both the specific war crimes offences and their particular elements in the Elements of Crimes. The four Subdivisions reflect the four categories of war crimes in Article 8(2) of the ICC Statute, and the only point of departure in the Act is the omission of the war crime in Article 8(2)(b)(xx) – that of employing weapons, projectiles or materials or methods of warfare listed in the Annex to the Statute. Since that Annex contains no such listed weapons yet (and will not before the 1st Review Conference of the Statute seven years after entry into force – at the earliest) the Australian legislation does not include this particular offence. Once the Annex does have specific weapons listed, and assuming Australia is still a State Party to the Statute, the Australian implementing legislation will presumably be amended appropriately.

The Act, however, contains a somewhat anomalous addition – Subdivision H covering 'War Crimes That are Grave Breaches of Protocol I to the Geneva Conventions'. The rationale for this additional Subdivision is to bring all war crimes under Australian Law into one legislative location – the new Division 268 of the Criminal Code Act 1995. As a State Party to the four Geneva Conventions of 1949 and the two 1977 Protocols Additional to the Conventions, Australia is obligated to provide criminal sanctions for grave breaches of the Conventions and of Additional Protocol I.

Until now, those penal sanctions have been provided in the Geneva Conventions Act 1957. The intention of Schedule 3 of the Act is to amend the Geneva Conventions Act 1957 by repealing the operative part of the legislation criminalising grave breaches on the basis that all grave breaches will henceforth be covered by the Criminal Code Act 1995. Because Subdivision D of the Act explicitly covers grave breaches of the Geneva Conventions (reflecting Article 8(2)(a) of the ICC Statute), it was not necessary to draft an additional subdivision for those offences. However, the ICC Statute does not include an equivalent sub-article explicitly dealing with grave breaches of Additional Protocol I. There is no question that some of the provisions in Article 8(2)(b) of the ICC Statute do cover certain grave breaches of Additional Protocol I. However, the ongoing lack of consensus about the customary law status of the Protocol precluded the Rome Conference from comprehensively listing all grave breaches of the instrument in Article 8(2)(b) of the Statute. The Act achieves a more comprehensive approach than the Statute itself and this result is admirable.

In the initial draft of the legislation, however, proposed Subdividision H included 15 war crimes – all grave breaches of Additional Protocol I.[99] As it happened, some of those proposed war crimes repeated offences in either Subdivision D or E. The mere fact of repetition may not necessarily have caused problems except that the specific elements of the repeated offences were, on occasion, disparate. The inconsistency in specifying elements could easily have caused problems, as future defendants would justifiably raise objections if they were charged with a specific war crime appearing twice in the legislation, with the prosecution choosing the specific offence with the less onerous elements.

Some examples will illustrate the potential problem. Proposed Section 268.96, the war crime of 'medical or scientific experiments', repeated the same offence as proposed Section 268.47 (in Subdivision E). Both proposed Sections 268.96 and 268.47 enumerated five similar elements of the specific offence but those elements were not identical. For example, proposed Section 268.96(1)(c) incorporated an objective test for evaluating the perpetrator's conduct such that the conduct was not "consistent with generally accepted medical standards that would be applied under similar medical circumstances to persons who are nationals of the perpetrator…". Since proposed Section 268.47 contained no such explicit reference to an objective standard of conduct, it is arguable that the prosecution may have been required to prove a subjective standard – that is, that the accused themselves knew that their conduct was unjustified by the medical condition of the victim. Such a subjective standard may have been more difficult to prove beyond reasonable doubt in some circumstances than an objective test of 'generally accepted medical standards'. Disparity in the specific elements of the same crime referred to in two different Subdivisions of the draft legislation could not have been helpful.

Other examples of war crimes referred to in the original draft of Subdivision H that repeated offences already covered in proposed Subdivisions D or E included draft Section 268.98 – "attacking civilians" (repeating draft Section 268.34 of the same name); draft Section 268.99 – the "war crime of indiscriminate attack against civilians or civilian objects resulting in excessive loss of life, injury to civilians or damage to civilian objects" (repeating draft Section 268.37 – the war crime of "excessive incidental death, injury or damage"); draft Section 268.103 – the war crime of "improper use of the distinctive emblems of the Geneva Conventions" (repeating draft Section 268.43 of the same name); and draft Section 268.104 – the war crime of "transfer of population" (repeating draft Section 268.44 of the same name).

The written submission of the Australian Red Cross to the enquiry of the Joint Parliamentary Standing Committee on Treaties into Australia's ratification of the ICC Statute exposed the repetition and the possible problems arising from that repetition.[100] The Joint Standing Committee referred explicitly to the Australian Red Cross submission in making its recommendation to Parliament that the draft legislation be amended to

99 See Sections 268.94-268.108 of the ICC (Consequential Amendments) Bill 2001.

100 This submission to the Inquiry of the Joint Standing Committee on Treaties is available at: http://www.aph.gov.au/house/committee/jsct/ICC/sub244.pdf. See specifically pp 6 and 7 of the submission on the issue of repetition of some war crimes.

remove the repeated crimes.[101] The consequence is that the enacted Subdivision H now contains only seven war crimes, each of which are grave breaches of Additional Protocol I not covered elsewhere in the legislation – namely the war crimes of "medical procedure", "removal of blood, tissue or organs for transplantation", "attacks against works and installations containing dangerous forces resulting in excessive loss of life, injury to civilians or damage to civilian objects", "attacking undefended places or demilitarised zones", "unjustifiable delay in repatriation", "apartheid", and "attacking protected objects". This is in contrast to the originally proposed 15 war crimes in this Subdivision. Eight of those draft provisions have been omitted from the Act because they are already covered in either Subdivision D or E of the legislation.

4.1.4 Crimes against the administration of the justice of the ICC

Subdivision J (there is no proposed Subdivision I – presumably to avoid confusion between the capitalisation of the letter 'i' and Roman Numeral I) of the new Division 268 of the Criminal Code Act 1995 covers a range of offences against the work of the ICC. None of these offences are within the subject matter jurisdiction of the Court itself and yet it will be important for such offences to be prosecuted in some other forum if and when they are actually committed. Article 70(4)(a) of the ICC Statute acknowledges this reality and obliges States Parties to enact laws criminalising offences against the Court and its work. In this respect, it is significant that Section 268.117 authorises Australian courts to exercise extraterritorial jurisdiction over these particular offences if the perpetrator is an Australian citizen. Whether or not that breadth of jurisdictional competence will be utilised by Australian authorities remains to be seen, but the provision of such broad jurisdictional scope is considered significant.

The new offences in Subdivision J include "perjury", "falsifying evidence", "destroying or concealing evidence", "deceiving witnesses", "reprisals against witnesses" and "reprisals against officials of the International Criminal Court". As a general rule, the stated maximum penalties for offences under this Subdivision are significantly less than for the other substantive crimes in Subdivisions B-H (ranging from 5 to 10 years' imprisonment).

5 Jurisdiction of Domestic Courts and Principles of Liability

5.1 Grounds of jurisdiction

The implementing legislation extends universal jurisdiction to Australian courts in respect of the new domestic crimes of genocide, crimes against humanity and war crimes – that is, an alleged perpetrator of any of these new crimes under Australian law who happens to be in Australia or otherwise in Australian custody can be tried for the alleged crime irrespective of the territory where the crime allegedly occurred, irrespective of the nationality of the accused and irrespective of the nationality of the victims of the crime.

101 See Recommendation 10 of the Report of the Joint Standing Committee on Treaties to the Parliament of the Commonwealth of Australia on 'The Statute of the International Criminal Court'. P 85 of the Report involves the Committee's discussions of Recommendation 10. The full text of the Report is available at: http://www.aph.gov.au/house/committee/jsct/reports/report45/report45.pdf

As has already been mentioned, in respect of crimes against the administration of justice of the ICC, Australian courts can only exercise jurisdiction against those allegedly committing such crimes on the physical territory of Australia or against Australian nationals allegedly responsible for such crimes irrespective of where in the world the crimes were said to have occurred.

5.2 Temporal jurisdiction

The Australian legislation precludes any retrospective application of the law. Prosecutions of any of the crimes within the new Division 268 of the Criminal Code Act 1995 can only arise in respect of the alleged perpetration of acts after the entry into force of the ICC Statute for Australia – namely 01 July 2002, the date of the deposit of the country's instrument of ratification.

5.3 Principles of liability

The new Division 268 of the Criminal Code Act 1995 is silent as to principles of liability and so the general provisions of the legislation apply. Those preclude criminal responsibility for children under 10 years of age (Section 7.1) and require the prosecution to establish that a child aged 10 years or more but under the age of 14 is criminally responsible by proving beyond reasonable doubt that the child knew their conduct was wrong (Section 7.2). A child over the age of 14 is presumed to be criminally responsible for alleged crimes falling within the Criminal Code Act 1995. Here then the Australian implementing legislation diverges markedly from the ICC Statute prescription that children under 18 years of age cannot be tried before that Court.

All the new domestic crimes in Division 268 of the Criminal Code Act 1995 only apply to natural persons. All of them explicitly commence with the words "A person (*the perpetrator)* commits an offence if…" precluding the prosecution of a corporation for any of the specific crimes.

6 Rights of the Accused

A person accused of the commission of an offence under Division 268 of the Criminal Code Act 1995 will be entitled to all the same rights as any other accused person in Australia. The rights of the accused include those codified in the Criminal Code Act 1995[102] as well as those available under the Constitution and at common law.

7 Available Defences

In the main, the defences available to a person accused of committing a crime contained in the Rome Statute appear to be the same as those available for other offences under the Criminal Code Act 1995. Brief details of the applicable defences, including the war crimes specific defence of superior orders, are provided below.

102 The full text of the Criminal Code Act 1995 is available at http://scaleplus.law.gov.au /html/pasteact/1/686/top.htm.

7.1 Duress

Duress is available as a defence against criminal responsibility where a person carries out conduct because he or she reasonably believes that:

- A threat has been made that will be carried out unless an offence is committed; and
- There is no reasonable way that the threat can be rendered ineffective; and
- The conduct of the accused is a reasonable response to the threat.[103]

The defence is not available if the threat is made by a person with whom the accused is voluntarily associated for the purpose of committing the crime.

7.2 Age

As noted above, children under the age of 10 are not criminally responsible for the commission of an offence.[104] Where a child aged between 10 and 14 years is charged with an offence, s/he can only be criminally responsible for an offence if s/he knows that the conduct is wrong.[105] This is a question of fact, and the burden of proof falls on the prosecution. There is no defence on the basis of age available to persons over 14 years.

7.3 Intoxication

The defence of intoxication is available on limited grounds under the Criminal Code Act 1995 and turns on whether it was self-induced.[106] Intoxication is presumed to be 'self-induced' unless it was involuntary or was as a result of fraud, sudden or extraordinary emergency, accident, reasonable mistake, duress or force. Where the intoxication was not self-induced, an accused is not criminally responsible for conduct arising from that intoxication.[107] Where the intoxication was self-induced, and the defence depends on the actual knowledge or belief of the accused, then evidence of intoxication may be considered in determining whether that knowledge or belief existed. Where the relevant standard is that of a reasonable person, self-induced intoxication is not a defence.

7.4 Self-defence

The Criminal Code Act 1995 provides for self-defence in section 10.4, and this defence absolves the accused of criminal responsibility for their conduct.[108] Conduct is carried out in self-defence where a person believes the conduct is necessary to:

- defend themselves or another person;
- prevent or terminate the unlawful imprisonment of any person;

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103 Section 10.2, Criminal Code Act 1995.

104 Section 7.1, Criminal Code Act 1995.

105 Section 7.2, Criminal Code Act 1995.

106 Sections 8.1-8.5, Criminal Code Act 1995.

107 Section 8.5, Criminal Code Act 1995.

108 Section 10.4 (1) , Criminal Code Act 1995.

- protect property from unlawful appropriation, destruction, damage or interference; or
- prevent criminal trespass or remove a person committing criminal trespass

The conduct must also be a reasonable response in the circumstances, as perceived by the accused.[109] It should be noted that self-defence is not available as a defence to the use of force intended to inflict really serious injury or death in order to protect property or prevent trespass.

7.5 Diminished responsibility and insanity

Section 7.3 of the Criminal Code Act 1995 contains the defence of mental impairment. 'Mental impairment' includes senility, intellectual disability, mental illness, brain damage and severe personality disorder. According to this section, a person is not criminally responsible for an offence if, at the time of commission, s/he suffered from a mental impairment that meant that the person:

- did not know the nature and quality of their conduct;
- did not know that the conduct was wrong; or
- was unable to control the conduct.

It is presumed that an accused was not suffering from mental impairment; however, this presumption can be displaced if the mental impairment is proven on the balance of probabilities.

7.6 Mistakes of fact and law

It is a defence to a crime under the Criminal Code Act 1995 if the person accused was under a mistaken belief about, or was ignorant of, facts, and if those facts had existed, the conduct would not have constituted an offence.[110] In general, mistakes about, or ignorance of, the law (including subordinate legislation) do not constitute a defence to criminal responsibility.[111]

7.7 Superior orders

A limited defence of superior orders was inserted into the Criminal Code Act 1995 by the ICC (Consequential Amendments) Act 2002.[112] The fact that a person, pursuant to an order of a government or a superior, has committed genocide or a crime against humanity does not relieve that person of criminal responsibility.[113] There is a limited defence of superior orders available for the commission of war crimes. It is a defence to a war crime where a person, pursuant to an order of a government or a superior, commits a war crime, and:

109 Section 10.4(2), Criminal Code Act 1995.

110 Section 9.1, 9.2, Criminal Code Act 1995.

111 See sections 9.3 and 9.4, Criminal Code Act 1995.

112 Section 268.116, Criminal Code Act 1995.

113 Section 268.116(1), Criminal Code Act 1995.

- the person was under a legal obligation to obey the order;
- the person did not know that the order was unlawful; and
- the order was not manifestly unlawful.

The defendant bears the evidential burden of establishing the elements of the defence of superior orders.

7.8 Other

Two further defences are available under the Criminal Code Act 1995: the defence of lawful authority[114] and the defence of sudden or extraordinary emergency.[115] According to the defence of lawful authority, a person is not criminally responsible for an offence if the conduct is justified or excused by, or under, a law. The defence of sudden or extraordinary emergency is available where the conduct constituting the offence was in response to a sudden or extraordinary emergency. The person must reasonably believe that the circumstances of such an emergency exist, that committing the offence is the only reasonable way to deal with the emergency and that the conduct is a reasonable response to the emergency.

8 Immunity, International Crimes and Domestic Courts

Australia's implementation of its obligations contained in Article 27 of the ICC Statute is less than satisfactory. Article 27 states that the ICC's jurisdiction "shall apply equally to all persons without any distinction based on official capacity…[O]fficial capacity…shall in no case exempt a person from criminal responsibility under this Statute". Given the detailed nature of the Australian implementing legislation, the absence of specific incorporation of Article 27 is strange. According to the Attorney-General's Department, the terms of Article 27 are not repeated in the implementing legislation "because under customary international law an international tribunal may deal with a person alleged to have committed an international crime, regardless of the person's official capacity".[116] According to this view, acts of genocide, war crimes and crimes against humanity can never form part of a person's 'official capacity'; the immunity does not attach to conduct of this nature. Thus, there is no need for the implementing legislation to expressly override the privileges and immunities afforded to officials in Australia.

Whilst this position may be technically correct, as was noted by Human Rights Watch in its submission to the review of the Australian implementing legislation,

> "it would be best to explicitly provide that immunities and other barriers to prosecution do not apply to crimes covered in the ICC Crimes Bill, either in relation to arrest and surrender of persons to the ICC or for the purpose of prosecution of the ICC Crimes Bill offences in Australian Courts. Both bills should be amended to include a

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114 Section 10.5, Criminal Code Act 1995.

115 10.3, Criminal Code Act 1995.

116 Attorney-General's Department, *Submission No 232.2* (2002), p 2.

> provision expressly excluding the application of the immunities in the *Foreign States Immunities Act 1985 and the Diplomatic Privileges and Immunities Act 1961."*[117]

The parliamentary review body – the Joint Standing Committee on Treaties (JSCOT) – recommended that:

> "the Attorney-General review the legislation to ensure that the responsibilities required under Article 27 of the Statute are fully met either in the proposed bills or in current applicable legislation."[118]

This recommendation is particularly important in light of the fact that, in certain circumstances, there are limitations on Australia's power to arrest and surrender a person in an official capacity to an international tribunal. In particular, Australia may be unable to comply with a request for arrest and surrender where such a request would require Australia to act inconsistently with its "obligations under international law with respect to the State or diplomatic immunity of the person or property of a third State".[119] JSCOT's recommendation was not incorporated into the legislation before its passage into law.

9 Trial Procedure and Punishment in Domestic Courts

The trial procedure and punishment in domestic courts for persons accused of war crimes, genocide and crimes against humanity is subject to the same procedure as any other criminal offence. The proceedings can be heard in any jurisdiction and the right of appeal to the High Court of Australia is available.

10 Article 98 Agreements

10.1 Government response to American attempts to conclude Article 98 agreements

The Australian Government has acknowledged that it has been approached by the US with a request to conclude an Article 98 Agreement. The Government has indicated its willingness to enter into negotiations but has also stated that it will ensure that any such agreement is not inconsistent with Australia's obligations under the ICC Statute. No agreement has yet been signed. Before the Government commits itself to any such agreement, the text of the instrument must be considered by JSCOT. That body has the discretion to call a public enquiry into the proposed agreement and take both written and oral submissions from interested members of the public or to conduct its review of the proposed agreement without public consultation.

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117 Human Rights Watch, *Submission No 23.2* (2002), p 2.

118 Joint Standing Committee on Treaties, *Report 45: The Statute of the International Criminal Court* (May 2002), Recommendation 8, p 84. The report is available online at: http://www.aph.gov.au/house/committee/jsct/ICC/index.htm.

119 Attorney-General's Department, *Submission No 232.2* (2001), p 2.

Chapter 7

William A Schabas

Canada

1 A Short History of Domestic Prosecutions of International Crimes Prior to Implementing Legislation

Canadian case law presents a modest collection of decisions dealing with the law of armed conflict. A handful of reported cases dealt with escaped prisoners-of-war in Western Canada during World War II,[1] applying the 1929 Geneva Convention.[2] Canada was one of the few Allies not to participate actively in the United Nations War Crimes Commission. The war crimes prosecutions in the aftermath of World War II were of modest proportions,[3] although one precedent is still cited today as an authority on command responsibility.[4] Canada then became somewhat of a haven for fleeing Nazis.[5] It was only in the 1980s, under pressure from Jewish organisations,[6] that the Government established a commission of inquiry into the presence of war criminals in Canada. The Commission's president was a distinguished judge, Jules Deschênes.[7] A decade later, he was one of the first judges elected to the International Criminal Tribunal for the former Yugoslavia (ICTY), where he had the distinction of being part of the majority in the famous *Tadic* decision.[8]

The report of the Deschênes Commission identified more than 800 suspected Nazi war criminals who were resident in Canada. Parliament responded by enacting legislation allowing for prosecution of war crimes and crimes against humanity on the basis of universal jurisdiction. The amendments to the Criminal Code[9] authorised the courts to adjudicate crimes committed abroad by foreign nationals, to the extent that (a) they constituted crimes against humanity or war crimes under customary international law, and

1 *R.* v. *Shindler* (1944) 3 WWR 125, 82 CCC 2067 (Alta Police Court); *R.* v. *Brosig* (1945) 2 DLR 232, 83 CCC 199 (1945) OR 240 (1945) 1 WWR 566 (Alta SC, AD); *R.* v. *Kaehler & Stolski* (1945) 3 DLR 272, (1945) 83 CCC 353 (1945) 1 WWR 566 (Alta SC, AD).

2 *International Convention Relative to the Treatment of Prisoners of War* (1931-32) 118 *League of Nations Treaty Series (LNTS)* 343, (1942) CTS 6.

3 Patrick Brode, *Casual Slaughters and Accidental Judgments, Canadian War Crimes Prosecutions, 1944-1948*, Toronto: University of Toronto Press, 1997.

4 *Canada* v. *Meyer*, 4 LRTWC 98 (1948) (Canadian Military Court). See: Howard Margolian, *Conduct Unbecoming: The Story of the Murder of Canadian Prisoners of War in Normandy*, Toronto: University of Toronto Press, 1998.

5 Howard Margolian, *Unauthorized Entry: The Truth about Nazi War Criminals in Canada, 1946-1956*, Toronto: University of Toronto Press, 2000.

6 David Matas, *Justice Delayed: Nazi War Criminals in Canada*, Toronto: Summerhill, 1987.

7 Jules Deschênes, *Commission of Inquiry on War Criminals Report,* Ottawa: Minister of Supply and Services, 1986.

8 *Prosecutor* v. *Tadic*, ICTY Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 (case no. IT-94-1-AR72).

9 Criminal Code, RSC, 1985, c. C-46.

(b) they had been punishable under Canadian law at the time they were committed. Canada's Constitution makes an exception to the principle of non-retroactivity of criminal offences where these are recognised at international law or the general principles of law recognised by the community of nations.[10]

Investigations of the cases identified in the Deschênes report led to only four prosecutions, none of them successful. The most important of them was that of a Hungarian collaborator named Imre Finta. Finta did not testify in his own defence, and never denied charges that he had participated in the 'de-jewification' of Szeged during the spring of 1944. This involved expropriation, ghettoisation, concentration, entrainment and eventual deportation (primarily to Auschwitz and Birkenau) of all Hungarian Jews, and was unquestionably part of the 'Final Solution'. Finta was charged with crimes against humanity involving the unlawful confinement, robbery, kidnapping and manslaughter of 8,617 Jews. The reasons for Finta's acquittal remain locked in the consciences of the jurors. Subsequent litigation focused on the trial judge's charge to the jury, which may or may not have been decisive in the ultimate determination of guilt or innocence. Essentially, the judge invited the jury to consider that even if Finta had committed the acts charged, they did not rise to the level of crimes against humanity, given that Finta might have assumed he was following lawful orders in the context of resistance to the Soviet troops, who were by then not far from Hungary's borders.

The Ontario Court of Appeal[11] and the Supreme Court of Canada[12] dismissed prosecution appeals directed at obtaining a new trial. *Finta*'s high threshold for the mental element of crimes against humanity has been significantly cut down by the case law of the international criminal tribunals.[13]

Finta dealt a body blow to the political will for war crimes prosecutions. The Canadian Government's focus shifted to immigration legislation as a more effective technique for challenging war criminals,[14] although obviously expulsion and deportation fall short of proper criminal prosecution. After a review of the prosecutions in 1997, the Government revived the war crimes programme and devoted significant resources for investigation and prosecution. It also oriented its work increasingly towards what are called 'modern war crimes', that is, those committed in contemporary humanitarian crises such as the Rwandan genocide, the wars in the former Yugoslavia, and atrocities committed under tyrannical regimes in Afghanistan, Haiti, Iraq and Somalia. This is not to say that there is no further interest in World War II cases. There have actually been several recent successes with respect to former Nazis involving revocation of citizenship, although there is a high rate of attrition as suspects pass away during the proceedings.

10 Canadian Charter of Rights and Freedoms, RSC 1985, Appendix II, No. 44, s. 11(g).

11 *R.* v. *Finta*, (1992) 92 DLR (4th) 1 (CA Ont.).

12 *R. v. Finta*, [1994] 1 SCR 701.

13 *Prosecutor* v. *Tadic*, ICTY Judgment of 15 July 1999 (case no. IT-94-1-A), para. 290.

14 For example: *Minister of Citizenship and Immigration* v. *Odynsky*, (2001) 196 FTR 1, 14 Imm LR (3d) 3; *Minister of Citizenship and Immigration* v. *Baumgartner*, (2001) 211 FTR 197, 17 *Imm L Rev* (3d) 85; *Minister of Citizenship and Immigration* v. *Fast*, [2001] 3 FC 373. See, for example: J. Rikhof, 'The Exclusion Clauses : The First Hundred Cases in the Federal Court', (1996) 24 *Imm L Rev* (2nd) 137.

2 Implementing Legislation

2.1 Title

The Canadian legislation intended to implement obligations assumed under the Rome Statute[15] is the Crimes Against Humanity and War Crimes Act (in full, An Act respecting genocide, crimes against humanity and war crimes and to implement the Rome Statute of the International Criminal Court, and to make consequential amendments to other Acts).[16] The Act reflects an important development in international criminal law, namely the elimination of the nexus between crimes against humanity and war crimes. At Nuremberg, the two concepts were intertwined but, as the Appeals Chamber of the ICTY insisted in its first major ruling, "customary international law no longer requires any nexus between crimes against humanity and armed conflict".[17] This progressive development in international law was confirmed by Article 7 of the Statute of the International Criminal Court (ICC). Parliament did not deem it necessary to include a reference to genocide in the short title, given that genocide is widely considered to be an aggravated form of crimes against humanity.[18]

The legislation received Royal Assent on 29 June 2000. Canada deposited its instrument of ratification of the ICC Statute a week later, on 7 July 2000, becoming the fourteenth State party.[19] The Crimes Against Humanity and War Crimes Act came into force on 23 October 2000.[20] It was the first major enactment of its kind in the Commonwealth. The Canadian legislation has been much studied by other legislators in their efforts to implement the Rome Statute in domestic law, in part because of the significant role Canada has played internationally in promoting ratification and implementation. Canadian experts have provided a great deal of guidance to other countries in this area, and they are, inevitably, influenced in their approaches by their country's own legislation.

2.2 Amendments to existing domestic legislation/laws in force

While the Act was aimed at ensuring that Canada can respect the obligations it has undertaken by ratification of the Rome Statute, it was also intended to strengthen the effectiveness of the existing programme for dealing with war criminals within Canada. For this reason, the Act contains several provisions that effect consequential amendments to

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15 Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9.

16 S.C. 2000, c. 24. See http://laws.justice.gc.ca/en/C-45.9/41465.html#rid-41472 For academic commentary, see: William A Schabas, 'Canadian Implementing Legislation for the Rome Statute', 3 *Yearbook Int'l Humanitarian L.* 337 (2000); Joseph Rikhof, 'Canada and War Criminals: The Policy, the Programme and the Results', in *ICC-International Criminal Court: Implementation in Central and Eastern Europe*, paper presented at Bucharest, 9-11 May 2003.

17 *Prosecutor* v. *Tadic*, note 8 above, para. 78; also paras. 140-141.

18 See, for example, Theodor Meron, 'International Criminalization of Internal Atrocities', 89 *American Journal of International Law (AJIL)* 554 (1995) at 557; 'Report of the International Law Commission on the work of its forty-eighth session 6 May-26 July 1996', UN Doc. A/51/10, p. 86. But see: *Prosecutor* v. *Krstic,* Judgment of 2 August 2001 (case no. IT-98-33-T), paras. 553, 683-684; *Prosecutor* v. *Krstic,* Judgment of 19 April 2004 (case no. IT-98-33-A), paras. 216-229.

19 Canada signed the Rome Statute on 18 December 1998.

20 *Canada Gazette* Part III, p 457, SI/2000-95, Vol. 134.

such existing legislation as the Immigration Act,[21] the Mutual Legal Assistance in Criminal Matters Act[22] and the Extradition Act.[23]

The two-pronged objective of the legislation is also manifested in parallel substantive law provisions, one set being applicable to crimes committed outside Canada at any time, the other to crimes committed inside Canada subsequent to the Act's entry into force.

3 Incorporating the Crimes

The Crimes Against Humanity and War Crimes Act repeals the existing definitions of crimes against humanity and war crimes in the Canadian Criminal Code, which were introduced in 1987 to give effect to the recommendations of the Deschênes report. It introduces three new definitions: genocide, crimes against humanity and war crimes. In fact, there are six provisions because each definition appears twice, once in the section of the Act describing crimes committed inside Canada, and the other in the section describing crimes committed outside Canada. The new provisions barely resemble the corresponding texts for the same three categories of crimes within the Rome Statute. Instead, the definitions in the Act make specific reference to customary international law, which they incorporate into Canadian law. These references mean that in prosecutions for genocide, crimes against humanity and war crimes, whether committed before or after the entry into force of the legislation, and whether committed inside or outside Canada, the courts will be required to rule on the state of customary law. It is an area in which, it must be said, they have little expertise.

As guidance for the courts, the Act makes two attempts to determine the state of customary law. A general provision, applicable to crimes committed both inside and outside Canada, states:

> "For greater certainty, crimes described in Articles 6 and 7 and paragraph 2 of Article 8 of the Rome Statute are, as of July 17, 1998, crimes according to customary international law."[24]

The second provision establishes that crimes against humanity have been recognised as part of customary international law since 1945. It is applicable only to crimes committed outside Canada (the legislation does not authorise retrospective application to crimes committed inside Canada). The provision states that:

> "[f]or greater certainty, the offence of crime against humanity was part of customary international law or was criminal according to the general principles of law recognised by the community of nations before the coming into force of either of the following: (a) the Agreement for the prosecution and punishment of the major war criminals of the

21 RSC c. I-2. The Immigration Act was subsequently replaced by the Immigration and Refugee Protection Act, SC 2001, c. 27.

22 RSC c. 30 (4th Supp.).

23 SC 1999, c. 18.

24 Crimes Against Humanity and War Crimes Act, sections. 4(4), 6(4).

> European Axis, signed at London on August 8, 1945; and (b) the Proclamation by the Supreme Commander for the Allied Powers, dated January 19, 1946."[25]

That Parliament felt the need to make a declaration that crimes against humanity were punishable under customary international law or general principles of law at the time of the post-Second World War prosecutions may seem surprising. A close look at the 1994 *Finta* ruling of the Supreme Court of Canada may assist in understanding the rationale for this provision. Justice Peter Cory, who drafted the reasons of the majority, examined whether prosecution for crimes against humanity committed in 1944 violated the norm against retroactive prosecution. He noted that at the time, such eminent international lawyers as George Schwarzenberger and Hans Kelsen believed that the Nuremberg and Tokyo Charters were not in fact declarative of already existing international law.[26] Justice Cory endorsed these words of Kelsen:

> "A retroactive law providing individual punishment for acts which were illegal though not criminal at the time they were committed, seems also to be an exception to the rule against ex post facto laws. The London Agreement is such a law. It is retroactive only in so far as it established individual criminal responsibility for acts which at the time they were committed constituted violations of existing international law, but for which this law has provided only collective responsibility. The rule against retroactive legislation is a principle of justice. Individual criminal responsibility represents certainly a higher degree of justice than collective responsibility, the typical technique of primitive law. Since the internationally illegal acts for which the London Agreement established individual criminal responsibility were certainly also morally most objectionable, and the persons who committed these acts were certainly aware of their immoral character, the retroactivity of the law applied to them can hardly be considered as absolutely incompatible with justice. Justice required the punishment of these men, in spite of the fact that under positive law they were not punishable at the time they performed the acts made punishable with retroactive force. In case two postulates of justice are in conflict with each other, the higher one prevails; and to punish those who were morally responsible for the international crime of the second World War may certainly be considered as more important than to comply with the rather relative rule against ex post facto laws, open to so many exceptions."[27]

Justice Cory said he found these remarks "eminently sound and reasonable", and used this as a basis to dismiss a constitutional challenge to the crimes against humanity provision that then applied in Canadian law.[28] The reference to the Nuremberg and Tokyo Charters in the new Crimes Against Humanity and War Crimes Act constitutes a legislative correction of Justice Cory's pronouncement in *Finta.*

25 Ibid, article 4(5).

26 *R.* v. *Finta* above p 872.

27 Ibid, p 873, citing Hans Kelsen, 'Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?', 1 Int'l LQ 153 (1947) at 165.

28 Ibid, p 874.

As for the other two categories, genocide and war crimes, they too may be prosecuted under the Act when they have been committed outside Canada prior to its entry into force, but Parliament has declined to provide any legislative direction to the courts as to where they may seek guidance in this area.

The declaration that the offences of genocide, crimes against humanity and war crimes as they are defined in the Rome Statute constitute customary law at the time of their adoption, on 17 July 1998, is a technique that is not without its potential difficulties. Customary law will continue to evolve; indeed, in a provision based on Article 10 of the Rome Statute, the Canadian legislation specifically contemplates this eventuality: "This does not limit or prejudice in any way the application of existing or developing rules of international law".[29]

The presumption seems to be that international law will become increasingly broad, although evolution in the other direction is not inconceivable, in which case Canada might find its courts applying definitions that are narrower than those in the Rome Statute.

The case law of the ICTY already provides some evidence of divergence between customary international law and the applicable law of the ICC. The Appeals Chamber of the ICTY would probably quarrel with the claim in the Canadian legislation that the Rome Statute is consistent with customary international law. For example, Article 7 of the Statute states that crimes against humanity must be committed "pursuant to or in furtherance of a State or organisational policy to commit such attack".[30] But in a 2002 case, the Appeals Chamber held that "no such requirement exists under customary international law" that "a policy or plan constitutes an element of the definition of crimes against humanity".[31] The ICTY has also held that some of the Elements of Crimes,[32] adopted pursuant to the Rome Statute, are inconsistent with customary international law.[33] However, because the Canadian legislation only declares that the Rome Statute is compatible with customary law, and does not refer to its subordinate legislation (such as the Elements of Crimes), Canadian judges could reason in the same way as the Appeals Chamber and disregard the Elements and adopt the position at customary international law.

3.1 Genocide

The definition of the crime of genocide presented in Article 6 of the Rome Statute is essentially identical with that of the 1948 Genocide Convention.[34] The Canadian legislation states that "'genocide' means an act or omission committed with intent to destroy, in whole or in part, an identifiable group of persons, as such, that, at the time and in the place of its

29 Ibid.

30 Rome Statute, Article 7(2)a).

31 *Prosecutor* v. *Kunarac* et al, Judgment of 12 June 2002 (case no. IT-96-23 & IT-96-23/1-A), footnote 114. Also: *Prosecutor* v. *Krstic,* Judgment of 19 April 2004 (case no: IT-98-33-A), para. 225.

32 ICC-ASP/1/3, pp 108-155.

33 *Prosecutor* v. *Krstic*, above, para. 224.

34 (1951) 78 UNTS 277, [1949] CTS 27. Canada signed the Convention on 28 November 1949 and ratified it on 3 September 1952.

commission, constitutes genocide according to customary international law or conventional international law or by virtue of its being criminal according to the general principles of law recognised by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission".[35] The Canadian definition contemplates the expansion of the Convention definition of genocide in two respects: (a) the punishable acts, and (b) the groups protected.

In Article 6 of the Rome Statute, there is an exhaustive list of five punishable acts. The Canadian enactment anticipates the development of customary law so as to include other punishable acts. At the time the Genocide Convention was being drafted, a lengthy list of punishable acts was considered, broadly grouped into three main categories, defined by the adjectives 'physical', 'biological' and 'cultural'. Ultimately, the Convention's scope was confined to physical and biological genocide, with the exception of the last punishable act – forcibly transferring children from one group to another – which is an act of cultural genocide. But there was no doubt in 1948 of the reluctance of States to recognise international criminal liability for acts such as prohibition of language and religion that might be intended to destroy a group.

Ironically, in 1948 Canada was one of a group of States who felt strongly that cultural genocide be excluded from the Convention. In the Sixth Committee of the General Assembly, the representative of Canada declared that if the Committee were to retain the cultural genocide provision, the Canadian Government would have to make certain reservations.[36] Documents in the National Archives show how sensitive and important this issue really was: The Canadian delegation to the seventh session of the Economic and Social Council was instructed to support or initiate any move for the deletion of Article III on 'cultural' genocide (see document E/794) and, if this move were not successful, it should vote against Article III and, if necessary, against the whole Convention. The delegation was instructed that the Convention as a whole, less Article III, was acceptable though legislation would naturally be required in Canada to implement it.[37] The delegation's report to Ottawa at the conclusion of the debate states:

> "According to instructions from External Affairs, the Canadian delegate had only one important task, namely to eliminate the concept of 'cultural genocide' from the Convention. He took a leading part in the debate on this point and succeeded in having his viewpoints accepted by the Committee. The remaining articles are of no particular concern for Canada."[38]

There is in fact some evidence of an evolution in the interpretation of the crime of genocide so as to encompass a broader range of punishable acts that might be characterised as cultural genocide, with the concept of 'ethnic cleansing' first and

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35 Crimes Against Humanity and War Crimes Act, ss. 4(3), 6(3).

36 UN Doc. A/C.6/SR.83 (Lapointe, Canada).

37 'Commentary for the Use of the Canadian Delegation', NAC RG 25, Vol. 3699, File 5475-DG-3-40'2' (this text is also in NAC RG 25, Vol. 3699, File 5475-DG-1-40).

38 'Progress reports on work of Canadian delegation, in Paris, November 1, 1948', NAC RG 25, Vol. 3699, File 5475-DG-2-40.

foremost among them. The German courts have extended the definition of genocide in this way,[39] although the ICTY has been reluctant to follow out of fear of breaching the norm *nullum crimen sine lege* (no crime without a law).[40]

Another area in which the definition of genocide may evolve is in the groups protected. Article 6 of the Rome Statute repeats the enumeration found in Article II of the 1948 Convention, namely 'national, ethnical, racial and religious' groups. Over the years, there have been many attempts to enlarge the coverage of the Convention. The International Criminal Tribunal for Rwanda (ICTR) proposed that the enumeration be interpreted so as to cover all permanent and stable groups,[41] although its counterpart for the former Yugoslavia has never given any support to such a view. Instead, it has suggested that the enumeration was meant to describe "a single phenomenon, roughly corresponding to what was recognised, before the second world war, as 'national minorities', rather than to refer to several distinct prototypes of human groups".[42]

There were some unsuccessful efforts to open up the enumeration when the Rome Statute was being drafted. In the final version of the draft statute, the Convention definition of genocide was accompanied by the following footnote:

> "The Preparatory Committee took note of the suggestion to examine the possibility of addressing 'social and political' groups in the context of crimes against humanity. N.B. The need for this footnote should be reviewed in the light of the discussions that have taken place in respect of crimes against humanity."[43]

The idea went no further, and was not even entertained at Rome. The reluctance to tamper with the 1948 definition[44] is evidence of its stability, and it would seem unlikely there will be any evolution in customary law in this area anytime in the near future. In any case, persecution of groups other than those listed in the definition of genocide is adequately captured under crimes against humanity.

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39 *Nikolai Jorgic*, *Bundesverfassungsgericht* [Federal Constitutional Court], Fourth Chamber, Second Senate, 12 December 2000, 2 BvR 1290/99, para. 23; *Novislav Djajic*, *Bayerisches Oberstes Landesgericht,* 23 May 1997, 3 St 20/96, excerpted in 1998 Neue Juristische Wochenschrift 392. See: Christoph J M Safferling, 'Public Prosecutor v. Djajic' 92 *AJIL* 528 (1998).

40 *Prosecutor* v. *Krstic,* Judgment of 2 August 2001 (case no: IT-98-33-T), para. 580.

41 *Prosecutor* v. *Akayesu,* Judgment of 2 September 1998 (case no. ICTR-96-4-T), para. 515. But the same Trial Chamber, in a subsequent decision, *Prosecutor* v. *Rutaganda*, Judgment of 6 December 1999 (case no. ICTR-96-3-T), seemed to hedge its remarks somewhat: "It appears from a reading of the *travaux préparatoires* of the Genocide Convention that certain groups, such as political and economic groups have been excluded from the protected groups, because they are considered to be 'mobile groups' which one joins through individual, political commitment. That would seem to suggest *a contrario* that the Convention was presumably intended to cover relatively stable and permanent groups." (reference omitted). Also: *Prosecutor* v. *Musema,* Judgment of 27 January 2000 (case no. ICTR-96-13-T), para. 162.

42 *Prosecutor v. Krstic*, note 40 above, para. 556.

43 UN Doc. A/AC.249/1998/CRP.8, p. 2.

44 For detailed discussion of the various attempts at modification of the enumeration of groups, see: William A Schabas, *Genocide in International Law*, Cambridge: Cambridge University Press, 2000.

3.2 Crimes against humanity

Crimes against humanity are defined in the Canadian legislation as "murder, extermination, enslavement, deportation, imprisonment, torture, sexual violence, persecution or any other inhumane act or omission that is committed against any civilian population or any identifiable group and that, at the time and in the place of its commission, constitutes a crime against humanity according to customary international law or conventional international law or by virtue of its being criminal according to the general principles of law recognised by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission".

The definition is inspired by its predecessor in the 1987 legislation, although the acts of torture and sexual violence have been added to the list.[45] As with genocide, of course, the definition of crimes against humanity in the Rome Statute is incorporated by reference into this definition. The list in the Canadian Act is striking for its omission of certain punishable acts of crimes against humanity listed in Article 7 of the Rome Statute, specifically enforced disappearance of persons and apartheid. Canada never signed or ratified the International Convention on the Suppression and Punishment of the Crime of Apartheid, perhaps out of unease with the grievances of the country's aboriginal population. The Act refers to 'sexual violence' rather than 'rape'; Canadian criminal law no longer defines the crime of rape, having opted, instead, for the unquestionably gender-neutral concept of sexual assault.[46]

The definition is left open to new crimes derived from customary law, general principles of law and conventional law. 'Conventional international law' is defined in the Act as "any convention, treaty or other international agreement (*a*) that is in force and to which Canada is a party; or (*b*) that is in force and the provisions of which Canada has agreed to accept and apply in an armed conflict in which it is involved".[47]

3.3 War crimes

The definition of 'war crime' is the simplest, in that it is really no definition. It simply makes an offence "an act or omission committed during an armed conflict that, at the time and in the place of its commission, constitutes a war crime according to customary international law or conventional international law applicable to armed conflicts, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission". Similar issues as those referred to with respect to crimes against humanity arise. It is probably in the area of war crimes where the disconnect between the Rome Statute and customary law may raise the greatest difficulty, because in some respects the Statute studiously avoided customary law. It prohibits the employment of "material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate", but only to the extent they are part of a

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45 Canadian courts have previously noted the inconsistencies of the definition with the recognised models derived from international law: *Canada* v. *Mehmet*, [1992] 2 FC 598 (CA), at 618.

46 SC 1980-81-82-83, ch. 125. See: Christine Boyle, *Sexual Assault*, Toronto: Carswell, 1984; David Watt, *The New Offences Against the Person: The Provisions of Bill C-127*, Toronto: Butterworths, 1984; G Parker, 'The "New" Sexual Offences', 31 CR (3d) 317 (1983).

47 Crimes Against Humanity and War Crimes Act, section 2(1).

comprehensive prohibition included in an annex to the Statute that does not as yet exist.[48] But Article 23(e) of the 1907 Hague Regulations, to which Canada is a party,[49] prohibits the employment of "arms, projectiles, or material calculated to cause unnecessary suffering" as a general principle.[50] Might a Canadian judge consider that the use, or even the possession, of anti-personal mines falls within this prohibition, either by a creative application of conventional law or an innovative reading of customary law?

4 Principles of Liability

Article 25 of the Rome Statute, entitled '[i]ndividual criminal responsibility', presents a detailed scheme dealing with primary and secondary participation in crimes within the jurisdiction of the Court, as well as certain inchoate offences. There is no attempt to incorporate these provisions in the Canadian legislation – which is, in any event, subject to the general provisions in the Canadian Criminal Code. Because the Criminal Code provides for primary participation, as well as liability for aiding and abetting, it corresponds in a general sense to the Rome Statute.

According to its Article 25(3), a person is criminally liable under the Rome Statute who: (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible; (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted; (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission.

Section 21 of the Criminal Code says that everyone is a party to an offence who: (a) actually commits it; (b) does or omits to do anything for the purpose of aiding any person to commit it; (c) abets any person in committing it. Section 22 makes a person a party to an offence who 'counsels' the offence, a term that includes 'procure, solicit or incite'. Probably Article 25(3) of the Rome Statute and sections 21 and 22 of the Criminal Code cover much the same ground. The term 'orders' appears in the Rome Statute but not the Criminal Code, although a person who orders an offence would be convicted of either abetting or counselling under Canadian law. The possibility in the Rome Statute of a crime being committed 'through another person' who may not be criminally responsible – such as a child – find its equivalent in Canadian case law, although this is not formally codified.[51]

Most of the recent prosecutions by the *ad hoc* international tribunals for the former Yugoslavia, Rwanda and Sierra Leone have been based upon the 'joint criminal enterprise'

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48 Rome Statute, Article 8(b)(xx).

49 International Convention Concerning the Laws and Customs of War by Land, [1910] TS 9. The Hague Convention came into force for Canada on 27 November 1909 as a consequence of ratification by the United Kingdom.

50 Similarly, see *Legality of the Threat or Use of Nuclear Weapons (Request by the United Nations General Assembly for an Advisory Opinion)*, [1996] ICJ Reports 226.

51 *Cardinal* v. *The Queen*, (1984) 18 CCC (3d) 96 (SCC); *R.* v. *Zanini*, [1968] 2 CCC 1 (SCC).

theory of criminal liability.[52] The concept is derived from both post-World War II prosecutions and national criminal justice systems. It has long been part of Canadian law, where it is known as 'common purpose' complicity and codified in section 21(2) of the Criminal Code.[53] The Trial Chamber of the ICTY that introduced the concept justified its recognition in customary international law by relying upon its inclusion in Article 25(3) of the Rome Statute.[54] Essentially, common purpose liability holds an individual liable for crimes committed by associates to the extent that these were a reasonably foreseeable outcome of the joint criminal enterprise.

It is doubtful, however, that Canadian courts would be prepared to convict offenders of genocide, war crimes and crimes against humanity based upon 'common purpose' liability. A line of cases decided under section 7 of the Canadian Charter of Rights and Freedoms has held that section 21(2) of the Criminal Code violates principles of fundamental justice because it has the potential to stigmatise offenders for very serious crimes even when they did not fully intend to commit them.[55] Thus, Canadian courts might be judged by the ICC to be "unable genuinely" to prosecute "the most serious crimes of concern to the international community as a whole". If a case were ever to arise, Canada's Parliament would still have the option of suspending section 7 of the Charter.[56]

A similar difficulty arises with respect to superior responsibility, which is a form of incrimination defined in Article 28 of the Rome Statute. Like common purpose complicity, it holds an individual liable for crimes committed by others, to the extent that the offender was in a superior-subordinate relationship with the primary perpetrator and failed to exercise proper control. It, too, would almost invariable fall afoul of section 7 of the Canadian Charter in prosecutions for genocide, crimes against humanity and war crimes. For this reason, Parliament decided not to incorporate superior responsibility in the Canadian legislation in the same form as it is presented in the Rome Statute. Instead, Parliament converted superior responsibility into an autonomous crime of negligence.

The new offence is labelled 'Breach of responsibility'.[57] The wording is based on Article 28 of the ICC Statute, but with several minor changes. The Rome Statute refers to "a military commander or person effectively acting as a military commander". To this, the Canadian legislation adds "a person who commands police with a degree of authority and control comparable to a military commander".[58] The Rome Statute defines superior responsibility as a superior-subordinate relationship other than that of the military commander; the Canadian legislation defines the term 'superior' as "a person in authority, other than a military commander". The Rome Statute provision applies to a commander who "knew or,

52 For example: *Prosecutor* v. *Kvocka* et al, Judgment of 2 November 2001 (case no. IT-98-30/1-T); *Prosecutor* v. *Krnojelac,* Judgment of 15 March 2002 (case no. IT-97-25-T); *Prosecutor* v. *Galic,* Appeals Judgement, 2 June 2002 (case no. IT-98-29-AR73.2); *Prosecutor* v. *Vasiljevic,* Judgment of 29 November 2002 (case no. IT-99-32-T).

53 As was noted by the ICTY Appeals Chamber in *Prosecutor* v. *Tadic* above, para. 224, fn 288.

54 *Prosecutor* v. *Furundzija,* Judgment of 10 December 1998 (case no. IT-95-17/1-T), para. 216.

55 *R.* v. *Logan*, [1990] 2 SCR 73, *R.* v. *Rodney*, [1990] 2 SCR 687; *R.* v. *Sit*, (1991) 66 CCC (3d) 449 (SCC).

56 Canadian Charter of Rights and Freedoms, above note 10, section 33.

57 Crimes Against Humanity and War Crimes Act, ss. 4(2),

58 Ibid, 5(4).

owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes"; the Canadian equivalent refers to the military commander who "knows, or is criminally negligent in failing to know, that the person is about to commit or is committing such an offence". The Canadian provision also adds the words "as soon as practicable" to the requirement that the military commander take necessary and reasonable measures to prevent, repress and denounce the criminal acts.

The Crimes Against Humanity and War Crimes Act does not incorporate an offence of direct and public incitement to commit genocide into Canadian law. This inchoate offence is included in Article 25(3)(e) of the Rome Statute, and gives effect to a provision in Article III of the 1948 Genocide Convention. Parliament enacted a crime of 'advocating genocide' in the late 1960s as part of an attempt to strengthen the criminal law in the area of hate speech.[59]

The Canadian Act includes a general provision dealing with other inchoate forms of commission, namely conspiracy, attempt and complicity after the fact.[60] Although the wording of Article 25(3)(d) of the Rome Statute leaves some room for interpretation, it seems that it does not contemplate an inchoate form of conspiracy, but rather something akin to the concept as it is known in Romano-Germanic codes, where it is really nothing more than a form of complicity in a crime that is subsequently committed following upon an agreement or *entente* between two or more persons. In contrast, common law conspiracy makes it an offence for two or more persons to agree to commit a crime, whether or not the crime is actually committed. Thus, the Canadian legislation goes beyond what is required by the Rome Statute, making the mere agreement to commit genocide, crimes against humanity and war crimes, a punishable offence. The *travaux préparatoires* of the Genocide Convention leave no doubt that the reference in Article III to 'conspiracy' addresses inchoate conspiracy as it is known in the common law. In this respect, the Canadian Act is more faithful to the Genocide Convention than the Rome Statute.[61]

5 Jurisdiction of Domestic Courts

Canadian criminal law bases jurisdiction principally on territory,[62] although in exceptional cases the Criminal Code allows jurisdiction based on the nationality of the offender and, even more exceptionally, on the nationality of the victim. A recently enacted provision governing sexual tourism even gives Canadian courts extraterritorial jurisdiction over permanent residents who are not citizens. Following the report of the Deschênes Commission, in 1987, the Criminal Code was amended in order to admit jurisdiction over war crimes and crimes against humanity if the offender was present in Canada, irrespective of the place where the crime was committed or the nationality of the offender

59 Criminal Code, above note 9, section 318, see Canada, *Report to the Minister of Justice of the Special Committee on Hate Propaganda in Canada*, Ottawa: Queen's Printer (1966), p 62. Also see *R.* v. *Andrews et al*, (1989) 43 (3d) 193, 65 *CR* (3d) 320 (CA Ont); Rosalie S Abella, 'Limitations on the Right to Equality Before the Law', in Armand de Mestral et al, eds, *The Limitation of Human Rights in Comparative Constitutional law*, Cowansville: Editions Yvon Blais (1986), pp 223-236, at p 235.

60 Crimes Against Humanity and War Crimes Act, sections 4(1.1), 5(2.1), 6(1.1), 7(2.1).

61 See: William A Schabas, *Genocide in International Law*, Cambridge: Cambridge University Press (2000).

62 Criminal Code, above note 9, section 6(2).

or the victim.[63] This is a form of universal jurisdiction that is sometimes called custodial jurisdiction, to distinguish it from universal jurisdiction *in absentia.*[64] In other words, there must be some *nexus* with the prosecuting State, even if the only link with the offender is presence within Canada.

These provisions are repealed and replaced by similar texts in the Crimes Against Humanity and War Crimes Act.[65] Section 8 gives jurisdiction to Canadian courts where the offence was committed outside Canada if "after the time the offence is alleged to have been committed, the person is present in Canada". The legislation also allows for jurisdiction if, at the time the offence was committed, (a) the alleged offender was a Canadian citizen, or was employed by Canada in a civilian or military capacity; (b) the person was a citizen of a State that was engaged in an armed conflict against Canada, or was employed in a civilian or military capacity by such a State; or (c) the victim was a Canadian citizen or a citizen of a State that was allied with Canada in an armed conflict.

There is a lingering ambiguity with respect to so-called *in absentia* jurisdiction. In the case of alleged offenders with no other personal link to Canada – in other words, universal jurisdiction as opposed to a form of active or passive personal jurisdiction – the text of the Act says they must have been "present in Canada…after the time the offence is alleged to have been committed". It does not say that they must be present in Canada at the time prosecution is initiated, however, or even during trial. Several scenarios can be imagined. An investigation might be carried out with respect to a suspect in Canada, but by the time it was completed and an indictment issued, the person might have fled the jurisdiction. Would this make the entire proceedings illegal, or void? In Canada it is not possible for a trial to begin without the presence of the accused, but the Criminal Code will allow one to proceed in the absence of the accused when he or she absconds.[66]

This seems to suggest that it is possible, at least theoretically, for Canadian courts to attempt to exercise jurisdiction over an individual who is not physically present in Canada for crimes not committed in Canada and where there is no other personal *nexus* with the country. If this interpretation seems far-fetched, the contrary construction appears to be even more unreasonable. Why should a prosecutor, at the time of issuance of an indictment, be required to ensure that the suspect is in Canada? Given the availability of air travel and the possibility of fleeing the jurisdiction within hours, a suspect might easily evade arrest by leaving Canada? Could this void the proceedings, or make them illegal under Canadian or international law? On a practical level, it might be unlikely that the authorities would want to devote the significant resources involved in a universal jurisdiction prosecution if they did not have physical custody of the offender. But in law, the prospect cannot be ruled out. The fact that the exceptions to presence of the accused at trial apply to proceedings under the Act is in fact specified by a distinct provision: "For greater certainty, in a proceeding commenced in any territorial division under subsection

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63 Ibid, sections 7(3.71)-7(3.77).

64 On the ongoing debate in public international law about these concepts see: *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium)*, Judgment, 15 February 2002, *Separate Opinion of President Guillaume*; *Joint Separate Opinion of Judges Higgins, Buergenthal and Kooijmans*.

65 Crimes Against Humanity and War Crimes Act, section 42.

66 Criminal Code, section 475.

(1), the provisions of the Criminal Code relating to requirements that an accused appear at and be present during proceedings *and any exceptions to those requirements* apply" (my italics).[67]

For each of the three crimes defined in the Act, there are in fact two distinct definitional provisions – one for crimes committed within Canada and the other for crimes committed outside Canada. The two sets of provisions resemble each other closely. The provisions concerning crimes committed within Canada[68] are only prospective in effect. They will enable Canada to prosecute crimes within the temporal jurisdiction of the ICC, and thereby ensure that Canada is 'willing and able genuinely'[69] to investigate and prosecute. The preamble to the Rome Statute recognises "that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes".

The part concerning crimes committed outside Canada is intended to update the earlier war crimes legislation. It authorises Canadian courts to exercise universal jurisdiction in the case of genocide, crimes against humanity and war crimes, and operates retrospectively. Consistent with Article 15 of the International Covenant on Civil and Political Rights and the Canadian Charter of Rights and Freedoms, it does not prohibit retrospective criminal law provisions to the extent that the offences were recognised under international law at the time of their commission. The new Crimes Against Humanity and War Crimes Act applies the definitions of the three core crimes as they are set out in the Rome Statute, although it is careful to limit these, in the case of offences committed prior to adoption of the Statute, to such crimes only insofar as they correspond to the state of customary law at the time of their commission.[70]

The provision dealing with 'breach of responsibility' committed outside Canada does not seem to have a retrospective effect, however. Section 6, which defines the three crimes, uses the phrase "either before or after the coming into force of this section", but this is absent in section 7, which deals with 'breach of responsibility'. This does not create a problem with respect to implementation of the Rome Statute, of course, because Canadian courts can prosecute 'breach of responsibility' that takes place outside Canada subsequent to 1 July 2002 in accordance with the Act. But it is surely of some interest that Parliament chose not to authorise prosecution of 'breach of responsibility' committed in the past. Did it think this was an obvious violation of the *nullum crimen sine lege* norm and unlikely to pass constitutional scrutiny? There is authority for the recognition of command responsibility of military superiors with respect to commission of war crimes in international armed conflict going back as far as 1945.[71] In a recent case, the ICTY Appeals Chamber ruled that customary international law authorised prosecutions of war crimes committed in internal armed conflict on the basis of command responsibility, although conceding that "[i]t is true that, domestically, most States have not legislated for command

67 Crimes Against Humanity and War Crimes Act, section 9(2).

68 Ibid, section 4.

69 Rome Statute, Article 17.

70 Crimes Against Humanity and War Crimes Act, section 6.

71 *United States of America* v. *Yamashita*, (1948) 4 LRTWC 1; In *re Yamashita*, 327 *US* 1 (1945). Also Protocol Additional I to the 1949 Geneva Conventions and Relating to The Protection of Victims of International Armed Conflicts (1979) 1125 UNTS 3, [1991] CTS 2.

responsibility to be the counterpart of responsible command in internal conflict".[72] As for genocide and crimes against humanity, which may be committed in the absence of armed conflict of any kind, Trial Chamber II of the ICTY held, in *obiter*, that "the doctrine has been recognised as applying to offences committed either within or in the absence of an armed conflict".[73]

6. Available Defences

The earlier statutes of the Nuremberg and Tokyo tribunals, as well as those of the *ad hoc* tribunals, left many of the general principles of criminal law to be developed by the judges in the course of prosecution. The Rome Statute, however, makes an attempt at codification, including the definition of available defences.[74] The availability of certain defences can have a rather dramatic effect on the substance of the offences themselves. To the extent that implementing legislation attempts to facilitate prosecution by domestic courts, in pursuance of the principle of complementarity and in recognition of the duty of States to ensure that suspects are tried by their own courts, attention must be paid not only to the incorporation of the definitions of the crimes themselves but also of the regime applicable to defences. To this effect, the Crimes Against Humanity and War Crimes Act contains a distinct part entitled 'Procedure and Defences'.

The rule with respect to defences is set out in section 11 of the Act: "In proceedings for an offence under any of sections 4 to 7, the accused may, subject to sections 12 to 14 and to subsection 607(6) of the Criminal Code, rely on any justification, excuse or defence available under the laws of Canada or under international law at the time of the alleged offence or at the time of the proceedings". One of the consequences of this provision is to permit the accused to benefit from changes in the law between the commission of the alleged offence and the proceedings. This is an exception to the ordinary rule by which an accused may only invoke defences that were available at the time the alleged acts were committed.

Defences under Canadian law are a subject of considerable complexity. They consist of a combination of statutory provisions, set out in the Criminal Code, and common law rules, elaborated by Canadian judges and, to a certain extent, those of other common law jurisdictions.[75] The Criminal Code describes in some detail such defences as insanity (known in Canadian law as 'mental disorder'),[76] duress[77] and self-defence.[78] Other defences, such as non-insane automatism[79] and *res judicata* (case already decided by

72 *Prosecutor* v. *Hadzihasanovic et al,* Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility of 16 July 2003 (case no. IT-01-47-AR72), para. 17.

73 *Prosecutor* v. *Hadzihasanovic et al,* Decision on Joint Challenge to Jurisdiction of 12 November 2002 (case no. IT-01-47-PT), para. 94.

74 On general principles under the Rome Statute, see, for example, William A Schabas, *Introduction to the International Criminal Court*, Cambridge: Cambridge University Press, 2nd edition (2004).

75 Criminal Code, above note 9, section 8(3).

76 Ibid, section 16.

77 Ibid, section 17.

78 Ibid, sections 34 *et seq.*

79 *R.* v. *Parks*, [1992] 2 SCR 871.

another court between the same parties)[80] have been left solely to the discretion of judges. Some defences – voluntary intoxication[81] and mistake of fact[82] – are partially codified and partially defined by common law. Courts have on occasion declared certain codified defences to be unconstitutional; when this occurs, the common law defence is revived.[83]

As for international law, a number of defences are set out in Articles 31 to 33 of the Rome Statute itself. But the Statute recognises that the list is not exhaustive, and allows other defences "derived from applicable law as set forth in Article 21". These might include, for example, military necessity and reprisal.[84] Still other defences seem to be implicit in the nature of the crimes, and exist despite the silence of the Rome Statute. An example is consent, which can be a defence to such crimes as rape, enforced prostitution and enforced sterilisation.[85] Some have argued that aspects of the defence of self-defence, as set out in Article 31(1)(c) of the Rome Statute, are in fact contrary to international law and in violation of norms of *jus cogens*.[86]

Because there is considerable overlap between the available defences under Canadian law and those offered by international law, issues of conflict may arise. The Crimes Against Humanity and War Crimes Act seems quite clear that in such cases, the accused is entitled to the more favourable provision. For example, Canadian law explicitly excludes the defence of mistake of law,[87] something that is contemplated by Article 32 of the Rome Statute. In a prosecution for one of the core crimes, a defendant would therefore be entitled to invoke this defence (perhaps giving Canadian prosecutors a good reason to prefer to charge the traditional underlying offences of murder, theft and rape rather than the international offences of genocide, crimes against humanity and war crimes).

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80 *R.* v. *Kienapple*, [1975] 1 SCR 729.

81 Criminal Code, above note 9, s. 33.1. For the common law, see: *R.* v. *Bernard*, [1988] 2 SCR 833; *R.* v. *Daviault*, [1994] 3 SCR 63.

82 Ibid, sections 150.1(4), 163.1(5), 265(4), 274.2. For the common law, see: *DPP* v. *Morgan*, [1976] 2 All. ER 347 (HL).

83 *R.* v. *Langlois*, [1993] RJQ 676, 80 CCC (3d) 28 (CA).

84 See: Albin Eser, '"Defences" in War Crime Trials', in Yoram Dinstein, Mala Tabory, eds, *War Crimes in International Law*, The Hague/Boston/London: Kluwer Law International (1996), pp 251-273, at pp 268-269.

85 That consent must exist as a defence to the crime of rape seems clear enough from the reference to it in the Elements of Crimes, note 32 above, art. 7(1)(g)-1, para 2 (rape), art. 7(1)(g)-3, para. 1 (enforced prostitution), art. 7(1)(g)-5, para. 2 (enforced sterilisation), art. 7(1)(g)-6, para. 1 (sexual violence), art. 8(2)(b)(xvi), para. 3 (pillaging), art. 8(2)(b)(xxii)-1, para. 2 (rape), art. 8(2)(b)(xxii)-3, para. 1 (enforced prostitution), art. 8(2)(b)(xxii)-5, para. 2 (enforced sterilisation), art. 8(2)(b)(xxii)-6, para. 1 (sexual violence), art. 8(2)(e)(v), para. 3 (pillaging), art. 8(2)(e)(vi)-1, para. 2 (rape), art. 8(2)(e)(vi)-3, para. 1 (enforced prostitution), art. 8(2)(e)(vi)-5, para. 2 (enforced sterilisation), art. 8(2)(e)(vi)-6, para. 1 (sexual violence). Also: Rules of Procedure and Evidence, ICC-ASP/1/3, pp 10-107, Rule 70, Principles of evidence in cases of sexual violence.

86 Éric David, *Principes de droit des conflits armés*, 2nd edition, Brussels: Bruylant (1999), p 694, para. 4.184c.

87 Criminal Code, above note 9, section 19. But see the remarks of Chief Justice Lamer in *R.* v. *Jorgensen*, [1995] 4 SCR 55.

The defence of insanity is set out in section 16 of the Criminal Code and in article 31(1)(b) of the Rome Statute in terms that are similar but not identical.[88] There would appear to be a fundamental difference respecting the burden of proof. Under Canadian law, a defendant must establish the defence of insanity on a preponderance of evidence.[89] But under the Rome Statute, the overriding presumption of innocence seems only to impose upon the defendant the need to raise a reasonable doubt; anything more would conflict with Article 67(1)(i) of the Statute, which protects an accused against "any reversal of the burden of proof or any onus of rebuttal".[90] The Crimes Against Humanity and War Crimes Act says nothing about the burden of proof of defences, however, and judges will have to decide whether section 11 of the Act applies not only to the substantive defences but also to the evidentiary onus.

An aspect of what international law knows as the defence of *ne bis in idem*, and what common law calls the defence of 'double jeopardy', is considered in section 12 of the Act, as well as in section 607(6) of the Criminal Code. Canadian law takes a larger view of the *ne bis in idem* defence than many other jurisdictions. Thus, an acquittal or conviction in a foreign jurisdiction may be set up as an obstacle to prosecution before Canadian courts. Section 607(6) of the Criminal Code allows for a special plea of 'previously convicted' (*autrefois convict*), 'previously acquitted' (*autrefois acquit*) or pardon in the case of international offences that have been tried outside of Canada, where the proceedings have been held *in absentia* or where the offender has not been punished in accordance with the sentence imposed. The provision is a codification of principles of common law.[91] The Crimes Against Humanity and War Crimes Act suspends the effect of section 607(6) and applies a special rule, which is set out in section 12.

Section 12 deems that a person who has been tried and dealt with outside Canada for an offence under the Act may invoke the defences of previously convicted, previously acquitted or pardon. The foreign proceedings must satisfy Canadian requirements for asserting a defence of double jeopardy before Canadian courts. The defence cannot be invoked where the foreign proceedings (a) have been essentially a sham conducted for the purpose of shielding the accused from criminal responsibility, (b) were not conducted independently or impartially according to international norms of due process or (c) were conducted in a manner "inconsistent with an intent to bring the person to justice". This language, which appears in section 12(2) of the Act, is drawn from Article 20(3) of the Rome Statute. Because *ne bis in idem* is enshrined in the Canadian Charter of Rights and Freedoms,[92] it is not inconceivable that Canadian defence lawyers will argue that this restriction is an unreasonable limitation upon a fundamental right.

The Rome Statute allows a defendant to invoke pardons by national governments in the context of a plea of *ne bis in idem.* This was a controversial compromise during the

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88 The common law basis of the test in the two instruments is the same, however: *M'Naghten's Case*, (1843) 10 Cl. & Fin 200, 8 ER 718.

89 Criminal Code, above note 9, section 16(3).

90 But contrast this with the case law of the ICTY: *Prosecutor* v. *Delalic* et al, Judgment of 20 February 2001 (case no. IT-96-21-A), paras. 575-576.

91 *R.* v. *Riddle*, [1980] 1 WWR 592, 48 CCC (2d) 365 (SCC).

92 Canadian Charter of Rights and Freedoms, above note 10, section 11(*h*).

drafting. Canada is not required by the Rome Statute to observe the same rule in its domestic prosecutions, although this is the approach taken in the Act. But like the Rome Statute, the Canadian statute requires that, before any pardon, there must be an independent and impartial trial in accordance with international norms of due process conducted in a manner consistent with a genuine intent to bring the accused to justice. Presumably this will preclude those cases that most offend the rule of law, where pardon is granted before trial and conviction.

Section 13 of the Act declares the defence of obedience to law, set out in section 15 of the Criminal Code, to be unavailable to prosecution for the three core crimes.[93] According to section 15 of the Code, no one shall be convicted of an offence in respect of conduct that was in obedience to laws made by authorities in *de facto* possession of the sovereign power over the place where the conduct occurred. The 1987 amendments to the Code had attempted to exclude the defence of section 15, but the wording of the provision gave rise to some ambiguity, and it was argued that judges had a degree of discretion as to the admissibility of the defence of obedience to law.[94] Section 13 of the Act endeavours to correct the situation.

The Crimes Against Humanity and War Crimes Act offers the limited defence of superior orders as it is codified in Article 33 of the Rome Statute.[95] Section 14(3) of the Act addresses an issue raised by the *Finta* decision,[96] and in effect overrules one of the findings of the Supreme Court of Canada. The majority of the Court, in perhaps the more disturbing aspect of the decision, considered evidence of Nazi propaganda claiming Jews were disloyal to be relevant to the existence of an honest but mistaken belief that orders calling for deportation of Jewish civilians were lawful.[97] Accordingly, the Act declares that "[a]n accused cannot base their [*sic*] defence under subsection (1) on a belief that an order was lawful if the belief was based on information about a civilian population or an identifiable group of persons that encouraged, was likely to encourage or attempted to justify the commission of inhumane acts or omissions against the population or group".[98]

7 Sentencing

The Crimes Against Humanity and War Crimes Act imposes a maximum penalty of life imprisonment for genocide, crimes against humanity, war crimes and breach of responsibility.[99] Capital punishment was, of course, abolished in Canada long ago, and would now be considered to violate the Constitution even if Parliament were to consider its reintroduction.[100] Where an intentional killing forms the basis of the offence of

93 Crimes Against Humanity and War Crimes Act, section 13.

94 *R.* v. *Finta*, above, p. 829 (per Cory J). Also: M Cherif Bassiouni, *Crimes Against Humanity in International Law*, 2nd edition, The Hague: Kluwer Law International (1999), p 450.

95 Crimes Against Humanity and War Crimes Act, section 14.

96 Irwin Cotler, 'R. v. Finta', 90 *AJIL*. 460 (1996).

97 *R.* v. *Finta*, above pp. 816-817 and 847-848 (per Cory J).

98 Crimes Against Humanity and War Crimes Act, s. 14(3).

99 Ibid, sections 4(2)(b), 5(3), 6(2)(b), 7(4).

100 *United States* v. *Burns*, [2001] 1 SCR 183.

genocide, crimes against humanity or war crimes, the Act makes life imprisonment a mandatory sentence.[101] If this is imposed, the offender is not eligible for parole for 25 years if a planned and deliberate killing forms the basis of the offence,[102] or if the person had previously been convicted of a similar offence.[103] In all other cases of genocide, crimes against humanity and war crimes involving intentional killing, the parole ineligibility is a minimum of 10 years and a maximum of 25.[104] These provisions are essentially similar to those applicable to homicide in Canadian law.[105]

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101 Crimes Against Humanity and War Crimes Act, sections 4(2)(a), 6(2)(a),

102 Ibid, section 15(1)(a).

103 Ibid, section 15(1)(b).

104 Ibid, section 15(1)(c)

105 Criminal Code, note 9 above section 745.

Chapter 8

Treasa Dunworth

New Zealand

1 A Short History of Domestic Prosecutions of International Crimes Prior to Implementing Legislation

1.1 Under customary international law

There have been no domestic prosecutions of international crimes under customary international law in New Zealand. Although the question has never been tested, it seems that a crime at customary international law could not be prosecuted in the domestic sphere without implementing legislation to incorporate the crime into domestic law.[1]

1.2 Under conventional international law

Similarly, there have been no domestic prosecutions of international crimes under conventional international law in New Zealand. The New Zealand Court of Appeal confirmed in *New Zealand Airline Pilots' Association Inc v Attorney-General* that New Zealand holds a dualist approach to international treaties.[2] Citing Lord Aitken in *Attorney-General for Canada v Attorney-General for Ontario*[3] Keith J said:[4]

> "[W]hile the making of a treaty is an Executive act, the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action. The stipulations of a treaty duly ratified by the Executive do not, by virtue of the treaty alone, have the force of law."

On the basis of this dualist approach then, no domestic prosecution can proceed on the basis of an international treaty without domestic enactment. Thus, the New Zealand courts have no jurisdiction over the crimes created by the Rome Statute in the absence of the domestic implementing legislation.

1.3 Under other domestic or international legal provisions

Grave breaches of the four Geneva Conventions were criminalised in New Zealand by the Geneva Conventions Act 1958. Grave breaches of the First Additional Protocol to the Conventions have been criminalised in New Zealand since 1993 by virtue of the Geneva

1 Section 9, Crimes Act 1961 provides that "No one shall be convicted of any offence at common law…".

2 [1997] 2 NZLR 269.

3 [1937] AC 326 at 347.

4 Above, note 2, at 280.

Conventions Amendment Act 1987. Torture became a crime in New Zealand by virtue of section 3 of the Crimes of Torture Act 1989.[5]

There are a number of other Acts that criminalise in New Zealand acts or omissions that might be considered international crimes: Anti-Personnel Mines Prohibition Act 1998; Crimes (Internationally Protected Persons, United Nations and Associated Personnel, and Hostages) Act 1980; Nuclear-Test-Ban Act 1999; and Terrorism Suppression Act 2002.[6]

There has been no domestic prosecution under any of these Statutes.

2 Implementing Legislation

2.1 Title

International Crimes and International Criminal Court Act 2000 (hereinafter referred to as 'the Act' or, where the context requires, 'the principal Act'). The Act is available on the Internet at http://www.legislation.co.nz/.

2.2 When in force

The main provisions of the Act fall into two general categories: those relating to co-operation with the International Criminal Court (ICC) and those creating crimes in New Zealand. The provisions in the first category came into force as from 1 July 2002.[7] The remainder of the Act (including the incorporation of the core crimes into domestic law) came into force on 1 October 2000.[8]

2.3 Government departments

The Act is administered by the Ministry of Justice.[9] The Ministry of Foreign Affairs and Trade is an authorised channel in terms of requests for assistance to New Zealand from the ICC.

2.4 Amendments to existing legislation

The New Zealand approach was to implement the Rome Statute in a stand-alone Act. However, in order to ensure consistency with other legislation, a handful of consequential amendments were necessary. These are listed in sections 181-187 of the principal Act and include:

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5 The definition of torture in this Act is taken directly from the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984.

6 All of these Acts are available at http://www.legislation.co.nz/

7 Section 2(1) effected by Clause 2, International Crimes and International Criminal Court Act Commencement Order 2002 (SR 2002/131).

8 Section 2(2).

9 Charles Fergusson Building (Tower Block), Bowen Street, PO Box 180, Wellington; Tel: (04) 494 9700; Fax: (04) 494 9701; E-mail: reception@justice.govt.nz; Internet: www.justice.govt.nz

2.4.1 Diplomatic Privileges and Immunities Act 1968

The purpose of the 1968 Act is to make provision for diplomatic privileges and immunities in New Zealand and for privileges and immunities of international organisations and related persons. Section 10D, inserted by section 183 of the principal Act, empowers the Governor-General of New Zealand to confer on the Judges, Prosecutor and staff of the ICC such privileges and immunities as may be required by Article 48 of the Statute.

In June 2002, the Diplomatic Privileges and Immunities Amendment Bill was introduced into Parliament. When enacted, it will repeal the existing provision in the 1968 Act, replacing it with more detailed provisions and allow New Zealand to ratify the Agreement on Privileges and Immunities.

2.4.2 Extradition Act 1999

Section 99 of the Extradition Act 1999 governs the priority that the Minister of Justice ought to give in a situation of competing requests for extradition. Section 184 of the principal Act inserts section 99(3) into the Extradition Act whereby competing requests from the ICC for surrender and one or more countries for extradition must be dealt with, not under the terms of the Extradition Act, but under the terms of the principal Act.

2.4.3 Geneva Conventions Act 1958

Section 3 of this Act criminalises in New Zealand law grave breaches of the four Geneva Conventions 1949 and the First Additional Protocol 1977. The section is amended by the principal Act to ensure consistency in the penalties established by both Acts.

2.4.4 Penal Institutions Act 1954

Section 21P of the Penal Institutions Act 1954 provides protection for certain telephone calls to or from prison inmates so that the calls are not monitored. This amendment adds to the list of protected calls those that take place between an inmate and a person acting in his or her official capacity on behalf of the ICC.

2.4.5 Proceeds of Crime Act 1991

The purpose of the 1991 Act is to provide authority to confiscate the proceeds of serious criminal offending. Various provisions of this Act are amended to ensure that New Zealand can co-operate with the ICC pursuant to Article 93(1)(k) of the Statute relating to the identification, tracing, freezing or seizure of proceeds, property or assets.

3 Co-operation with the ICC

A notable feature of the co-operation provisions in the Act is the clear concern to ensure that New Zealand will be able to co-operate fully with the Court. For example, section 27, dealing with the execution of requests, provides:

"(1) If the ICC makes a request for assistance, the request must be dealt with in accordance with the relevant procedure under the law of New Zealand (as provided in this Act).

(2) If the request for assistance specifies that it should be executed in a particular manner that is not prohibited by New Zealand law or by using a particular procedure that is not prohibited by New Zealand law, the Attorney-General or the Minister, as the case may be, must use his or her best endeavours to ensure that the request is executed in that manner or using that procedure, as the case may be."

While Parts 4 and 5 (sections 32-123) set out the detail of arrest, surrender and other forms of co-operation, Part 3 of the Act sets out some general provisions relating to requests for assistance. Requests must be made through an 'authorised channel'; that is, usually through diplomatic channels via the Ministry of Foreign Affairs and Trade,[10] although there is a provision for urgent requests.[11]

Sections 15 to 21 of the Act create several 'offences against the administration of justice', which supplement the co-operation provisions. The offences are directed at Judges and other officials of the Court itself as well as creating offences of bribery, giving false evidence, interference with witnesses or officials or conspiring to obstruct, prevent, pervert or defeat the course of justice.

3.1 Arrest and surrender

Generally speaking, requests for arrest and surrender will be made through diplomatic channels to the Ministry of Foreign Affairs and Trade, which will then transmit them to the Minister of Justice.[12] Part 4 of the Act (sections 32-80) deals specifically with detailed procedures for arrest and surrender.

3.1.1 Arrest procedure

On receipt of a request for surrender, the Minister "may" notify a District Court Judge and request the Judge to issue a warrant for the arrest of the person whose surrender is sought.[13] The Judge "must" issue the warrant if s/he is satisfied that the person is in New Zealand, suspected of being in New Zealand or may come to New Zealand *and* if there are reasonable grounds to believe the person is the person to whom the request relates.[14]

Following arrest, the person must be brought before a District Court Judge "as soon as possible".[15] Bail is not available as of right and the person may not be at large without bail.[16] However, the Judge may remand the person on bail, imposing any conditions s/he thinks fit.[17]

10 Section 25.

11 Section 26.

12 There is an urgency exception in section 26.

13 Section 33.

14 Section 34.

15 Section 39(1).

16 Section 39(2).

17 Section 39(3).

3.1.2 Surrender procedure

Once a person is arrested, the next step is for him/her to be brought before the District Court so that a determination can be made as to his/her eligibility for surrender. A person is eligible for surrender if the ICC warrant or judgment of conviction has been produced to the District Court and that Court is satisfied that the person in question is the person to whom the warrant or judgment relates.[18] There is also a requirement that the District Court is satisfied that the person has been arrested in accordance with the proper process as provided in Article 59(2)(b) of the ICC Statute and that the person's rights were respected as provided in Article 59(2)(c) of the Statute.

Section 43(5), read with section 55(1) of the Act, specifies the circumstances in which surrender must not proceed. In all cases, the ICC must have made a determination that the case is inadmissible or that it has advised that it does not intend to proceed with the request. In each case, the burden of proof lies on the person being sought for surrender.

The legislation is clear that these narrow grounds are the only ones available to decline surrender. The District Court is not entitled to hear evidence going to the substance of the charges against the person.[19] Essentially, the role of the District Court in making a determination of eligibility of surrender is a procedural check only. Note that a person may consent to being surrendered to the ICC.[20]

Once the determination is made that the person is eligible for surrender (or a person has consented to surrender under section 45), the District Court will issue a detention warrant, sending a copy to the Minister of Justice.[21] The District Court must inform the person that unless they waive the right, surrender will not be effected until 15 days have expired; that they have a right to make an application for a writ of habeas corpus; that they have a right of appeal to the High Court on a question of law only; that the actual decision on surrender is made by the Minister of Justice; and that if they are not removed from New Zealand within two months of the surrender order being made, they are eligible to apply to be discharged.[22] Bail may be granted.[23]

The next step is for the Minister of Justice to make a decision to surrender. The Minister "must" make a surrender order once the Court has made a determination of eligibility.[24] However, there is a narrow list of grounds for refusal of surrender. The most significant of these relate to restrictions on surrender that are listed in section 55 and are divided into mandatory (essentially that the ICC has determined that a case is inadmissible or it will not be proceeding) and discretionary (relating to where there are competing requests between the Court and another State).

18 Section 43(3).

19 Section 45(6).

20 Section 45.

21 Section 46(2).

22 Section 46(2)(c)-(e).

23 Section 46(3).

24 Section 47.

Section 53 onwards of the Act specifies the procedures to be followed in terms of the execution and form of surrender order once the Minister has made such an order.

3.1.3 Constitutional/human rights concerns

In many respects the procedures for arrest and surrender mirror procedures in New Zealand for dealing with extradition requests. An important difference is that the Extradition Act 1999 provides much broader grounds on which extradition can be (or must be) refused.[25] The aim of those limitations is to protect against abusive extradition requests from States whose motives are political, discriminatory or otherwise abusive.

By contrast, as outlined above, the grounds for refusal of surrender are much narrower in the ICC legislation. Section 55(3) of the Act provides as follows:

> "To avoid doubt,
> (a) the only grounds on which surrender to the ICC may be refused are those specified in this section and, if applicable, section 23(2) (which relate to offences involving the administration of justice); and
> (b) the restrictions on surrender specified in the Extradition Act 1999 do not apply in relation to a request for surrender from the ICC."

New Zealand does not have a written constitution, but the usual human rights protections are found in the common law, in the New Zealand Bill of Rights Act 1990 and in the Human Rights Act 1993. It would seem that the clear language of section 55(3) excludes any protection that these avenues might offer. That being said, many of the relevant protections, such as due process and the right to counsel, are already provided for within the legislation and so resort to the Bill of Rights Act, for example, would not be necessary.

3.2 Other forms of assistance to the Court

Part 5 of the Act (sections 81 to 123) puts in place detailed domestic procedures for types of co-operation other than arrest and surrender.

3.2.1 Article 93 of the Statute

Sections 81, 82, 89, 91, 92, 95, 100, 101, 109, 110, 111 and 113 respectively address the obligations set out in the sub-paragraphs (a)-(l) of Article 93(1) of the ICC Statute. In each case, it is the Attorney-General who considers the request and gives authority for it to proceed. The legislation sets out detailed criteria and procedures for dealing with and carrying out a request, but generally speaking the Attorney-General must be satisfied that it relates to an ICC investigation or proceeding and that (where relevant) the person or thing that is the subject of the request is or may be in New Zealand.

As with the provisions on arrest and surrender, the grounds on which a request may be refused are narrow – notwithstanding the apparent discretion conferred on the Attorney-

25 Section 7, Extradition Act 1999.

General. Section 114(1) sets out the grounds on which the Attorney-General must refuse a request for assistance (cannot be lawfully provided and there is no alternative assistance possible; or the ICC has determined that the case is inadmissible; or that it does not intend to proceed with the investigation or proceeding). The Attorney-General has the discretion to refuse a request on the grounds set out in section 114(2), namely that it would prejudice New Zealand's national security interests or that there is a competing request being made to New Zealand by another State. As with the arrest and surrender provisions, the legislation is very clear that these are the only grounds on which assistance can be refused.

3.2.2 Outside of mutual assistance context

Part 9 of the Act allows for the ICC to sit in New Zealand[26] and for the Prosecutor to conduct investigations in New Zealand.[27] While the ICC is sitting in New Zealand, it will exercise its functions and powers as provided for under the Statute and its Rules.[28] No orders, judgments or determinations of the ICC sitting in New Zealand are subject to review by the domestic courts.[29]

Sections 14 to 23 of the Act deal with offences against the administration of justice, such as corruption, bribery, giving false evidence, conspiring to defeat the course of justice and interfering with witnesses. Section 15 (corruption) is directed to Judges, Registrar and Deputy Registrar of the ICC and Section 17 (corruption and bribery) is directed to officials of the ICC.

Section 14 of the Act asserts extra-territorial jurisdiction in respect of this group of offences, but it does not go as far as the core crimes. Here, the extra-territoriality only applies in two situations: where the act or omission is alleged to have occurred in New Zealand or on board a ship or aircraft that is registered in New Zealand (so a standard territorial provision) or the person charged is a New Zealand citizen. As with the core crimes, a prosecution under these provisions may not be instituted in any New Zealand court without the consent of the Attorney-General, although this does not preclude an arrest taking place, a warrant being issued or a person being remanded in custody or on bail.[30]

3.2.3 Enforcement of sentences

Part 7 of the legislation sets out the provisions dealing with persons in transit to the ICC or serving sentences imposed by the Court. Section 139 provides that New Zealand may act as a State of enforcement for the ICC.

26 Section 167.

27 Section 166.

28 Section 168.

29 Section 170.

30 Section 22.

4 Incorporating the Crimes

The fact that the Statute appears in a Schedule to the Act does not, by itself, incorporate the Statute into domestic law.[31] Section 6 of the Act does specify a number of provisions of the Statute, mainly relating to co-operation and assistance with the Court, that are to have the force of law in New Zealand. Section 12 provides for a range of provisions from the Statute to be applied in domestic proceedings. As regards the ICC crimes, rather than incorporating the crimes directly, an approach was taken whereby the legislation creates offences of genocide, crimes against humanity and war crimes that are in turn defined by direct reference to the relevant articles in the ICC Statute. In this way, the definitions of the core crimes are identical in New Zealand law and in the ICC Statute. Further consolidating that approach, section 12(4) of the Act provides that a New Zealand court, exercising jurisdiction over one of the three core crimes, "may have regard to any elements of crimes adopted or amended in accordance with article 9 of the Statute".

4.1 Measure and extent of incorporation

4.1.1 Genocide

Section 9(1)(a) of the Act creates the offence of genocide while section 9(1)(b) creates the offence of conspiring or agreeing with any person to commit genocide. Section 9(2) provides that for the purposes of the section, "genocide is an act referred to in article 6 of the Statute".

It is notable that the Statute itself only asserts jurisdiction over the actual act of genocide. Thus, the legislation goes further than the Statute in providing for the conspiracy offence as well. However, this offence is found in the Genocide Convention 1948 to which New Zealand is a party.

4.1.2 Crimes against humanity

The same approach of directly legislating for the offence and drawing on the Statute for the definition of the crime is adopted as regards crimes against humanity in section 10 of the Act.

4.1.3 War crimes

Section 11 of the Act deals with war crimes. In line with the approach in the two preceding sections, sub-section (1) creates the offence of a war crime and sub-section (2) goes on to define it. Again, it does this by reference to the Statute itself, referring to Article 8(2).

Because the definition is limited to Article 8(2), it would seem that in a prosecution in New Zealand there is no threshold imposed such that applies in prosecutions in the Court itself. In other words, the threshold in Article 8(1) that the Court shall have jurisdiction "in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes" has not been incorporated into New Zealand domestic law.

31 For a full discussion of what is required in a Statute to incorporate an international treaty, see *New Zealand Airline Pilots' Association Case*, above, note 2.

5 Jurisdiction of Domestic Courts and Principles of Liability

5.1 Grounds of jurisdiction

The legislation asserts jurisdiction over "every person" who "in New Zealand or elsewhere" commits the said offences.[32] Section 8(1)(c) supplements and confirms this extra-territoriality by providing that proceedings may be brought under the Act regardless of the nationality or citizenship of the accused, or whether or not any act forming part of the offence occurred in New Zealand or whether or not the accused was in New Zealand at the time that the act constituting the offence occurred or at the time a decision was made to charge the person with an offence.

Extra-territorial jurisdiction is an increasing feature of New Zealand's criminal legislation in the case of offences that are international by nature.[33] However, this legislation goes much further because jurisdiction in respect of the core crimes applies even where there is no jurisdictional nexus with New Zealand.

Section 13 puts in place a safeguard to balance this sweeping power. It provides that proceedings in respect of all three crimes may not be instituted in any New Zealand court without the consent of the Attorney-General.

5.2 Temporal jurisdiction

Retrospective jurisdiction is asserted in respect of genocide (section 9) and crimes against humanity (section 10). Section 11 (war crimes) is not retrospective – but war crimes have been a crime in New Zealand since the enactment of the Geneva Conventions Act 1958.[34]

By virtue of section 8(1), genocide occurring on or after 28 March 1979 (the date on which New Zealand became a party to the Genocide Convention 1948) falls within the Act. Crimes against humanity that occurred on or after 1 January 1991 fall within the Act. This date is the date on which jurisdiction over crimes against humanity were vested in the International Criminal Tribunal for the former Yugoslavia (ICTY) and is seen as a definitive date by which crimes against humanity were international crimes.

At the time the legislation was being enacted, the New Zealand Court of Appeal had occasion to strongly criticise the use of retrospective legislation in two separate cases, both dealing with sentencing provisions.[35] However, the retrospective provisions in the principal Act do not attract the same criticisms for two reasons. First, because genocide and crimes against humanity were criminal under international law from the relevant dates, the provisions do not offend Article 15(1) of the International Covenant on Civil and Political Rights 1966, which provides:

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32 Sections 9(1), 10(1) and 11(1).

33 See for example, section 144A Crimes Act 1961 and section 3 Crimes (Internationally Protected Persons and Hostages) Amendment Act 1998.

34 There are of course some differences in the two Acts. Note that s 11(4) provides that nothing in s 11 of the principal Act affects or limits the operation of section 3 of the Geneva Conventions Act 1958 (which makes a grave breach of the Geneva Conventions an offence under New Zealand law).

35 *R v Poumako* [2000] 2 NZLR 695 and *R v Pora* [2001] 2 NZLR 37.

> "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. ..."

Further, the retrospectivity goes back to clearly defined dates that are linked to international law developments. The second reason why the retrospectivity might be seen to be justified is that the underlying components of both genocide and crimes against humanity were always criminal under New Zealand law: murder, grievous bodily harm, assault, kidnapping, rape and so on. Thus, although the name of the offence is different, the substance of the offence pre-exists the legislation.

5.3 Principles of liability

Section 12(1)(b) of the Act provides that the provisions of New Zealand law and the principles of criminal law applicable to the offence under New Zealand law apply to proceedings in New Zealand. Thus, all the usual principles of liability apply. However, Section 12(1)(a) of the Act lists a number of provisions of the Statute that apply to such proceedings and these are outlined below. In the event of any inconsistency between the Statute's provisions and New Zealand law, the former prevails.[36]

Section 12 (1)(a)(v) provides that Article 26 of the Statute (exclusion of jurisdiction over persons under 18) applies in New Zealand proceedings. Consequently, persons under the age of 18 will not fall within the jurisdiction of this legislation. This is in contrast to New Zealand criminal law, which generally applies only to persons over the age of 17.[37] Persons under the age of 10 years cannot be convicted for committing an offence[38] and persons between the ages of 10-14 years can only be convicted if they knew that the act or omission was wrong or contrary to law.[39]

Section 12(1)(a)(iv) of the Act provides that Article 25 of the ICC Statute (individual criminal responsibility) applies in New Zealand proceedings. Thus, complicity jurisdiction is asserted for New Zealand prosecutions on the same basis as for the Court itself. There is already provision in the New Zealand Crimes Act for complicity,[40] but the incorporation of Article 25 in this way takes the law much further and provides greater detail.

Section 12(1)(a)(vi) of the Act provides that Article 28 of the Statute (responsibility of commanders and other superiors) applies in New Zealand proceedings. This marks a

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36 Section 12(3).

37 Section 208 of the Children and Young Persons and Their Families Act 1989 provides that criminal proceedings ought not be instituted against young persons (defined as a person under the age of 17 and never married) if there is an alternative course of action, unless the public interest requires the prosecution.

38 Section 21, Crimes Act 1961.

39 Section 22(1), Crimes Act 1961.

40 Sections 68 (for murder) and 69 (crimes other than murder), Crimes Act 1961. Note that s 181 of the principal Act amends those sections to ensure that they do not "limit or effect" ss 9-11 of the principal Act (criminalising genocide, crimes against humanity and war crimes).

significant change as previously there was no provision for command responsibility in New Zealand statute law.[41]

Section 12(1)(a)(vii) of the Act incorporates Article 29 of the ICC Statute (non-applicability of statute of limitations) into New Zealand law. Thus, there is no time limit imposed on when proceedings could be commenced in New Zealand. This is consistent with the general criminal law for all indictable offences.

Section 12(1)(a)(viii) of the Act provides that Article 30 of the Statute (mental element) applies in New Zealand proceedings. This is broadly similar to the *mens rea* requirement in New Zealand criminal law for comparable indictable offences.[42]

6 Rights of the Accused

By virtue of section 12(1)(b),[43] a person being prosecuted under the Act will enjoy all the same rights under New Zealand law that normally attach to an accused. This includes the application of the Bill of Rights Act 1990. In addition, a number of protections in the ICC Statute itself are directly incorporated into New Zealand law by section 12(1)(a), which is discussed below. As with the principles of liability discussed above, in the event of any inconsistency between the ICC Statute protections and any protections offered by New Zealand domestic law, the Statute will prevail.[44]

Section 12(1)(a)(i) of the Act provides that Article 20 (*ne bis in idem*) applies in New Zealand proceedings. The principle would appear to have already been part of New Zealand law by virtue of sections 358 and 359 of the Crimes Act 1961 and section 26(2) of the Bill of Rights Act 1990. However, inclusion of this provision removes any possible ambiguity.

Section 12(1)(a)(ii) of the Act provides that Article 22(2) of the ICC Statute *(nullem crimen sine lege* in the context of strict construction) applies in New Zealand proceedings. Again, this principle would also appear to be part of the New Zealand common law.[45]

Section 12(1)(a)(iii) of the Act provides that Article 24(2) of the Statute (non-retroactivity) applies in New Zealand proceedings. This provision of the Statute is concerned with a change in the law prior to a final judgment and provides that, in such an event, the law more favourable to the accused shall apply. There is a strong prohibition against retrospectivity in New Zealand law.[46] However, that is premised on a retrospective

41 The First Additional Protocol to the Geneva Conventions of 1949 is included in the Fourth Schedule to the Geneva Conventions Act 1958 (as amended), but this by itself did not introduce the concept of command responsibility as set out in Article 86(2) of the Protocol into New Zealand domestic law.

42 See, for example, the definition of murder in section 167 Crimes Act 1961.

43 It provides that for the purpose of proceedings in respect of any of the three core crimes, "the provisions of New Zealand law and the principles of criminal law applicable to the offence under New Zealand law apply".

44 Section 12(3).

45 See *R v Poupouare* (Unreported), T157/86 per Wylie J at 5.

46 See the discussion in *Pora* and *Poumako*, above, note 35.

provision operating to the detriment of an accused. Because the Statute will over-ride the New Zealand domestic law, Article 24(2) would take precedence.

7 Available Defences

Section 12(1)(c) of the Act provides that a person charged with war crimes, genocide or crimes against humanity may rely on any "justification, excuse, or defence available under the laws of New Zealand or under international law". Section 20 of the Crimes Act 1961 preserves all common law defences as part of the New Zealand criminal law. As with principles of liability and rights of the accused, defences available to an accused in respect of the core crimes are available from the ICC Statute by means of the direct incorporation of Article 12.

Therefore, there are three sources of defences to an accused under the Act: New Zealand statutory defences, New Zealand common law, and the defences available in the ICC Statute. However, in the light of Section 12(3) of the Act,[47] it will be Articles 31 (by virtue of section 12(1)(a)(ix) of the Act), 32 (section 12(1)(a)(x)) and 33 (section 12(1)(a)(xi)) that would be applied for the most part in a New Zealand proceeding.

8 Immunity

When the Bill was first presented to Parliament, it was drafted so that Article 27 of the ICC Statute (irrelevance of official capacity) would apply directly in New Zealand law.[48] Reporting to Parliament, the Foreign Affairs, Defence and Trade Select Committee proposed that existing New Zealand law would apply instead, whereby "prosecutions of current diplomats and others holding similar immunities can take place in the court of another State only if the State which has the immunity waives it".[49] The Committee's proposal was accepted so that the legislation as enacted does not incorporate Article 27. Accordingly, for prosecutions that proceed within New Zealand, the normal immunities will apply.

A second aspect of the legislation dealing with immunity is where there is a request for surrender or assistance by the Court with respect to its own prosecutions or investigations. The initial Bill dealt with this issue by giving the Minister of Justice or Attorney-General the discretion to refuse a request from the Court in the event that Article 98 of the Statute was invoked by another State.[50] The Select Committee recommended that the onus of resolving questions about the existence of any immunities be placed with the Court – a recommendation that was subsequently adopted. Accordingly, as the legislation now stands, section 31 provides that the existence of any immunity is not a ground for refusing or postponing a request for surrender or assistance subject to sections 66 and 120. Essentially, these sections place the onus on the ICC to resolve any questions relating to Article 98 and then advise whether or not it intends to proceed with the

47 That in the event of an inconsistency between the domestic law and Statute, the Statute will prevail.

48 By means of Clause 12 of the Bill (now section 12 of the Act).

49 Report of the Foreign Affairs, Defence and Trade Select Committee, p 10.

50 Clauses 66 and 120 of the Bill.

request. If it does wish to proceed, then the request must be executed; if not, then that is the end of the request.[51]

9 Trial Procedure and Punishment in Domestic Courts

The trial procedure and punishment for the three ICC core crimes is the same as for all indictable offences in New Zealand. They are governed by the Summary Proceedings Act 1957 (pre-trial) and the Crimes Act 1961 (trial). The provisions of the Bill of Rights Act 1990 will also apply. There is a right of appeal against conviction or sentence to the Court of Appeal.[52]

10 Article 98 Agreements

10.1 Government response to American attempts to conclude Article 98 agreements

The New Zealand Government has acknowledged that it has been approached by the United States with a request to conclude an Article 98 Agreement. In a statement to the Sixth Committee of the United Nations General Assembly, New Zealand seems to have indicated that it does not favour concluding such an Agreement. The New Zealand representative said:[53]

> "In this formative period all States Parties have a particular responsibility to support the ICC they have helped to create and to protect and maintain the integrity of the Rome Statute and the principles it contains. In that regard, New Zealand takes this opportunity to reassert its commitment to both the letter and the spirit of the Statute…
>
> In our view, the Rome Statute contains a comprehensive range of checks and balances to protect against abuse. While we understand the sincerity of those few States that have reservations about the ICC, we are confident that its operations will, in fact, assuage those concerns.
>
> Accordingly, as the ICC moves into its operative phase, we hope that all States will cooperate with its work, and recognize the particular obligations assumed by States Parties to the Rome Statute."

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51 Report of the Foreign Affairs, Defence and Trade Select Committee, p 10.

52 Section 383, Crimes Act 1961.

53 Statement by New Zealand representative, Elana Geddis, to the United Nations General Assembly Fifty-Eighth Session, Sixth Committee, 20 October 2003, available from www.mft.govt.nz.

Chapter 9

Max du Plessis

South Africa

1 A Short History of Domestic Prosecutions of International Crimes Prior to Implementing Legislation

No domestic prosecutions of international crimes have taken place in South Africa. Prior to the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 ('the ICC Act'), South Africa had no municipal legislation on the subject of war crimes or crimes against humanity.[1] 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 *nullem crimen sine lege* (no crime without a law) would probably have constituted a bar to any such prosecution.[2] 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.[3]

2 Implementing Legislation

2.1 Title

The Implementation of the Rome Statute of the International Criminal Court Act No. 27, 2002.

2.2 When in force

The ICC Act came into force on 18 July 2002 after promulgation by the President in the Government Gazette.[4]

2.3 Government departments

The ICC 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

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1 See John Dugard, *International Law – A South African Perspective* (2000), p 142.

2 Ibid.

3 Ibid. This proposition is, however, currently being challenged before the South African Constitutional Court in *S v Basson*, a matter that will be finalised after the publication of the first edition of this Guide.

4 Government Gazette, Vol. 445, 18 July 2002, No. 23642. The full text of the Act is available at http://www.info.gov.za/acts/2002/a27-02/

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 ICC Act gives effect to the complementarity scheme by creating the structure necessary for national prosecutions under the ICC Statute (the structure is created in terms of Chapter 2 of the Act, entitled 'Jurisdiction of South African Courts and Institution of Prosecutions in South African Courts in Respect of Crimes').

The procedure for the institution of prosecutions in South African courts is set out in section 5 of the Act. This procedure involves different governmental departments and officials. First, the ICC Act requires that the consent of the National Director of Public Prosecutions must be obtained before any prosecution may be instituted against a person accused of having committed a crime (s 5(1)).[5] 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 a core crime (s 5(3)).

Given the importance of any such prosecution, it is clear that a specialised court needs 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" (s 5(4)). 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. As such, if the National Director declines to prosecute a person under the Act, s/he must provide the Director-General for Justice and Constitutional Development with the full reasons for that decision (s 5(5)). The Director-General is then obliged to forward the decision, together with reasons, to the Registrar of the ICC in The Hague.[6]

2.4 Amendments to existing domestic legislation/laws in force

The ICC Act deals specifically with the non-applicability of statutes of limitations. Article 29 of the Rome Statute provides that the crimes within the jurisdiction of the Court shall not be subject to any statute of limitations. To comply with this directive, section 39 of the ICC Act points to an amendment to the Criminal Procedure Act,[7] effected by way of Schedule 2 to the ICC Act. In terms of that amendment, section 18 of the Criminal Procedure Act (which deals with the prescription of the right to institute prosecutions) now

5 The National Director of Public Prosecutions (NDPP) is appointed in terms of section 179 of the Constitution, Act 108 of 1996. There is a single national prosecuting authority in South Africa and the NDPP is the head of the prosecuting authority (s 179(1)).

6 Ibid.

7 Act 51 of 1977.

includes the right to institute a prosecution for crimes of genocide, war crimes and crimes against humanity as a right that does not lapse.[8]

A second amendment effected by the ICC Act is to the Military Discipline Supplementary Measures Act 16 of 1999. Schedule 2 of the ICC Act provides that any member of the South African Armed Forces who is subject to the Military Discipline Code, and who commits one of the core crimes, must now be dealt with in accordance with the provisions of the ICC Act (and not the Military Discipline Supplementary Measures Act as in the past).[9]

Aside from these express amendments, an implied amendment appears to have been effected in relation to Head of State and other official immunity by the ICC Act. The Diplomatic Immunities and Privileges Act 37 of 2001 provides in section 4(1) that "[a] head of state is immune from the criminal and civil jurisdiction of the courts of the Republic, and enjoys such privileges as - (a) heads of state enjoy in accordance with the rules of customary international law". Section 4(2) provides that "[a] special envoy or representative from another state, government or organisation is immune from the criminal and civil jurisdiction of the courts of the Republic, and enjoys such privileges as - (a) a special envoy or representative enjoys in accordance with the rules of customary international law".

This grant of immunity (for Heads of State and special envoys or representatives) appears to have been supplanted, however, by section 4(2) of the ICC Act. The section provides as follows:

> "Despite any other law to the contrary, including customary and conventional international law, the fact that a person –
>
> (a) 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."

3 Co-operation with the ICC

3.1 Arrest and surrender

3.1.1 The procedure involved in the arrest process

The ICC Act is premised on an understanding that the ICC will in most circumstances have to rely on the intercession of national jurisdictions to gain custody of suspects. As a result

8 The amendment to section 18 of the Criminal Procedure Act has been effected "by the addition…of the following paragraph:
"*(g)* the crime of genocide, crimes against humanity and war crimes, as contemplated in section 4 of the Implementation of the Rome Statute of the International Criminal Court Act, 2002".

9 See the amendment of the Military Discipline Supplementary Measures Act 16 of 1999 by Schedule 2 of the ICC Act. The amendment has been effected by the addition of the following subsection:
"(4) When a person who is subject to the Code is suspected of having committed a crime contemplated in section 4 or an offence contemplated in section 37 of the Implementation of the Rome Statute of the International Criminal Court Act, 2002, the matter must be dealt with in accordance with the Act."

it 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 the National Director of Prosecutions. In both scenarios the warrant 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.[10]

Under 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 Court 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.[11] 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.[12]

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 to immediately forward the request to the National Director of Public Prosecutions (NDPP), who must then bring an application for a warrant before a magistrate.[13] The application must be supported by an affidavit attesting to various factors, for example, that a warrant of arrest or a judgment against the person in question exists, and that the person concerned is in or on his or her way to the Republic.[14] A magistrate may then issue a warrant of arrest for that person and must notify the Director-General of that fact.

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 detention".[15]

3.1.2 The procedure involved in the surrender process

Having laid their hands on the arrestee, the South African authorities then become engaged in what is known as the 'surrender' of an arrestee to the ICC – his or her 'delivery' to The Hague.

To make a delivery order, with a view to the surrender of an arrestee to the ICC, the magistrate has to be satisfied of three things only: (1) that the person before court is the individual named in the warrant;[16] (2) that the person has been arrested in accordance

10 See section 9(3) of the ICC Act.

11 See section 8(1) of the ICC Act.

12 See section 8(2) of the ICC Act.

13 See section 9(1) of the ICC Act.

14 See section 9(2) of the ICC Act.

15 See section 10(1) of the ICC Act.

16 See section 10(1)(a) of the ICC Act.

with the procedures laid down by domestic law;[17] and (3) that the arrestee's rights, as contemplated in Chapter 2 of the Constitution Act 108 1996, have been respected, if, and to the extent to which, they are or may be applicable.[18]

The nature of these three requirements makes it clear that surrender to the ICC is a different beast to extradition in international law. First, there is no mention of the double criminality rule that has become so central to extradition proceedings. And second, 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 s/he "must issue an order committing that person to prison pending his or her surrender to the Court".

Of course, the magistrate also has to have some sense that the ICC 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 satisfied 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 (one must assume that the listing of these conditions is in the disjunctive).

There is unfortunately little indication in the Act as to 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 the person's trial for the offence s/he is alleged to have committed.[19] Presumably any of these three factual conditions will have been proved by the terms of the ICC's request, either for the endorsement of its own warrant of arrest within South Africa (in terms of section 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 section 9 of the ICC Act). 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 as well.

One should also bear in mind that to obtain a warrant of arrest and surrender 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 a core offence. As such, it is submitted here that because an onerous evidential burden has already been overcome by the Prosecutor to obtain the warrant, and because of the

17 See section 10(1)(b) of the ICC Act.

18 See section 10(1)(c) of the ICC Act.

19 The UK's ICC Act, for example, rather more helpfully 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 ICC Act 2001); see also the commentary on the Act by Robert Cryer, 'Implementation of the International Criminal Court Statute in England and Wales', 51 *International and Comparative Law Quarterly (ICLQ)* 733 (2002) at 736) and Chapter 10 to this Guide.

distinct nature of the ICC,[20] these additional requirements be regarded as satisfied on the strength of the "material supporting the request"[21] for surrender provided by the Court.

3.1.3 Constitutional/human rights concerns

As explained above, in order to make a delivery order with a view to the surrender of an arrestee to the ICC, a magistrate has to be satisfied that three requirements are met, one of which is that the arrestee's rights, as contemplated in Chapter 2 of the South African Constitution Act 108 of 1996,[22] have been respected, if, and to the extent to which, they are or may be applicable.[23] It does not appear that constitutional or human rights concerns will ordinarily be triggered by South Africa's co-operation with the ICC. An arrestee who is detained pursuant to a warrant would automatically become entitled to the protections contained in section 35 of the South African Constitution, *viz.*, the rights reserved for arrested, detained and accused persons (including, for instance, the rights to remain silent, to be brought before a court as soon as is reasonably possible and to a legal practitioner). Such protections would inure to the arrestee under South African domestic law, and South African officials would be obliged to respect the arrestee's constitutional rights, quite apart from the procedure involved in the surrender process.

In relation to sentencing, the ICC sentencing regime does not pose an obstruction to surrender. For example, life imprisonment is a competent sentence in South African municipal law and the imposition of the same sentence by the ICC will not create difficulties for a South African court seized with the surrender process.

3.2 Other forms of assistance to the court

3.2.1 Forms of assistance offered to the Court in fulfilment of Article 93 of the Rome Statute

Part 2 of the ICC Act sets out a variety of circumstances in which the "relevant competent authorities in the Republic" must "co-operate 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.[24] The areas of co-operation must be

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20 Article 91 of the Rome Statute provides that the request for the arrest and surrender of a person for whom a warrant of arrest has been issued by the Pre-Trial Chamber shall contain or be supported by, *inter alia*, such "documents, statements or information as may be necessary to meet the requirements for the surrender process in the requested State, except that those requirements should not be more burdensome than those applicable to requests for extradition pursuant to treaties or arrangements between the requested State and other States *and should, if possible, be less burdensome, taking into account the distinct nature of the Court*." (Emphasis added.)

21 See Article 89 of the Rome Statute.

22 Chapter 2 of the Constitution contains the Bill of Rights.

23 See section 10(1)(c) of the ICC Act.

24 The full list of areas of co-operation is set out in section 14 (a)-(l), and these are modelled on Article 93 of the Rome Statute.

undertaken in terms of the relevant law applicable to investigations in South Africa, as well as the applicable rules in the ICC Statute,[25] and with the ultimate aim of assisting the ICC.

Certain acts of co-operation are subject to comprehensive regulation in the ICC Act, while 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 domestic law for assistance. In this context there is little difference between South African 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 ICC 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,[26] the transfer of a prisoner to the ICC for the purposes of giving evidence or to assist in an investigation,[27] the service of process and documents[28] and acts of entry, search and seizure.[29]

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 is not found in the ICC Statute, but presumably refers to the provisional measure of assistance that 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 93(1)(k) provides for the "identification, tracing and freezing or seizure of proceeds, property … [etc] for the purposes of eventual forfeiture".

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25 Section 14 reads that the "relevant competent authorities in the Republic must, *subject to the domestic law of the Republic and the Statute*, co-operate with, and render assistance to, the Court…" (emphasis added). The Constitution, where applicable, will no doubt provide the background standards against which the relevant 'co-operation' is undertaken. So, for example, when it comes to searches and seizures in terms of s 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.

26 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 that a witness might commit and the procedure by which the attendance of a witness might be secured in proceedings before the ICC.

27 See section 20 of the ICC Act.

28 See section 21 of the ICC Act.

29 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.

As such, a restraint order would seem to cover the scenario under the ICC 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 ICC 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 ICC 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 the order with the Registrar of the High Court in whose jurisdiction the property is situated or present a certified copy of that order.[30]

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.[31] 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.[32]

3.2.2 Obligations outside the mutual assistance context

In terms of the ICC Act the President of South Africa may, at the request of the ICC and by proclamation in the Government Gazette, declare any place in the Republic to be the seat of the ICC.[33] Should such a declaration be made, then the ICC Act sets out a variety of privileges and immunities for the Court. First, the Court is accorded such rights and privileges of a South African court of law in the Republic as may be necessary to enable it to perform its functions (Section 7(1)). Furthermore, the judges, the Prosecutor, the Deputy Prosecutors and the Registrar of the Court, while performing their functions in the Republic, enjoy the same immunities and privileges that are accorded to a representative of another State or government in terms of section 4(2) of the South African Diplomatic Immunities and Privileges Act No. 37, 2001 (section 7(2)). Those immunities include immunity from the criminal and civil jurisdiction of the courts of the Republic, and the privileges enjoyed are those that (a) a special envoy or representative enjoys in accordance with the rules of customary international law; or (b) are provided for in any agreement entered into with a State, government or organisation whereby immunities and privileges are conferred upon such special envoy or representative".

30 See section 22(1) for 'restraint orders' and section 27(1) for '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 details). 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.

31 Act 121 of 1998. See section 23 of the ICC Act.

32 See section 28(1) of the ICC Act.

33 Section 6.

The Deputy Registrar, the staff of the Office of the Prosecutor and the staff of the Registry of the Court enjoy the privileges and facilities necessary for the performance of their functions in the Republic as may be published by proclamation in the Government Gazette, as provided for in section 7(2) of the Diplomatic Immunities and Privileges Act of 2001 (section 7(3)).

The Minister of Foreign Affairs may, after consultation with the Minister of Justice, confer immunities and privileges on any other member of the staff of the Court or any person performing functions for purposes of the ICC Act. Such immunities and privileges are conferred by the Minister of Foreign Affairs publishing notice in the Government Gazette, on such conditions as s/he deems necessary (section 7(4)). Any person who is accorded immunities or privileges in terms of the ICC Act must have his or her name entered into a register, as contemplated in section 9(1) of the Diplomatic Immunities and Privileges Act 2001 (section 7(5)).

3.2.3 Enforcement of sentences

The Rome Statute stresses that "States Parties should share the responsibility for enforcing sentences of imprisonment, in accordance with principles of equitable distribution".[34] The ICC 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.[35]

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 take into account the views of the sentenced prisoner, his or her nationality, and "widely accepted international treaty standards governing the treatment of prisoners".[36] 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.[37]

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.[38] If the Republic is placed on this list and is designated as the State in which an offender is to serve a prison sentence, then such person must be committed to prison in South Africa.[39] The provisions of the Correctional Services Act 1998[40] and South African domestic law then apply to that

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34 See Article 103(3)(a) of the Rome Statute as well as Rule 201 of the Rules of Procedure and Evidence.

35 See further W Schabas *An Introduction to the International Criminal Court* (2001), 144 et seq. If no State offers its prison services, the host State of the ICC – the Netherlands – will take up the job (see Article 103(4) of the Rome Statute).

36 See Article 103(3) of the Rome Statute.

37 See Article 106(2) of the Rome Statute.

38 See section 31 of the ICC Act.

39 See section 32 of the ICC Act.

40 Act 111 of 1998.

individual. However, the sentence of imprisonment may only be modified at the request of the ICC, after an appeal by the prisoner to, or review by, the Court in terms of the ICC Statute.[41]

It is commendable that the ICC Act requires the government to indicate its availability to assist in enforcing the ICC sentences. It is not a given, however, that South Africa will be placed on the list of States available for enforcement duty. As William Schabas has written, 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".[42] This is a particular problem for South Africa, given the poor state of its prisons. 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.[43] Earlier reports by groups such as Human Rights Watch show that "South African prisons are places of extreme violence, where assaults on prisoners by guards or fellow inmates are common and often fatal".[44] The possibility of being asked to act as a conduit for the enforcement of an ICC prison sentence ought therefore to be regarded as further motivation, if any were needed, for South Africa to urgently respond to the sub-standard condition of its prisons.

The ICC Statute also enables the ICC to impose a fine, but only "[i]n addition to imprisonment".[45] 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.[46] 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,[47] and these must be 'registered' with a court in the Republic having jurisdiction.[48] Once this has been done, 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 realised in the execution of the sentence or the order, minus any expenses incurred by the Republic in the execution thereof.[49]

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41 See section 32(4)(b) of the ICC Act. 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".

42 W Schabas, note 35 above, p 145.

43 See Amnesty International, 'Country Report, South Africa – 2002' (available at http://web.amnesty.org/web/ar2002.nsf/afr/south+africa!Open).

44 See Human Rights Watch Report, *Prison Conditions in South Africa,* Africa Watch Prison Project (1994), p ix.

45 See Article 77(2)(a) of the Rome Statute.

46 See Article 75(2) of the Rome Statute.

47 See sections 25 and 26 of the ICC Act.

48 See sections 25(2) and (3) of the ICC Act.

49 See section 26 of the ICC Act.

4 Incorporating the Crimes

4.1 Measure and extent of incorporation

The advantage of the ICC Statute is that it brings together, in one place, a codified statement of the elements that 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 ICC Statute's definitions of the core crimes directly into South African law through a schedule appended to the Act. In this regard Part 1 of Schedule 1 follows the wording of Article 6 of the ICC 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 ICC 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",[50] and section 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".

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 the Elements of Crimes. For the purposes of interpreting and applying the definitions of crimes found in Articles 6, 7 and 8 of the Rome Statute, reference must also be made to this 50-page document adopted in June 2000 by the Preparatory Commission for the ICC.[51] There is nothing, however, that prevents a South African court from having regard to the Elements of Crimes were it to be involved in the domestic prosecution of one of the Rome Statute offences. However, in the interests of clarity and completeness it has been suggested that South Africa follow other States Parties[52] and incorporate by regulation the Elements of Crimes.[53]

5 Jurisdiction of Domestic Courts and Principles of Liability

5.1 Grounds of jurisdiction

Section 4(1) of the ICC Act creates jurisdiction for a South African court over the core crimes by providing that "[d]espite anything to the contrary in any other law of the Republic, any person who commits a [core] crime, is guilty of an offence and liable on conviction to a fine or imprisonment…". Presumably section 4(1) creates jurisdiction over such core crimes on the basis that they are committed within South African territory.

50 See section 3(c) of the ICC Act.

51 See the Finalised Draft Text of the Elements of Crimes (PCNICC/2000/INF/3/Add.2). See also the discussion in W Schabas, note 35 above, p 29.

52 The Secretary of State in England has, for example, 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

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

Section 4(3) of the Act goes further and provides for extra-territorial jurisdiction in express language. In terms of that section the jurisdiction of a South African court will be triggered when a person commits a core 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 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.

The jurisdictional 'triggers' in the ICC Act are largely uncontroversial. Section 4(1), as we have seen, appears to assert the traditional principle of territoriality, namely, that a State has competency in respect of all acts that occur in its territory. And section 4(3), which deals with extra-territoriality, begins in trigger (a) with the recognised nationality basis for jurisdiction. That is, international law has long accepted that States have the competency to exercise jurisdiction over their nationals for crimes committed anywhere in the world. Trigger (b) extends, in similar fashion, jurisdiction over South African residents on the basis that they have a close and substantial connection with South Africa at the time of the offence. Trigger (c) of the ICC Act 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.[54] The conclusion that flows from this is that trigger (c) is grounded in the idea of universal jurisdiction; that is, jurisdiction existing for all States in respect of certain crimes that attract universal jurisdiction by their egregious nature, and consequently over the perpetrators of such crimes on the basis that they are common enemies of mankind. This form of jurisdiction is to be welcomed, as genocide, crimes against humanity and war crimes are among 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'.[55] Trigger (d) is founded on the passive personality principle in international law. In terms of that principle a State has the competency to exercise jurisdiction over an individual who causes harm to one of its nationals abroad.

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54 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 International Criminal Court Act 2001).

55 See for example A Cassesse, P Gaeta, J Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary,* Vol. II (2002), p 1862.

5.2 Temporal jurisdiction

Jurisdiction exists for South African courts over the core crimes in the ICC Statute from the date on which the ICC Act was enacted into law: 18 July 2002. The ICC 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" (section 5(2)).

5.3 Principles of liability

The ICC Act states that a South African court has jurisdiction over "any person who commits a [core] crime". There is no indication whether that person must have attained the age of 18 at the time of the offence, or whether the jurisdiction extends to crimes by corporations. Since the objects of the ICC Act are "to create a framework to ensure that the [Rome] Statute is effectively implemented in the Republic", and "to ensure that anything done in terms of [the Act] conforms with the obligations of the Republic in terms of the Statute", it is not inconceivable that the ICC Act will take its cue from the ICC Statute regarding which subjects are covered by the Statute's criminal prohibitions.

6 Rights of the Accused

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".[56] The South African Constitution in section 35 sets out a panoply of rights for arrested, detained and accused persons. These protections will be afforded to any person who is being tried under the ICC Act.

7 Available Defences

Part 3 of the ICC Statute sets out a comprehensive framework of general principles of liability and defences. While the drafters of the ICC Act have not chosen to expressly adopt Part 3, section 2 of the Act says that applicable law for any South African court hearing any matter arising under the Act includes "conventional international law, and in particular the Statute".[57] As such, 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) can appropriately be relied on by a South African court.

8 Immunity, International Crimes and Domestic Courts

One of the most interesting and difficult questions in international law has been the question of immunities from jurisdiction. The most heated debate has been 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.

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56 Section 2, ICC Act.

57 See section 2(a) of the ICC Act.

The Rome Statute attempts to bring clarity to the position and provides in Article 27 that "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".[58] An individual charged before the ICC is therefore stripped of immunity, the official status of that person no longer being allowed to lead to impunity in respect of crimes with which s/he has been charged.

The ICC Act, in similar vein, proclaims boldly, 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".[59] In terms of the Act, South African courts, acting under the complementarity scheme, are accorded the same power to 'trump' the immunities that usually attach to officials of government as the Court is by virtue of Article 27 of the ICC Statute. This is a significant aspect of the ICC Act and one that is to be welcomed, signalling as it does South Africa's intention of acting hand in hand with the ICC to bring government officials, whatever their standing, to justice.[60]

However, whether the boldness of the Act matches the state of international law is another question, and this will undoubtedly be seized upon by any high-standing foreign government official who finds him or herself the subject of prosecution before a South African court for alleged commission of an ICC offence. The international and domestic case law suggests that the diplomatic or Head of State immunity of an accused prevents national courts, regardless of what their domestic legislation might insist, from dealing with allegations of international crimes unless that immunity has been waived.

For instance, we have seen that even 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* (i.e., personal immunity on account of their status), irrespective of the nature of the crime alleged, unless waived by the sending State. While their Lordships denied immunity to Pinochet in his capacity as a former Head of State, they made it clear that if he had still been an acting Head of State, this immunity in international law would have continued to subsist. 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".[61] Lord Millett in

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58 Rome Statute of the ICC, 1998, Article 27(1). Nor shall such capacity, "in and of itself, constitute a ground for reduction of sentence". Article 27(2) reinforces this immunity by providing that "[i]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person".

59 See section 4(2)(a) of the ICC Act.

60 The provision, aside from being bold, is also prudent. As Cassesse et al, note 55 above, point out (p 1857):

"To avoid these difficulties [regarding immunities for officials], a prudent approach would be to provide that any issue of immunities will not bar arrest or surrender to the ICC. In essence, this approach leaves the issue to be decided by the ICC and not by national courts. In this manner, an implementing State can ensure that it will not find itself stuck with a legislative provision – or a judicial interpretation – on international immunities that hinders compliance with an ICC request."

61 *R v Bow St Magistrate, ex parte Pinochet Ugarte*, [1998] 4 All ER (Pinochet 1) at 938.

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".[62]

We have seen too that in its decision in *Democratic Republic of Congo v Belgium*[63] the International Court of Justice (ICJ) has reaffirmed this point. With regard to the provisions precluding immunity found in the constitutive instruments of a myriad of international criminal tribunals (the most recent being the Statute of the ICC), the ICJ expressly held that this exception to customary international law was not applicable to national courts.[64] 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.

In the context of the ICC Statute, a helpful cue for a South African court dealing with section 4(2)(a) of the ICC Act and faced with a claim of Head of State immunity is provided by the recent decision of the Belgian Court de Cassation in the *Sharon and others* case.[65] The Belgian legislation in question before the Court, like its South African counterpart, 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 Arial Sharon, the serving Israeli Head of State, was that the Article was in conformity with Article 27 of the Rome Statute. The Court de Cassation rejected this argument, finding that Article 27 of the Rome Statute does not affect or prevent the application of the customary rules of absolute immunity.[66]

According to the Belgian 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.[67] 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 that serve to indicate binding customary international law, may well be inclined to uphold the personal immunity of a Head of State notwithstanding the provisions of Section 4(2)(a) of the ICC Act. Such an inclination would be significantly bolstered by no less than the Constitution itself, inasmuch as its section 232 provides that courts interpreting legislation must always prefer any reasonable

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62 *R v Bow St Magistrate, ex parte Pinochet (No.3)* [1999] 2 WLR 824 at 905 H.

63 Judgment of 14 February 2002, *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, available at the ICJ homepage, *http://www.icj-cij.org*.

64 Para. 58.

65 See decision of 26 June 2002, available at http://www.sabra-shatila.be/documents/arrest020226.pdf.pp.22.

66 See Cassese, 'The Belgian Court of Cassation v. the International Court of Justice: the *Sharon and others* Case', 1 *Journal of International Criminal Justice*, 437 (2003) at 439.

67 Cassese, ibid p 443. The other customary international rules in question would be those relating to immunity *ratione material*, but these were not applicable in the case at issue. The possibility thus remains that functional immunities might legitimately have been removed from Article 5(3) of the Belgian law, and similarly, under the South African ICC Act.

interpretation that is consistent with international law over an interpretation that is inconsistent with international law.

That is not to say, of course, that the individual must be set free. Under the complementarity scheme it will be expected of South Africa as a State Party to the Rome Statute, should it find itself unable to exercise jurisdiction (because, for instance, such prosecution would be an affront to the dignity of a foreign State), to send the accused to the ICC for prosecution.

In this regard it must be stressed that 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. As such, if the National Director declines to prosecute a person under the Act, he or she must provide the Director-General for Justice and Constitutional Development with the full reasons for that decision (section 5(5)). The Director-General is then obliged to forward the decision, together with reasons, to the Registrar of the ICC in The Hague.[68]

It goes without saying under the complementarity scheme of the Statute that any decision by the South African authorities not to prosecute entitles the ICC to do so in South Africa's place. Section 5(6) of the ICC Act says to this effect that a decision by the National Director "not to prosecute a person under this section does not preclude the prosecution of that person in the [International Criminal] Court". And Article 98(1) of the ICC Statute entails that States parties to the Statute have a duty of co-operation with the Court, requiring such States to arrest and surrender to the Court persons charged with an ICC crime.

Such obligation, however, would only be incumbent upon a State where an official charged before its Court is an official of a State that is also a party to the ICC Statute. That is because both States, as parties to the ICC Statute, have accepted that the constitutive instrument of the ICC has scrapped immunities for Heads of State and other government officials through Article 27. The position may well be different where the accused person is an official of a State *not party* to the Statute. Article 98(1) of the Rome Statute 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."

If under international law personal immunity attaches to incumbent senior cabinet officials, then not only would any prosecution of such an official by South Africa be inconsistent with its (South Africa's) obligations under customary international law, but the ICC would also be prevented from instituting proceedings against such a person or

68 Ibid.

requesting the surrender of that person.[69] The only exception to this situation would be a waiver of the immunity by the third State.[70]

9 Trial Procedure and Punishment in Domestic Courts

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 a [core] crime" (section 5(5)). 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 that 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.

10 Article 98 Agreements

10.1 Government response to American attempts to conclude Article 98 agreements

South Africa was pressurised by the United States but refused to sign an Article 98 agreement. The US asserted a deadline of 31 June 2003 for the conclusion of such an agreement between the two States, backed up by the threat that South Africa's failure to sign would result in the suspension of US military aid to that country. Having refused to succumb to US pressure, South Africa then found itself among 35 States blacklisted by the United States on 1 July 2003.[71]

In response to this blacklisting and the resultant suspension of military aid by the US, South Africa's Foreign Ministry spokesperson, Mr. Ronnie Mamoepa, said that the Government would study "the implications of that decision".[72] Having done so, the South African Cabinet announced on 24 July 2003 that it "will maintain its decision not to sign an agreement with Washington giving United States nationals immunity from prosecution by the ICC".[73] According to the US embassy in Pretoria, South Africa's decision would cost it some 7.2 million dollars in military aid;[74] the South African Cabinet explained that the South African department of defence "will address the funding shortfalls through the normal budgeting and adjustment processes".[75]

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69 P Gaeta, 'Official Capacity and Immunities', in Cassese *et al* (eds), *The Rome Statue of the International Criminal Court: A Commentary,* Vol. 1 (2002), p 992.

70 Gaeta, ibid, pp 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.

71 *Cape Times*, 'US Suspends all military aid to South Africa', 02 July 2003.

72 *Mail and Guardian*, 'US slaps military funding embargo on SA', 02 July 2003.

73 "South Africa will not sign agreement with US on international court", statement by the Cabinet of the Government of the Republic of South Africa, Pretoria, 24 July 2003.

74 Agence France Press, 24 July 2003.

75 Ibid.

The Cabinet's reasons for maintaining its position were said to be premised on South Africa's "commitment to the humanitarian objectives of the ICC and the country's international obligations".[76]

Just prior to Cabinet's announcement, on 20 July 2003 at a meeting for the formation of a South Africa-Kenya bi-National Commission in Nairobi, Kenya, officials of the South African and Kenyan Governments expressed their concern at the diplomatic intimidation displayed by the US in relation to Article 98 agreements.[77] As a measure of challenge, Abdul Minty, Acting Director General in the South African Foreign Ministry, suggested that a joint effort with European countries was required to counter US advances.[78]

76 Ibid.

77 Panafrican News Agency (PANA) Daily Newswire, "Kenya, South African Oppose US Stand on UN Court", 20 July 2003.

78 Ibid.

Chapter 10

Ben Brandon

The United Kingdom

1 A Short History of Domestic Prosecutions of International Crimes Prior to Implementing Legislation

1.1 Introduction

On 1 April 1999, 79-year-old Antony Sawoniuk was convicted at the Old Bailey in London of murdering two Jews in September 1942 in Domachevo, Belorussia, a town under German occupation, in "violation of the laws and customs of war". He received a sentence of life imprisonment.

Despite the leading role played by Great Britain at the International Military Tribunal (IMT) in Nuremberg, and in the prosecution of Nazi war criminals in occupied Germany between 1945 and 1950 in its own Military Courts and under Control Council Order Number 10, Sawoniuk was the first person to be tried in England for war crimes committed during World War II. He will probably be the last.

There are a host of legal, historical and political reasons for the absence of substantive prosecutions for international crimes in the United Kingdom for 50 years – but it really comes to this: Until the late 1980s it was not thought that any war criminals lived in the UK. The few thousand German prisoners of war in the UK at the end of the War were rapidly repatriated. It was confidently assumed that the 'displaced persons' and other migrants from the Eastern Front (where many of the worst atrocities of the War occurred) had been adequately screened before their arrival in the UK to help with the post-War reconstruction effort, and any potential war criminals identified and arrested.

Three factors influenced the UK Government to re-examine the question of war crimes prosecutions in the late 1980s. Firstly, the thawing in relations between the former Soviet Union and the West led to greater information sharing between NGOs, police and foreign ministries about suspected war criminals who had escaped justice after 1945 – a process that had been almost completely absent in the immediate aftermath of the War. Secondly, the relentless investigations of pressure groups such as the Simon Wiesenthal Center in Los Angeles disclosed the presence of suspected war criminals in the UK population. Finally, although not explicitly referred to in contemporary debates, the rise of ethnic violence and gross human rights violations in the former Yugoslavia from 1991 onwards caused many law-makers in Europe to look again at their own record of failure in prosecuting war criminals after the terrible conflict of 1939-1945.

1.2 Domestic implementation and international crimes in the UK

The UK Government, and in particular the Foreign Secretary, can enter into treaty relations that confer rights and create binding obligations on the executive, without the prior

consent of Parliament. However, such rights and obligations have no effect in domestic law "unless domestic law is in force to give effect to them".[1] Parliament can incorporate such rights and obligations into domestic law through legislation. This constitutional arrangement is known as 'dualism'. Under the dualist approach treaty provisions that have been incorporated into domestic law "have only the status of domestic law",[2] and can be amended or repealed by subsequent legislation, regardless of the impact on the UK's international obligations to other States Parties to the relevant treaty.

Treaties are incorporated into UK law in one of three ways: (1) where the whole or part a treaty is annexed to the relevant Act as a Schedule and expressed "to have the force of law of the United Kingdom";[3] (2) where Parliament confers a power on the executive to conclude future treaties of a particular type; and (3) where an Act of Parliament authorises the Crown to create secondary or delegated legislation in the form of Orders in Council making the treaties part of domestic law.[4]

There is nothing in English constitutional law that *per se* prevents English courts from recognising customary international law norms as part of the English common law. At the same time, whether or not a rule of customary international law forms part of English law is governed by the principle of certainty. In *Jones & Others v. Gloucestershire Crown Prosecution Service*,[5] the Court of Appeal was called upon to determine the legality of the invasion of Iraq by UK and US forces in March 2003. In considering whether the international crime of aggression was a crime in English law, the Court noted that:

> "The mere fact that an act can clearly be established as proscribed by international law and is described as 'a crime' does not necessarily of itself determine its character in domestic law unless its characteristics are such that it can be translated into domestic law in a way which would entitle domestic courts to impose punishment."

The Court of Appeal found that there was insufficient consensus in the international community as to the constituent elements of the crime of aggression for it to meet the certainty test. By contrast, in *Pinochet No. 3*[6] their Lordships appeared to accept the possibility that torture existed as a crime in English law before it was defined in the Criminal Law Act 1988.[7]

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1 Anthony Aust, *Modern Treaty Law and Practice*, Cambridge (2000).

2 Ibid.

3 See, for example the Geneva Conventions Act 1957 (which had annexed to it all four Geneva Conventions, and as amended, the First Additional Protocol), discussed below. Also, for a commentary on the same, Rowe and Meyer, 'The Geneva Conventions (Amendment) Act 1995: A Generally Minimalist Approach', *ICLQ* (1996). Also see Schedule 8 to the ICC Act, which incorporates the three ICC core crimes of genocide, crimes against humanity and war crimes into UK domestic law.

4 See for example, the ICC Elements of Crimes incorporated into UK domestic law by the International Criminal Court Act (Elements of Crimes) Regulations 2001 [SI 2001/2505].

5 *Jones and Others v. Gloucestershire Crown Prosecution Service* [2004] EWCA Crim 1981.

6 *R. v. Bow Street Metropolitan Stipendiary Magistrate and Others ex parte Pinochet Ugarte* [200] 1 AC 61.

7 But held, nonetheless, that the dual criminality provisions of the extradition arrangements between the UK and Spain were not satisfied until the extra-territorial effect of the torture offence was made certain in English law by the passage of the Act.

As a matter of practice, experience has shown that it is unlikely that prosecutions will be brought to a successful conclusion in UK courts unless there is relevant domestic legislation in existence implementing customary international law norms or international conventions to which the UK is a party.

Two pieces of legislation were passed in the UK prior to the International Criminal Court Act 2001 that allow for the prosecution of two of the three core international crimes in domestic courts – the Geneva Conventions Act of 1957 and the Genocide Act of 1969. No one has been prosecuted in the UK for grave breaches of the Geneva Conventions or genocide, and both Acts lie on the statute books unused. Other non-core international crimes, such as hostage taking and torture, are also the subject of domestic legislation, and have been used in a small number of prosecutions in the UK courts.

Therefore the history of domestic prosecutions in the UK of international crimes prior to the implementation of the International Criminal Court Statute can be understood through the prism of the *Sawoniuk* case alone.

1.2.1 Moscow Declaration 1943 to the War Crimes Act 1991

Although Great Britain was a party to the Hague Conventions of 1907 and incorporated many of its provisions into the 1914 British Manual of Military Law, the long road that led to Sawoniuk's conviction began a year after his dreadful crimes were committed, in Moscow on 30 October 1943.

On that day, Churchill, Roosevelt and Stalin signed the Moscow Declaration. Two important features of that treaty determined what would follow: first, upon Germany's surrender, those responsible for war crimes were to be sent back to the place where the crimes were committed to be judged and punished; second, the major war criminals whose offences "had no particular location" would be punished by joint agreement of the Allies.[8] The agreement reached after the Moscow Declaration was that the major war criminals should be tried at the IMT in Nuremberg.

Although there was tremendous political will to ensure that war criminals did not escape justice both during and in the immediate aftermath of the War, it soon dissipated as the huge scale of the reconstruction effort in Europe increasingly took precedence over thoughts of 'retribution', and the overwhelming practical difficulties involved in apprehending and trying suspects became apparent.

Eight million men under arms were captured and imprisoned by the Allies in 1945. Many combatants in the German armed forces were not German nationals, but from the Baltic States in the East, much of which was occupied by the Soviets. At Yalta, Churchill and Roosevelt had agreed to surrender all Soviet citizens under the control of Commonwealth forces in Europe and facilitate their return to the USSR. Between May and September 1945, some two million Soviet 'citizens' had been repatriated. The repatriations continued until 1949. It is not known how many Balts who had fought with the Germans against the Russians were returned. Britain was also under an obligation to return alleged war

8 See Joint Four Nation Declaration Order 1943 at http://www.yale.edu/lawweb/avalon/wwii/moscow.htm

criminals regardless of their nationality to the Baltic States, where many of the worst crimes had been committed.

Nevertheless, huge numbers of men remained in the camps. Quite apart from the obligations imposed on belligerent occupiers by the Hague Conventions to release prisoners of war after a conflict had ended, there was a tremendous shortage of labour after the war across Europe, and many of those captured in 1945 were educated, skilled and willing workers. Thousands were released from the camps and made their way to Britain as European Volunteer Workers.

The job of screening camp internees for possible prosecution fell to two organisations that were established to investigate and identify war crimes suspects – the Allied Central Registry of War Criminals and Security Suspects (CROWCRASS) and the United Nations War Crimes Commission (UNWCC). Their already difficult task was rendered virtually insurmountable by resource constraints and intelligence failures. The Soviet authorities had declined to actively participate in or provide evidence to either CROWCASS or the UNWCC, after the US and the UK had refused to allow the Baltic nations to sit on the UNWCC as independent States. Such information as was provided was often of limited value, as investigators were frequently overwhelmed by the logistical hurdles put in their path by the chaos of post-War Europe.

War crimes trials did take place in the British-controlled sectors of occupied Germany, either under the authority of a Royal Warrant of 1945 that created Military Courts, or Control Council Order Number 10. Although Hartley Shawcross, the then Attorney General said in October 1945 that "we must set ourselves an absolute minimum of prosecuting at least 10% of those criminals in the British zone…I am setting as an irreducible minimum that we try 500 by 30 April 1946", it is unlikely that even that number were tried. Staff numbers for both investigations and prosecutions continued to decline, and Shawcross was forced to concede in May 1946 that "[i]n these circumstances I can only suggest that the trials should continue to the end of the year and that we should then review the situation with a view to bringing them to an end except in the most serious of cases." [9]

By 1946, even Churchill was growing weary of war crimes trials. In a speech he gave in Zurich in September that year, he said "there must be an end to retribution. We must turn our backs upon the horrors of the past, and we must look to the future". A number of factors contributed to this change of heart.

When the idea of war crimes trials was first mooted by the British in 1942, one of the original aims was swift trials to reduce the length of time suspects were kept in custody without charge, and to permit the rapid return of a peaceful atmosphere to Europe. These factors continued to influence thinking after the War had ended, and combined with concerns that the German population would perceive war crimes trials as an extended punishment of a defeated people, led to a reappraisal of the value of such trials. In addition, there was increasing concern at the treatment meted out to those extradited to the Soviet Union to face what appeared to be increasingly politically motivated war crimes

9 See Sir Thomas Hetherington KCB CBE TD QC and William Chalmers Esq. CB MC, '*War Crimes - Report of the War Crimes Inquiry*, presented to Parliament by the Secretary of State for the Home Department by Command of Her Majesty July 1989. Cmd. 744 at p 25 (the Hetherington-Chalmers Report).

trials under Stalin. The huge number of those said to have been involved in the crimes also presented tremendous practical problems, and with it came an increasing realisation that the numbers who could be traced, identified and punished for such widespread atrocities would be small in relation to the total number of war criminals. Finally, the British economy was in a parlous state, and it became increasingly difficult to justify further expenditure on war crimes trials in occupied Europe when the problems were so acute at home.

As a consequence, by 1950 Britain had largely abandoned its plans to prosecute large numbers of war criminals. It was considered that CROWCROSS and UNWCC screening of displaced persons coming to the UK from 1945 onwards had been largely effective. Very few, if any, German citizens were allowed to enter the UK after the war. A few extradition requests were received from the Soviets after the war, but hardly any were acted upon.[10]

However, Antony Sawoniuk, and others like him, did manage to enter the UK undetected between 1939 and 1950. Sawoniuk had fled the Russian advance in 1943 to 1944 with the German army, and joined the Waffen SS, fighting the Allies in France. Realising that the tide of the war was turning against the Axis, he abandoned his unit, and joined the Polish Corps, who at that point in the war were fighting their way up Italy. After the War it is unlikely that Sawoniuk faced any sustained interrogation about his background, and he assimilated into English life as many others had done.

1.2.2 The War Crimes Act 1991

Sir Thomas Hetherington (a former Director of Public Prosecutions in England) and William Chalmers (a former Crown Agent for Scotland) conducted a detailed investigation into alleged Nazi war criminals said to be in the UK in 1989, and assessed the need for further legislation. The Hetherington-Chalmers Report concluded that there was reliable evidence to support prosecutions of a number of (unnamed) suspects. They also concluded that existing UK law was inadequate, in that it did not permit the prosecution of Nazi war criminals who had committed crimes abroad. Although the Offences against the Person Act 1861 gave the UK courts extra-territorial jurisdiction to try British citizens for murder wherever the crime was committed, it did not allow for the prosecution of persons who had committed murder or manslaughter abroad if the accused was not a British subject at the time.

The Royal Warrant of 1945, which led to the trial of many war crimes suspects in occupied Europe and the Far East after the war, was over 40 years old, and it was felt that it could not be relied upon so long after the event, and in peacetime. Neither the Geneva Conventions Act 1957 nor the Genocide Act 1969 could be applied retrospectively. There were, at the time, no extradition arrangements between the UK and the Soviet Union, and it was difficult to return suspects to the USSR for trial. The Hetherington-Chalmers Report therefore concluded that further legislation was necessary.

Having considered war crimes legislation in other countries, including Canada and Australia, the authors of the Report recommended that:

10 Ibid, p 31. Also see David Cesarani, *Justice Delayed - How Britain became a refuge for Nazi war Criminals*, 2nd edition, London (2000).

> "British courts [should] be given extra-territorial jurisdiction over murder and manslaughter allegedly committed during the Second World War by persons who are now British citizens or resident in the United Kingdom….In our view, to enact legislation in this country to give British courts jurisdiction over murder and manslaughter committed as violations of the laws and customs of war would not be to create an offence retrospectively. It would be making an offence triable in British courts to an extent which international law has recognised and permitted at a time before the alleged offences in question had been committed." [11]

In the Summary of their findings, they concluded that:

> "there is sufficient evidence to support criminal proceedings for murder against some persons living in the United Kingdom and further investigations may disclose the necessary evidence against other such persons. The cases we have investigated disclose horrific instances of mass-murders, and we do not consider that the lapse of time since the offences were committed, or the age of the offenders provide sufficient reason for taking no action in such cases. We therefore recommend that some action should be taken in each case in which the evidence is adequate." [12]

Following a long and difficult passage through both the House of Commons and House of Lords, the War Crimes Act finally became law on 10 May 1991. Its only offence-creating provision is as follows:

(1) Subject to the provisions of this section, proceedings for murder, manslaughter or culpable homicide may be brought against a person in the United Kingdom irrespective of his nationality at the time of the alleged offence if that offence –
   (a) was committed during the period beginning with 1st September 1939 and ending with 5th June 1945 in a place which at the time was part of Germany or under German occupation; and
   (b) constituted a violation of the laws and customs of war.

(2) No proceedings shall by virtue of this section be brought against any person unless he was on 8th March 1990, or has subsequently become, a British citizen or resident in the United Kingdom, the Isle of Man or any of the Channel Islands.

(3) No proceedings shall by virtue of this section be brought in England and Wales or in Northern Ireland except by or with the consent of the Attorney General or, as the case may be, the Attorney General for Northern Ireland.

Parliament ultimately followed the recommendations of the Hetherington-Chalmers Report, in that only the offences of murder and manslaughter were proscribed in the Act. The Report's authors concluded that the evidence that they had considered disclosed the commission of many crimes in the course of the war, but that murder was both the most serious and most prevalent crime. Concerns about the retroactive nature of the legislation were allayed by the fact that any person committing murder in violation of the laws and

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11 See the Hetherington-Chalmers Report, note 8 above, p 96.

12 Ibid, p 103.

customs of war would have been well aware that such acts were in violation of international law at the time of their commission. Finally, although their Canadian and Australian counterparts had introduced retroactive legislation for other less serious crimes committed during wartime, both countries also had similar extra-territorial offence provisions for 'ordinary' crimes on their statute books. The only similar 'ordinary' offence in UK law with extra-territorial effect was murder. Hence it was considered that "any extraterritorial jurisdiction that is taken should be only in respect of the acts of murder and manslaughter".[13]

1.2.3 Regina v. Antony Sawoniuk

Sawoniuk was not the only person against whom proceedings were brought under the 1991 Act. Szymon Serafinowicz was also charged with the murder of two Jews in Mir in Belarus between 1941 and 1942. His trial was aborted after a specially convened jury determined that he was not fit to plead in January1997. He died seven months later. Neither Serafinowicz nor Sawoniuk appeared in the original list of 37 suspects sent to the British Government by the Simon Wiesenthal Centre in 1986, although it has been suggested that the nature of the allegations both men faced and the fact of their presence in the UK was known, or should have been known, by the British authorities from as early as 1946.[14]

When interviewed by the British authorities, Sawoniuk admitted that he had served in local police units under the command of the German occupiers at the time of the killings. This admission, combined with compelling eyewitness testimony of the terrible events that had occurred in a forest in Belarus 47 years earlier, persuaded Crown counsel to proceed against him. The relevant offence under section 1 of the War Crimes Act 1991 requires the Crown to prove that the murders constituted a violation of the laws and customs of war. After careful consideration, the Crown concluded that as a matter of evidence, charging Sawoniuk with murdering Jews rather than civilians would be less likely to give rise to complex legal arguments about the legality of reprisals against partisans during the German occupation of Domachevo.

Sawoniuk denied responsibility for the murders. However, he made a number of bizarre claims in his police interview, and subsequently at his trial – including the assertion that no Jews were killed by the local police or *Einsatzgruppen* in Domachecvo, which conflicted with records kept by the Germans themselves confirming the extent of the massacres. At the insistence of his counsel, the Judge and Jury paid a macabre visit to the scene of Sawoniuk's crimes and considered the harrowing testimony of two eye-witnesses who were children at the time of the offences, before convicting him of two murders.[15]

The Sawoniuk case brought an end to almost 10 years of debate about the morality and practicality of trying suspected war criminals who had led blameless lives since arriving

13 Ibid, p 96.

14 See John Silverman, 'War Crimes Inquiries - England accused of dragging its feet in prosecuting war criminals', *History Today*, November 2000.

15 I am indebted to Sir John Nutting QC Bt., who prosecuted Sawoniuk at trial, for his assistance in the preparation of this section of this chapter.

in the UK and who, in many instances, were old and infirm. Nonetheless, the public, the Appeal Courts and many of those intimately involved with the Sawoniuk case were convinced that he had received a fair trial – and that the prosecution that led to his conviction was far from the merciless victimisation of a defenceless old man as it had been characterised by sections of the media and amongst prominent opponents of the Act.[16] Instead, in the measured words of the authors of the Hetherington-Chalmers Report, the prosecution demonstrated that "the crimes are so monstrous that they cannot be condoned…. To take no action would taint the United Kingdom with the slur of being a haven for war criminals."[17]

The support for the Rome Statute by the UK delegation at the Rome Conference, and the timely implementation of the International Criminal Court Act 2001 (ICC Act) shortly after the Rome Statute came into force, suggests that the UK is unlikely to be a haven for those that commit the gravest of international crimes in future conflicts.

2 Implementing Legislation

2.1 Title

The full title of the UK implementing legislation is the International Criminal Court Act 2001 Chapter 17 (hereafter ICC Act). A full copy of the text of the ICC Act is available at http://www.legislation.hmso.gov.uk./acts/acts2001/20010017.htm.

2.2 When in force

The International Criminal Court Act 2001 (Commencement) Order 2001 [SI 2001/2161] brought the ICC Act into force on 1 September 2001, save that to the extent necessary for the purposes of making any Order in Council, order, rules or regulations under sections 7(3), 13(3), 49, 50(3) or (4) 79(3) or 80(3), the ICC Act came into force on 13 June 2001.

There are a number of pieces of subordinate legislation that give effect to, inter alia, the Elements of Crimes contained in the Report of the Preparatory Commission for the ICC adopted on 30 June 2000. The relevant regulations are set out in the International Criminal Court Act (Elements of Crimes) Regulations 2001 [SI 2001/2505]. In addition, the UK's reservations to the Rome Statute appear in another Statutory Instrument, entitled the International Criminal Court Act 2001 (Reservations and Declarations) Order 2001 [SI 2001/2559]. There are also Orders in Council relating to the enforcement of fines and forfeitures in the UK ordered by the ICC that appear in the International Criminal Court Act 2001 (Enforcement of Fines Forfeiture and Reparation Orders) Regulations 2001 [SI 2001/2376], as amended by the International Criminal Court Act 2001 (Enforcement of Fines Forfeiture and Reparation Orders) (Amendment) Regulations 2002 [SI 2002/822].

16 See Cesarani, note 5 above.

17 Hetherington-Chalmers Report, note 8 above, p 94.

2.3 Government departments

All prosecutions in England and Wales under the ICC Act will be conducted by the Crown Prosecution Service London Branch 1, at 50 Ludgate Hill, London EC4M 7EX. It is likely that any referrals it receives from either the Foreign and Commonwealth Office (who may receive requests via diplomatic or political channels) or the Home Office would be passed on to the Metropolitan Police SO13 Crimes Against Humanity Unit, c/o New Scotland Yard, the Broadway, London SW1.

2.4 Amendments to existing domestic legislation

There are a number of minor amendments to existing domestic legislation that relate to procedural issues. The changes to the extradition and mutual assistance provisions are dealt with in the next section. The principal substantive amendments are to the Geneva Conventions Act 1957 and the Genocide Act 1969, the latter having been repealed in its entirety. The relevant changes to pre-Act legislation appear as set out in Schedule 10 to the ICC Act.

As the ICC Act is not retroactive in effect, international crimes committed before its coming into force would have to be prosecuted under the Geneva Conventions Act 1957 or the War Crimes Act 1991.

3 Co-operation with the ICC

3.1 Arrest and surrender

The arrest and surrender provisions of the ICC Act are faithful to the corresponding Articles of the Rome Statute, which create a new and innovative regime of global judicial co-operation between States that are parties to the Statute and the ICC.

Arrest is effected using an endorsed ICC warrant or domestic warrant issued by a District Judge sitting at Bow Street Magistrates Court upon receipt of a request for the same issued by the Home Secretary. Provided that the District Judge is satisfied that the ICC has issued a warrant for the arrest of a person suspected of having committed an ICC core crime, or that a person has been convicted at the ICC, he is obliged to endorse the ICC warrant or issue a domestic warrant for the arrest of that person. A warrant so issued or endorsed is called a 'section 2 warrant' throughout the ICC Act. That person will be delivered up to the ICC provided that the District Judge is satisfied that the section 2 warrant has been properly endorsed or issued, and that "the person brought before the court is the person named or described in the warrant" (section 5(2)(a) and (b)).

There is no 'sufficiency of evidence' requirement, and even where it is established that "the person's [to be delivered up] rights have not been respected" under section 5(8) of the ICC Act, that person will in all likelihood be surrendered to the ICC. There are none of the usual bars to extradition available to defendants under the Extradition Act 2003, such as passage of time or double jeopardy. Similarly, a breach of the European Convention on Human Rights, which would be fatal to any extradition under the Extradition Act 2003, would appear to result in a declaration "that a person's rights have not been respected", rather than discharge. The common law right of habeas corpus remains, and there are

provisions in the ICC Act to permit the adjournment of surrender proceedings pending the outcome of such an application.

In short, a 'delivery order' will only be refused where there is some defect in the original warrant or notice of conviction and sentence issued by the ICC, or where the person arrested is not the person described in the warrant. There are provisions for adjourning proceedings whilst questions of admissibility and jurisdiction are determined by the ICC, although it is likely that the defendant will be remanded in custody pending the outcome of any such determination. There are strict time limits that apply at various stages of the arrest and surrender process, and the District Judge may discharge if the timetable is not followed. It is the High Court that has jurisdiction to discharge surrender proceedings upon hearing a successful habeas corpus application, not the Magistrates Court.

3.1.1 The procedure involved in the arrest process

As described above, it is the Secretary of State who initially receives a request from the ICC for the arrest and surrender of a person present (even temporarily) in UK territory. There are four types of request contemplated in the ICC Act: (1) a request in the form of a fully executed warrant from the ICC for the arrest of a person alleged to have committed an ICC crime (section 2(3)); (2) a request that a person be delivered up to the ICC who has already been convicted by the ICC (section 2(4)); (3) a request for the provisional arrest of a person alleged to have committed and ICC crime or alleged to have been convicted by the ICC (section 3); and (4) a separate procedure where a person who is being surrendered by another State to the ICC makes an unscheduled landing in the UK (section 22).

■ *ICC arrest warrant cases*

Where the Secretary of State (the Home Secretary in ICC cases) receives an ICC warrant for the arrest of a person suspected of having committed an ICC crime who is present in the UK, he is obliged to transmit that warrant to an appropriate judicial officer (section 2(1)). An appropriate judicial officer is a Senior District Judge or a District Judge sitting at a Magistrates Court (section 26). Virtually all extradition cases are dealt with by Bow Street Magistrates Court in central London, and it is anticipated that any ICC arrest and surrender cases will be heard there.

The Home Secretary is obliged to transmit any other documentation that accompanies the warrant received from the ICC to the District Judge. Given that there is no evidential sufficiency requirement, there is unlikely to be much in the way of supporting documentation in ICC arrest warrant cases, other than material relating to identity.

Provided that the District Judge is satisfied that the warrant has been issued by the ICC, he endorses the warrant for execution in the UK. Provided that is done, the warrant "shall be treated as if it were a warrant for the arrest of a person for an offence committed in that part of the United Kingdom" (section 14). The warrant does not need to be executed by a police constable, although in reality it is likely that a police officer will accompany the person executing the warrant at the very least. Any person arrested under such a warrant will be kept in custody before being brought before the District Judge at Bow Street "as soon as is practicable" (section 5(1)).

■ *ICC conviction cases*

The procedure is much the same in cases where the Home Secretary receives a request for the arrest of a person convicted by the ICC. Again, the Home Secretary is obliged to transmit the request to a District Judge. The ICC Act contemplates that the request may be in one of two forms. When it is in the form of an ICC warrant for the arrest of a convicted person, the procedure is identical to that described in the section dealing with ICC arrest warrant cases. Where the request is not accompanied by, or is not in the form of an ICC warrant, it must be accompanied by: "(a) a copy of the judgment of conviction, (b) information to demonstrate that the person sought is the one referred to in the judgment of conviction, and (c) where the person sought has been sentenced, a copy of the sentence imposed and a statement of any time already served and the time remaining to be served" (section 2(4)). Both warrants are termed 'section 2 Warrants' under the ICC Act.

■ *Provisional arrest warrant cases*

A provisional arrest warrant procedure is a familiar feature of UK extradition treaties and related domestic legislation. In relation to the ICC, it is designed to provide an immediate response where an urgent request for arrest has been received by the Home Secretary and there has been insufficient time to prepare an ICC arrest warrant. Provisional arrest warrant cases are likely to arise where a person alleged to have committed or been convicted of ICC crimes is on their way to the UK, or has just arrived in the UK from another State. When the Home Office receives a request from the ICC for the arrest of such a person, the Home Secretary passes on the request to a police constable, who then appears before the District Judge at Bow Street and makes an application for a warrant on oath in the normal manner. The police officer is required to give evidence to the effect that s/he has reason to believe "that a request has been made on grounds of urgency by the ICC for the arrest of a person, and that the person is in, or on his way to, the United Kingdom" (section 3(2)(b)). It would appear that the District Judge is obliged to issue a warrant if such an application is made.

The person arrested under a provisional warrant must be brought before the District Judge as soon as is practicable (section 4(1)). If upon that person's first appearance at the Magistrates Court a section 2 warrant is produced, then the matter proceeds as if he had been arrested under that warrant. If no ICC warrant is forthcoming, the defendant is remanded, either in custody or on bail, pending the production of such a warrant. The relevant Order in Council specifying the maximum period a person may be remanded pending production of a section 2 warrant in a provisional arrest case has not yet come into force. As soon as a section 2 warrant is produced, the period of remand is terminated, and the matter proceeds as if the person was arrested under the section 2 warrant (section 4(5)).

■ *Unscheduled landing cases*

Where a person is in the process of being surrendered to the ICC by another State, and that person lands in the UK by sea or air without warning, he may be arrested by any police officer, without a judicially authorised or executed warrant. If arrested under an unscheduled landing warrant, the defendant must be brought to a competent court as soon as is practicable. He is then remanded in custody, pending receipt from the ICC by the Home Secretary of a request for his transit. Such a request must be received within 96 hours of that person's arrest under the unscheduled landing warrant (section 22(3)). If no

ICC transit request is received in that period, the Magistrates Court must be notified and the person discharged. The Home Secretary retains discretion in unscheduled landing cases not to accede to the request of the ICC to surrender (section 22(1)(b)).

3.1.2 The procedure involved in the surrender process

As we have seen, the person arrested under a section 2 warrant or a provisional warrant is brought before the District Judge at Bow Street Magistrates Court as soon as is practicable. The Court then considers whether it is appropriate for the person to be delivered up to the ICC in The Hague, or the custody of a State enforcing a sentence of imprisonment on behalf of the ICC.

Provided that the ICC warrant has been properly endorsed by the District Judge under section 2(3), or has been properly issued under section 2(4), and the person in custody is the person on the warrant, the Court "shall make a delivery order". The Magistrates Court is expressly not permitted to enquire whether the warrant issued by the ICC was duly issued, or "in the case of a person alleged to have committed an ICC crime, whether there is evidence to justify his trial for the offence he is alleged to have committed" (section 5(5)(b)). In other words, the delivery order proceedings are simply not concerned with evidence at all.

In the arrest and surrender provisions of the ICC Act there are none of the recognised human rights protections now routinely built into UK legislation. Consistent with Article 59 of the ICC Statute, the District Judge only has the power to declare that a person's rights have not been respected during the arrest and surrender process. The Court is unable to make any other order or grant any other remedy (section 5(7)). However, any such declaration must be passed on to the ICC by the Home Secretary. It is not clear how this particular provision is consistent with the Human Rights Act 1998, which incorporates the European Convention on Human Rights (ECHR) into domestic law. Procedurally, the surrender process is susceptible to review and to appeal, and persons brought before the courts pursuant to ICC surrender requests are entitled to legal representation. It should be noted that the extradition process in the UK does not attract the full panoply of rights under the European Convention on Human Rights in any event.

Indeed, it is only recently that the courts in England have recognised that any form of challenge to a person's detention under an extradition warrant can be made before a court of law, as opposed to the Secretary of State. In a long line of authorities from *Atkinson*[18] (1971) to *Schmidt*[19] (1995), the House of Lords held that the Magistrates Court did not have the power to stay extradition proceedings as an abuse of process, as the Home Secretary could always refuse to surrender a fugitive where there was evidence that the requesting State had acted in bad faith. However, following the incorporation of the ECHR into UK law under the Human Rights Act 1998, the Administrative Court has decided that the power to stay extradition proceedings where there has been a breach of the detained person's rights under Article 5 of the ECHR should be exercised by the courts, not the executive.[20]

18 *Atkinson v. U.S.A. Government* [1971] A.C. 197.

19 *In re Schmidt*, 1 A.C. 339 (1995) (HL).

20 *R (Kashamu) v Governor of Brixton Prison*, 2 *Weekly Law Reports (WLR)* 907 (2002).

Whether similar arguments will be raised by the defence in surrender proceedings remains to be seen. However, it is clear from Part 9 of the ICC Statute and the UK ICC Act that successful challenges to surrender are likely to be a rare occurrence.

Arrest and surrender proceedings under the ICC Act differ from extradition proceedings in another important way. Under the Extradition Act 2003 and its predecessors, it was the Secretary of State who made the final decision as to whether the person whose extradition was sought in the request was sent to the requesting State. Hence even where extradition proceedings were successful, in the sense that the Magistrate ordered a person's extradition, the Home Secretary could still refuse to extradite. Under the arrest and surrender scheme in the ICC Act, however, the Home Secretary has no power to refuse to send an arrested person to the ICC once a delivery order has been made by the District Judge.

The delivery order proceedings may be avoided if the person arrested consents to his delivery up to the ICC. Where the District Judge refuses to make a delivery order, the matter cannot automatically be discharged. The District Judge must remand the defendant in custody or on bail, and immediately notify the Secretary of State of his decision. If the Magistrates Court is notified "without delay" by the Home Office that the Home Secretary intends to appeal against the District Judge's decision to refuse the order for delivery up, the Court must continue to remand the defendant. The Secretary of State has the right to appeal to the High Court without permission.

Where the Home Secretary appeals, the High Court considers it by way of rehearing. If the High Court allows the appeal, it may make the delivery order or refer the matter to the competent court to make a delivery order. If the High Court dismisses the appeal, the Secretary of State may appeal to the House of Lords with the permission of the High Court or the House of Lords. The person whose arrest and surrender is sought also has a right of appeal prescribed in the ICC Act.

Where the Magistrates Court makes a delivery order, the Home Secretary cannot make directions for the execution of the order until 15 days have passed, so as to allow adequate time for a habeas corpus application to be made on behalf of the defendant if appropriate. It may be that habeas corpus proceedings prove to be the principal route of challenge to the surrender process generally, and orders to deliver up in particular.[21]

Once the order is made, the delivery order is sufficient authority for any person acting in accordance with the instructions of the Home Secretary to keep the person in custody and deliver him up to the ICC or the State of enforcement.

In some instances, it may be that the person sought by the ICC is either already the subject of domestic criminal proceedings in the UK, or is wanted by another international tribunal, such as the ICTY. In such cases, the Home Secretary can consult with the domestic court where the proceedings are ongoing, and if necessary direct that the proceedings be discontinued (Schedule 2 of the ICC Act).

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21 See the procedure on habeas corpus applications in Clive Nicholls QC, Clare Montgomery QC, Julian P Knowles, *The Law of Extradition and Mutual Assistance – International Criminal Law: Practice and Procedure* (2002), pp 199-228.

■ *Bail*

Persons arrested provisionally or otherwise may apply for bail. In cases in England and Wales the general bail legislation applies as if the person were a fugitive offender.

To comply with Article 59 of the ICC Statute, the court must notify the Secretary of State that a bail application is to be made, so that he may consult with the ICC. Bail may not be granted without full consideration of the views of the ICC. Further, the court needs to consider at the hearing the test set out in Article 59(4) of the ICC Statute, namely whether, given the gravity of the offence or offences alleged to have been committed or for which the person has been convicted, there are urgent and exceptional circumstances justifying release on bail. The court must further consider whether any necessary measures have been or will be taken to ensure that the person will surrender in accordance with the terms of the bail. It is clear from these provisions that the Bail Act does not apply in arrest and surrender proceedings to the same extent that it does in extradition hearings.

■ *Failure to deliver up within 40 days*

The legislation also contemplates circumstances where the person is not delivered up within 40 days or where the ICC advises that the person is no longer required to be surrendered. In the former case the person may make an application for discharge, which should be granted unless reasonable cause is shown for the delay. In the latter case the appropriate executive officer will notify the judicial authorities, who shall order the discharge of the person.

■ *Transit*

As in extradition regimes, the legislation also makes provision for transit through the UK of a person being surrendered to the ICC and for holding a person in custody for 96 hours in the case of an unscheduled landing, pending receipt of a request for transit from the ICC.

3.1.3 Extradition and international crimes

A detailed consideration of UK and EU extradition law is beyond the scope of this work. However, there are two features of the Extradition Act 2003 that are worthy of review. First, "crimes within the jurisdiction of the International Criminal Court" are 'European Framework List offences' for the purposes of the new European Arrest Warrant (EAW) procedure under Part 1 of the 2003 Act.[22] As such, relevant member States[23] (not confined to the EU) who issue or receive requests for extradition in ICC core crimes cases do not have to meet formal dual criminality requirements, are obliged to surrender within strict time limits and do not have to satisfy any evidential sufficiency requirement. There are also no political offence exception provisions under the new EAW procedure.

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22 Article 2 of the Council Framework Decision of 13 June 2002 "on the European Arrest Warrant and the surrender procedures between member States", *Official Journal of the European Communities* L 190/1.

23 At the time of writing; Austria, Belgium, Cyprus, Denmark, Finland, France, Hungary, Ireland, Latvia, Lithuania, Luxembourg, Malta, The Netherlands, Poland, Portugal, Slovenia, Spain and Sweden. See The Extradition Act 2003 (Designation of Part 1 Territories) Order 2003 [SI 2003/3333] and the Extradition Act 2003 (Amendment to Designations) Order 2004 [SI 2004/1898].

In addition, a person whose extradition is sought from the UK to another State for an ICC crime, or for grave breaches of the Geneva Conventions under the 1957 Geneva Conventions Act, cannot rely on a *nullem crimen sine lege* bar to his surrender. Section 196 of the Extradition Act 2003 provides that "it is not an objection to extradition under this Act that the person could not have been punished for the offence under the law in force at the time when and in the place where he is alleged to have committed the act of which he is accused or of which he has been convicted".

3.2 Other forms of assistance to the Court

Part 3 of the ICC Act implements the UK's obligations under Article 93 to provide investigative and prosecutorial assistance to the ICC. Article 93 of the ICC Statute obliges State Parties to comply with the requests of the ICC and offer a myriad of different forms of legal assistance when required to do so. The ICC Act makes extensive provision for legal assistance in Part 3 of the Act, and at Schedules 3 to 6.

In general terms, UK criminal justice procedures have been 'cut and pasted' to fit the demands of Article 93, and procedures for the taking and production of evidence (section 29) entry, search and seizure (section 33) and the taking of fingerprints and non-intimate samples (section 34 and Schedule 4) simply refer back to the relevant domestic criminal and mutual assistance legislation. For many practitioners, there will be nothing new in many of these procedures, and much of Part 3 of the ICC Act will cover familiar territory. However, there are also less familiar procedural measures, which are drawn directly from and are consistent with Part 9 of the Rome Statute. This blend of measures perfectly articulates the marriage of domestic and international criminal law that is a consistent feature of this legislation.

The sections in the Act follow the structure of Article 93 of the ICC Statute and address each of the sub-paragraphs of paragraph 1, creating powers and procedures for each form of assistance as follows:

3.2.1 Questioning of a person under investigation or subject to prosecution

Consistent with domestic law, the questioning of a suspect or person subject to an ICC prosecution can only be undertaken with the person's consent under the ICC Act. In addition, the person must be afforded the rights set out in Article 55(1) of the ICC Statute[24] and be questioned in accordance with the procedure set out in Article 55(2).

3.2.2 Taking or production of evidence

Requests of this nature will be referred by the Secretary of State to a nominated court in England and Wales or Northern Ireland that can receive the relevant evidence. The court will use its general powers applicable in other court proceedings to secure the attendance of witnesses and the production of documents or other articles. The legislation provides for the public to be excluded from these proceedings where necessary to protect victims,

24 Not to be compelled to incriminate himself or confess to guilt, not to be subjected to any form of coercion, duress or threat, torture or any form of cruel, inhuman or degrading treatment or punishment, to have the assistance, free of charge, of an interpreter/translator, not be subjected to arbitrary arrest or detention.

witnesses, persons subject to investigation or prosecution as well as sensitive or confidential legislation.

3.2.3 Service of process

Requests for service of documents in England, Wales or Northern Ireland will be sent to relevant chief officers of police for personal service. The chief officer will report back on when and how the document was served or on the reasons why service was not possible.

3.2.4 Transfer of prisoner to give evidence or assist in investigation

Section 32 of the ICC Act provides a framework of powers for the temporary transfer of a prisoner in the UK to the ICC to provide assistance or testimony.

3.2.5 Entry, search and seizure

The obligation regarding search and seizure is implemented by providing that the existing criminal law powers for search warrants and other relevant orders applicable to serious arrestable offences will apply in relation to an ICC crime.

3.2.6 Taking of fingerprints or non-intimate samples

Schedule 4 to the legislation sets out a detailed procedure for the taking of fingerprints and non-intimate samples, which includes the use of nominated courts to issue the relevant orders. The procedure contemplates both consensual and non-consensual scenarios. The schedule provides for limitations on the use of the samples taken and for the application of normal rules relating to the ultimate destruction of any samples taken.

3.2.7 Orders for exhumation

Similar to the provision for search and seizure, orders for exhumation are made available by applying the relevant powers of the Coroners Act to ICC proceedings.

3.2.8 Provision of records and documents

Interestingly, the UK law contains a special provision dealing with requests for records of evidence given in proceedings in respect of conduct that would constitute an ICC crime or the results of any investigation of such conduct with a view to such a proceeding. It is left to the Secretary of State to take appropriate steps to obtain the relevant documents and records.

We can see from the brief survey above that there are some interesting innovations alongside more familiar provisions. For example, where a person is suspected of having committed an ICC core crime, or is being prosecuted by the ICC, he can be questioned in the UK pursuant to a request received from the ICC. However, he can only be questioned if he consents to being interviewed and is informed of his rights under Article 55 of the ICC Statute. There is no provision in the ICC Act as to how this questioning would take place, by whom or where. In addition, the protections afforded to suspects by Article 55 are far broader than those enjoyed by suspects in domestic criminal proceedings. For

example, no one may be compelled to answer questions under Article 55. There have been compulsory powers of questioning in the UK since the 1987 Criminal Justice Act, and an abrogated right to silence since 1996. In marked contrast with Article 55(2)(b) of the ICC Statute, an inference of guilt may be drawn by the tribunal of fact where a suspect has remained silent in response to a question put to him by an investigator or prosecutor in UK criminal proceedings.

By way of contrast, a witness called to give evidence under the mutual assistance provisions of section 29 of the ICC Act could be compelled to attend court and produce documents and other material using the witness summons procedure available in domestic criminal proceedings (See section 29(4)).

3.2.9 Freezing and forfeiture

The ICC Act provides domestic courts with the power to investigate the proceeds of an ICC crime (section 37), to freeze or seize the proceeds of an ICC crime pending forfeiture by the ICC upon conviction (section 38) and to forfeit the proceeds of ICC crimes on the order of the ICC (section 49). The procedures for investigation and obtaining freezing and seizing orders are set out in Schedules 5 and 6 of the Act. Detailed provisions in relation to the confiscation of the proceeds of ICC crimes on the order of the ICC have not yet been made, although any application for forfeiture will have to be made to the High Court. [25]

Where the Secretary of State (the Home Secretary) receives a request from the ICC for assistance in ascertaining whether a person has benefited from an ICC crime or identifying the whereabouts of property derived directly or indirectly from an ICC crime, s/he may direct a constable to make an application for a "production or access order" (section 37(1)). In certain circumstances, where it would be inappropriate or impracticable to grant a production or access order, a Circuit Judge may issue a search warrant.

The relevant procedure is set out in Schedule 5 to the Act. In summary, a Circuit Judge may grant an application for a production or access order where s/he is satisfied that there are reasonable grounds for suspecting that the person specified in the application has benefited from ICC crimes and "the material to which the application related is likely to be of substantial value to the investigation for the purposes of which the application is made" (para. 2(1)). A production order requires the person to whom the order is directed "to produce the material to a constable within a specified period for the constable to take away". An access order requires the person to give a constable access to the material within a specified period. The specified period is usually seven days, although the Circuit Judge can allow a longer period if appropriate.

A Circuit Judge may issue a search warrant to enter and search premises and seize and retain any material found there that is likely to be of value to the investigation in one of three circumstances: (1) where either the production or access order has not been complied with (para. 10(3)); (2) where it is not practicable to communicate with any person entitled to produce the material and immediate access to the material is required (para.

25 See International Criminal Court Act 2001 (Enforcement of Fines Forfeiture and Reparation Order) (Amendment) Regulations 2002 [2002/822].

10(4)); or (3) where the material cannot be particularised and it is not practicable to communicate with any person entitled to produce the material and immediate access to the material is required (paras. 10(5) & (6)).

The procedure for freezing assets or property is initiated by the Secretary of State, who receives a request from the ICC for "assistance in the freezing or seizure of proceeds, property and assets or instrumentalities of crime for the purposes of eventual forfeiture" (section 38). A freezing order may be made by the High Court if it is satisfied that a forfeiture order has been made in proceedings before the ICC, or that there are reasonable grounds for believing that a forfeiture order may be made in such proceedings (Schedule 6, para. 2). The effect of a freezing order is to "prohibit any person from dealing with the property specified in the order otherwise than in accordance with the order". Property may also be seized in order to prevent its removal from the jurisdiction. Forfeiture may be ordered by the High Court upon the making of such an order by the ICC, subject to hearing representations from any third parties affected by the order.

3.3 Obligations outside the context of other forms of co-operation

3.3.1 Sittings of the ICC

Under section 2 of Schedule 1 to the Act delegated legislation in the form of an Order in Council can be introduced to make such provision as may be necessary or expedient to enable sittings of the ICC to be held in the UK. The section makes specific reference to provisions for the detention of a person in the custody of the ICC that would be necessary in order for the accused to participate in the proceedings held in the UK.

3.3.2 Legal capacity, privileges and immunities

Under Schedule 1 an Order in Council can be used to confer on the ICC the legal capacities of a body corporate. Similarly this mechanism will be used to confer the relevant privileges and immunities for the ICC, ICC judges, prosecutors and officials and counsel, experts witnesses and other persons involved in the proceedings in accordance with the ICC Statute or a related agreement to which the UK is or will be party. The latter is clearly a reference to the Agreement on Privileges and Immunities, which is now in force.

3.3.3 Extension of administration of justice offences

Under Article 70 of the ICC Statute States are obliged to extend offences against the administration of justice (such as giving false testimony and intimidating witnesses) in a domestic context to ICC proceedings for offences committed within its territory or by its nationals. Jurisdiction over such offences is concurrent with the ICC. The UK law accomplishes this through section 54 of the ICC Act, which provides that the offences under Article 70.1 of the ICC Statute may be dealt with as for the corresponding domestic offences. The specific corresponding domestic offences are then listed in the section. The offences apply to acts committed in the territory (England and Wales) or by nationals or permanent residents as mandated by the ICC Statute.

3.3.4 Measures for the enforcement of sentences

■ *Enforcement of custodial sentences*

The ICC does not have facilities for convicted prisoners. Part 4 of the UK law provides a basis for prisoners who receive custodial sentences at the ICC to be accepted to serve out their time in the UK. Once the Secretary of State informs the ICC that a designation of the UK as the State of enforcement is accepted, the prisoner will be brought to the UK. Thereafter the prisoner shall be treated as if he were subject to a sentence of imprisonment in the UK, with some exceptions.

ICC prisoners will not be subject to the Repatriation of Prisoners Act (which would allow for State to State transfers that in this case can only be ordered by the ICC) and Schedule 1 to the Crime Sentences Act (which allows the transfer of prisoners within the British Isles). There are also a number of statutory provisions relating to matters such as the calculation of the sentence, remission, discharge at weekend or holidays that are made inapplicable to ICC prisoners under Schedule 7 as this would otherwise conflict with the UK's obligations under Part 10 of the ICC Statute.

The law also provides powers for the temporary transfer of the prisoner to the ICC or the transfer of the prisoner into the custody of another State if the designation of the State of enforcement changes. Further there is provision to transfer the prisoner within the UK.

■ *Enforcement of other orders*

The UK has further obligations under the ICC Statute to enforce ICC fines, forfeitures or reparation orders. These obligations are met in section 46 of the ICC Act, which empowers the Secretary of State to make provision for enforcement by regulation. The regulations shall provide for the registration of the relevant order by a court as a precondition to enforcement. The legislation recognises the need to protect third party rights by providing that a court may not exercise any powers of enforcement unless satisfied that a reasonable opportunity has been given for persons with an interest in the property to make representations, and that the exercise of the powers will not prejudice the rights of *bona fide* third parties.

4 Incorporating the Crimes

It is a criminal offence in the UK to commit genocide, war crimes or crimes against humanity. The definitions of the three core ICC crimes in English law are identical to those in Articles 6, 7 and 8[26] of the Rome Statue, which are incorporated directly into UK law by Schedule 8 to the ICC Act.[27] The Elements of Crimes are also incorporated into UK law through the passage of secondary legislation under section 50(2) of the ICC Act. The

26 With one exception: Article 8(2)(b)(xx) (indiscriminate means and methods of warfare) is excluded. This provision was inserted in the ICC Statute with a view to the eventual prohibition of the use of nuclear weapons and other weapons of mass destruction. As yet no "comprehensive prohibition" on such methods and means of warfare alluded to in this provision of the ICC Statute has been agreed. As the UK had a 'nuclear deterrent' for many years, Parliament clearly envisaged very real obstacles to the incorporation of this provision.

27 See the discussion of 'dualism' above (part 1.2).

relevant regulations setting out the Elements of Crimes in detail, and which must be taken into account by any UK court when interpreting the three core ICC crimes, came into force shortly after the ICC Act became law.[28]

There are also other offences connected to the commission of the three core crimes that are created by the ICC Act. These new offences, described as "ancillary offences" in section 52 of the ICC Act, are defined in section 55. They are familiar to lawyers who practice in common law jurisdictions, and are often described as 'inchoate offences'. The ancillary offences are "aiding, abetting, counselling or procuring the commission of an offence";[29] common law "incitement to commit an offence"; "attempting[30] or conspiring[31] to commit an offence"; and "assisting an offender"[32] or "concealing[33] the commission of an offence". The relevant offence for the purposes of section 52 is one of the three core crimes proscribed in section 51 of ICC Act.

There are also offences created in the ICC Act that are designed to mirror Article 70.1 of the ICC Statute, which proscribes acts that are "against the administration of justice". The proceedings contemplated by the ICC Act are those before the ICC, rather than domestic proceedings under section 51 or 52. Section 54(1) of the ICC Act provides that a person who intentionally commits any of the acts set out in Article 70.1 "may be dealt with as for the corresponding domestic offence committed in relation to a superior court in England and Wales". The corresponding domestic offences are set out in section 54(3) of the ICC Act and include perjury, interfering with witnesses, corruption and bribery.

5 Jurisdiction of Domestic Courts and Principles of Liability

Jurisdiction under the ICC Act is exercised by the UK courts on two grounds. First, the UK courts have jurisdiction under the ICC Act to try crimes under section 51 (genocide, crimes against humanity and war crimes) where the acts complained of were committed in the UK. This species of jurisdiction is usually described as territorial jurisdiction.

Secondly, the UK courts have jurisdiction to try crimes under section 51, even if the acts complained of were committed outside UK territory, where the crimes were alleged to have been committed by a UK national, a person "resident in the UK" or a "person subject to UK service jurisdiction." The definition of a UK national appears in section 67 of the ICC Act, which in turn refers to relevant immigration nationality legislation. A person "subject to UK service jurisdiction" is also given a precise statutory definition. A UK resident is given a rather tautologous definition in section 67, being described as "a person who is resident in the United Kingdom". It is likely that any decision as to whether or not a person charged with an offence under section 51 of the ICC Act who is not a UK citizen or serviceman, but who is alleged to be a resident in the UK, will turn on the facts of each individual case.

28 International Criminal Court Act (Elements of Crimes) Regulations 2001 [SI 2001/2505].

29 See section 8, Accessories and Abettors Act 1861.

30 See section 1, Criminal Attempts Act 1981.

31 See section 1, Criminal Law Act 1977.

32 See section 4(1), Criminal Law Act 1967.

33 See section 5(1), Criminal Law Act 1967.

During the passage of the International Criminal Court Bill through the House of Lords, two scenarios were discussed by a Government Minister, Baroness Scotland, during the debate over the relevant clause. On the one hand, Baroness Scotland suggested that a person who had been in the UK for some months, but had no intention of residing in the country permanently, might not be subject to the jurisdiction of the UK courts. Alternatively, a person who had been in the UK for only a few days, but who intended to live permanently in this country, might fall within the definition that appears in section 67.[34] A person who is resident in the UK for the purposes of the ICC Act does not have to have been a resident at the time that the offence was alleged to have been committed. [35] This species of jurisdiction is usually described as active nationality principle jurisdiction.

The position is rendered slightly more complicated by the jurisdictional provisions as they relate to the ancillary offences provisions of section 52 of the Act. It is contemplated that individuals can be prosecuted under section 52 even where the act to which the conduct is ancillary was committed outside the UK. The act in this context is an act that if committed in the UK would be an offence under section 51 (genocide, crimes against humanity or war crimes). For example, an offence is committed where a person who is resident in the UK incites another to commit a war crime outside the UK. Even where both the act and ancillary conduct take place abroad, it may be prosecuted under section 52 if the suspect is a UK national, resident in the UK or subject to UK service jurisdiction.

It is a general common law rule that the English criminal law is not retroactive. This rule was expressed by the House of Lords in *Waddington v. Miah*.[36] Article 7 of the ECHR prohibits not only the creation of retroactive offences by legislation, but also the retroactive application of existing criminal offences through the development of the common law. Article 7 is subject to the qualification that it does not "prejudice the trial and punishment of any person for any act or omission which, at the time it was committed, was criminal according to the general principles of law recognised by civilised nations". This provision permitted the passing of the War Crimes Act 1991 into law. However, it is quite clear from the ICC Act 2001 and the relevant Parliamentary debates, taken together with the Rome Statute, that the new ICC Act does not apply retroactively.

The usual principles of liability of the English criminal law apply to offences under the ICC Act. Criminal liability potentially attaches to all those over the age of 10 years in the UK. Provisions for the trial of child and juvenile defendants in the English criminal courts are complex and outside the scope of this work. In general terms, all those over the age of 10 can potentially be tried on indictment in adult courts. All offences under the ICC Act are triable on indictment only.

6 Rights of the Accused

The ICC Act forms part of the ordinary criminal law of the UK. As such all the rights of the accused that are available in criminal proceedings, that emanate from the common law

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34 Official Report, House of Lords, 12 February 2001, Hansard Volume 622 c.85.

35 Section 68 of the Act.

36 1 *WLR* 683 (1974).

and statute, in addition to the protections afforded by the ECHR, apply to those persons who are investigated and charged with offences under the ICC Act.

7 Available Defences

The Rome Statute sets out a comprehensive framework of general principles of liability and defences in Part 3 of the Statute. The ICC Act expressly incorporates the relevant parts of Article 28 (responsibility of commander and other superiors) and Article 30 (mental element) at sections 65 to 70.[37] In addition, section 66(4) expressly provides that "in interpreting and applying the provisions of this section (which corresponds to Article 30 [of the Rome Statute]) the court shall take into account any relevant judgment or decision of the ICC….account may also be taken of any other relevant international jurisprudence". An almost identical provision appears at section 65(5) of the Act in relation to command responsibility.

There is nothing in the ICC Act that suggests that defendants could not avail themselves of defences traditionally available to those who are tried in indictment in the criminal courts in the UK, including duress, self defence and mistake.

8 Immunity and International Crimes

The immunities usually afforded to Heads of State, senior governmental officials and diplomats in UK law are of limited application in proceedings under the ICC Act. Section 23(1) provides that: "Any state or diplomatic immunity attaching to a person by reason of a connection with a State Party to the Rome Statute does not prevent proceedings under this Part in relation to that person". State or diplomatic immunity in the ICC Act "means any privilege or immunity attaching to a person, by reason of the status of that person or another as head of state, or as representative, official or agent of a state" under relevant domestic law[38] and "any rule of law derived from customary international law".

Where the person who is potentially the subject of domestic investigation or even proceedings under the ICC Act is a national of a State that is not a party to the ICC Statute, s/he may benefit from the protections afforded to State officials and diplomats under relevant domestic and customary international law. Of course that immunity can be waived, and provided that confirmation of the waiver of immunity is received by the ICC, that person can be surrendered to the ICC or subjected to domestic proceedings under the ICC Act.[39]

Hence, with certain exceptions, it is only the nationals of State Parties to the Rome Statute who are deprived of the protections afforded by the doctrine of immunities. There are a number of interesting practical dilemmas that arise as a result of the drafting of this particular section, which are best explained by way of an example. A non-UK national can

37 See Richard May and Stephen Powles, 'Command Responsibility - A New Basis of Criminal Liability in English Law?', 21 *Criminal Law Review (Crim LR)* 363-378 (2002).

38 Including the Diplomatic Privileges Act 1964 (c. 81), the Consular Relations Act 1968, the International Organisations Act 1968 or the State Immunity Act 1978.

39 See section 23(2) of the ICC Act.

be tried in the UK courts for an offence under sections 51 or 52 of the ICC Act where the crime was committed in UK territory. Where the non-UK national accused of the relevant crime is a national of a State that is not a party to the Rome Statute, (e.g. the United States) AND is a person to whom diplomatic immunity usually attaches, that person may be immune from the process of the criminal courts in the UK.

However, where that person is charged with a core crime that is international in character, (e.g. war crimes, crimes against humanity or genocide) the protection from the criminal process of the UK courts afforded by the operation of the doctrine of immunities may be limited, according to whether that person is still in office, and whether the acts concerned were committed in a personal or official capacity.

Hence, if the United States national in our example was a senior member of the United States Government, he would benefit from personal immunity or immunity *rationae personae* for the duration of his time in office. Once he had left office he would benefit from functional immunity or immunity *rationae materiae* after he left office.

The most recent exposition of the distinction between personal and functional immunity appears in *DRC v. Belgium*.[40] That case was concerned with an Interpol warrant issued for the arrest of the Congolese Foreign Minister for crimes against humanity and war crimes. In that case the International Court of Justice (ICJ) held that;

> "…the functions of a Minister for Foreign Affairs are such that, throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability. That immunity and that inviolability protect the individual concerned against any act of authority of another State which would hinder him or her in the performance of his or her duties.
>
> In this respect, no distinction can be drawn between acts performed by a Minister for Foreign Affairs in an 'official' capacity, and those claimed to have been performed in a 'private capacity', or, for that matter, between acts performed before the person concerned assumed office as Minister for Foreign Affairs and acts committed during the period of office. Thus, if a Minister for Foreign Affairs is arrested in another State on a criminal charge, he or she is clearly thereby prevented from exercising the functions of his or her office. The consequences of such impediment to the exercise of those official functions are equally serious, regardless…whether the arrest relates to acts allegedly performed before the person became the Minister for Foreign Affairs or to acts performed while in office, and regardless of whether the arrest relates to alleged acts performed in an 'official' capacity or a 'private' capacity. Furthermore, even the mere risk that, by travelling to or transiting another State a Minister for Foreign Affairs might be exposing himself or herself to legal proceedings could deter the Minister from travelling internationally when required to do so for the purposes of the performance of his or her official functions….
>
> ….after a person ceases to hold office…he or she will no longer enjoy all of the immunities accorded by international law in other states. Provided it has jurisdiction under international law, a court of a state may try a former Minister of Foreign Affairs

40 In *The Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium),* ICJ, 14 February 2002, para. 52 ('*DRC v. Belgium*').

> of another state in respect of acts committed prior to or subsequent to his or her period in office, as well as in respect of acts committed during that period of office in a private capacity."

The distinction between personal and functional immunity afforded to diplomatic envoys in the English Courts was explained with admirable clarity by Diplock L J, as follows:[41]

> "The immunity of an envoy from suit or legal process arises from the duties owed by states to one another in international law. In respect of acts of an envoy in his private capacity the purpose of his immunity from suit or legal process is so that he may perform his duties to his government without harassment while 'en poste'. The immunity is from legal process, not from liability, and its purpose is fulfilled when he ceases to be 'en poste' and has had a reasonable time to wind up his affairs in the country to which he is accredited.…But quite different considerations apply to acts done by him in his official capacity. Such acts are done on behalf of his government. His government being a foreign sovereign government, under the principles of English law…is immune from the jurisdiction of the English courts. The propriety of its acts cannot be examined in a municipal court unless it consents to waive its immunity. A foreign sovereign government, apart from personal sovereigns, can only act through agents, and the immunity to which it is entitled in respect of its acts would be illusory unless it extended also to its agents in respect of acts done by them on its behalf. To sue an envoy in respect of acts done in an official capacity would be, in effect, to sue his government irrespective if whether the envoy had ceased to be 'en poste' at the date of the suit."

It can be seen that the functional immunity enjoyed by diplomatic agents and government officials is therefore "grounded on the notion that a state official is not accountable to other states for acts he accomplishes in his official capacity and that therefore must be attributed to the state". On the other hand, his personal immunity is predicated on the notion that the activities of (serving) diplomatic agents must be immune from foreign jurisdiction to "avoid foreign states either infringing sovereign prerogatives of states or interfering with the official functions of a foreign state agent under the pretext of dealing with an exclusively private act".[42]

It is clear from the decisions in *DRC v. Belgium* and *Pinochet No. 3*[43] that state officials or diplomatic agents who are not nationals of a State that is party to the Rome Statute, who are said to have committed core international crimes in UK territory, are immune from the process of the UK courts whilst in office, whether or not those crimes were committed in a personal or official capacity.

Where the same scenario arises, but the person accused of committing the core international crime had left office, the position is less clear in law. If the international crime was said to have been committed in a private capacity, there is no immunity from

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41 In Z*oernick v. Waldock* [1964] 1 *WLR* 675 at 692.

42 Cassese, *International Criminal Law,* Oxford (2003).

43 See above, note 6.

process. However, even where the relevant criminal act is said to have been committed in an official capacity, the accused may not be able to claim immunity from prosecution. Lord Hope in *Pinochet No. 3* declared that there were two types of criminal acts that gave rise to exceptions to functional immunity in customary international law: "The first relates to criminal acts which the head of state did under the colour of his authority as head of state but which are in reality for his own pleasure and benefit…[e.g.]…the head of state who kills his gardener in a fit of rage or who orders his victims to be tortured so he may observe them in agony…The second category relates to acts the prohibition of which has reached the status of *jus cogens*".

Therefore, where it is alleged that a diplomat or State official who has left his/her post has committed an international crime of a *jus cogens* character whilst in office in an official capacity, in English law he may not be immune from the process of the UK courts.

There is a sting in the tail of section 23. Section 23(4) grants the Secretary of State discretion (in consultation with the State concerned and the ICC) to halt proceedings against a person alleged to have committed international crimes, where that person would have been entitled to immunity but for the immunity cancelling provisions of section 23(1) and 23(2) discussed above. It is not clear from the section what the relevant State is, but it is assumed it is the sending State. The Secretary of State may exercise his discretion "in any particular case", suggesting that the interests of diplomacy, international comity and the peaceful relations between States are likely to remain a relevant factor in the exercise of prosecutorial discretion in UK international criminal cases for some time yet.

9 Trial Procedure and Punishment in Domestic Courts

All proceedings under the ICC Act are on indictment; that is, they are heard in the Crown Court. Any prosecution must be with the consent of the Attorney General, the senior government law officer. As such, all relevant laws of procedure as apply to criminal proceedings in indictment in UK courts are applicable to proceedings under the ICC Act. Expressly included are the provisions that provide protection for child and vulnerable witnesses, and victims of sexual offences (see sections 57 of the ICC Act).

As to sentencing, all offences under the ICC Act, except murder, are punishable with a term of imprisonment of up to 30 years. In English law, the sentence for murder is "fixed by law" following the passage into law of the Murder (Abolition of Death Penalty) Act 1965. Section 1 of that Act provides "No person shall suffer death for murder, and a person convicted of murder shall…be sentenced to imprisonment for life". In section 53(5) of the ICC Act, a person convicted of "an offence involving murder, or an offence ancillary to an offence involving murder, shall be dealt with as for an offence of murder or, as the case may be, the corresponding ancillary offence in relation to murder". In other words, life imprisonment upon conviction.

In relation to those offences set out in section 54 (offences against the administration of justice) the relevant penalties are those that are available in domestic law for the corresponding domestic offences.

10 Article 98 Agreements

The UK Government considers itself to be the United States' closest ally. It is perhaps for this reason that it is not easy to discern the UK position on Article 98 Agreements, discussed elsewhere in this Guide, although the Government has apparently recently declared that it believes US concerns about the ICC to be unjustified.[44] However, the UK did sign up to the common EU position, which was adopted by all 15 member States in September 2002. The essence of these guidelines is that such agreements are allowed under Article 98(2) of the Statute provided that they comply with the following basic principles:

- They must only cover persons who are not nationals of a State Party;
- They must have operative provisions to ensure that persons who have committed crimes falling within the jurisdiction of the Court do not enjoy immunity;
- They should cover only persons officially 'sent' by the State in question on government business; they cannot cover all that State's citizens.[45]

Regardless of the US assault on the authority and effectiveness of the ICC, the UK has been wholehearted in its support for the ICC and its institutions. This is evidenced by its active participation in the 'Like Minded Group' at the Rome Conference and its support for the establishment of a permanent international criminal court, together with the rapid passage of the relevant implementing legislation into UK domestic law.

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44 See the latest reports in the UK media, for example David Rennie, 'Republicans In Threat To Block Overseas Aid', *The Daily Telegraph,* 27 November 2004, London.

45 Also the EU position is set out in greater detail in, *Guiding Principles concerning Arrangements between a State Party to the Rome Statute of the International Criminal Court and the United States Regarding the Conditions to Surrender of Persons to the Court*, Council Of Europe Draft Council Conclusions on the ICC. Brussels, 30 September 2002. Available at: http://www.iccnow.org/documents/declarationsresolutions/intergovbodies/EUConclusions30Sept02.pdf

About the Contributors

Ben Brandon

Ben Brandon is a practising barrister specialising in domestic UK and international criminal law at 3 Raymond Buildings, London. He attended universities in England and the United States and recently read for an LLM degree at the University of London (KCL), where he graduated with Distinction in Public International Law. He has published widely in professional and academic journals on terrorism and international criminal law. Mr Brandon is a part-time lecturer at the London School of Economics and Political Science (LSE), where he teaches international criminal law to post-graduate students.

Treasa Dunworth

A graduate of Auckland and Harvard Universities, Treasa Dunworth is a Senior Lecturer in International Law at the University of Auckland, New Zealand. She has several years experience in international law, working in both non-governmental and intergovernmental spheres, where her focus has been on arms control – particularly the control of chemical weapons. She has published both within New Zealand and internationally. Her current research interests lie around the role of international law in domestic law, the accountability of international organisations and international criminal law. Ms Dunworth is the New Zealand Vice President of the Australian New Zealand Society of International Law, a member of the Advisory Board of the Asia-Pacific Centre for Military Law, the New Zealand correspondent for the Yearbook of International Humanitarian Law, a contributing editor on public international law to the New Zealand Law Review and a member of the New Zealand Committee for the Dissemination of International Humanitarian Law.

Max du Plessis

Max du Plessis graduated with an LLM from Cambridge University after studying law in South Africa. He is currently an Associate Professor at Howard College School of Law, University of KwaZulu-Natal, and previously taught international criminal law at the London School of Economics and Political Science (LSE) from 2001 to 2002. He has acted as a consultant to the South African Institute for International Affairs, the Institute for Security Studies and the Commonwealth Secretariat on questions of international law and international criminal law and is an advocate of the High Court of South Africa, with a practice predominantly in human rights and international law. His research interests include constitutional law, international criminal law and international law, and he has published numerous articles in these areas.

Håkan Friman

Håkan Friman obtained his LLM from Uppsala University, Sweden, in 1989. He is a former Associate Judge of Appeals, Svea Court of Appeals, Stockholm, Sweden; Deputy Director in the Swedish Ministry of Justice, Division for Criminal Law; Extraordinary Professor of Law, University of Pretoria, Department for Procedural Law, South Africa; Visiting Professor, University College London, Faculty of Laws, UK; and Consultant to the Office of the Prosecutor of the ICC. Mr Friman was a member of the Swedish ICC delegation to the Preparatory Committee, the Rome Diplomatic Conference, the Preparatory Commission and the Assembly of States Parties. He has lectured in different countries and is the author of a number of articles on the Court, particularly on issues of procedural law, as well as associate editor to a commentary on the Elements of Crimes and the Rules of Procedure and Evidence.

Jessica Howard

Jessica Howard graduated BA/LLB (Hons) from the University of Melbourne in 2000 and was admitted to legal practice the following year. In 2001 she was Associate to Justice A M North in the Federal Court of Australia. Ms Howard is currently completing a PhD (Law) at the University of Melbourne, where she is supervised by Professor Timothy McCormack. Her thesis examines international legal issues arising out of Australia's extra-territorial processing of, and protection measures for, asylum seekers and refugees. For the past two years she has been engaged as a sessional lecturer in the Law School, University of Melbourne and as a research assistant to Professor McCormack in his work as *amicus curiae* in the trial of Slobodan Milosevic.

Timothy L H McCormack

Timothy McCormack is the Foundation Australian Red Cross Professor of International Humanitarian Law at the University of Melbourne Law School and Foundation Director of the Asia-Pacific Centre for Military Law – a collaborative initiative of the Australian Defence Force (ADF) Legal Service and the Melbourne Law School. He is Director of Studies for the Graduate Programme in Military Law at the Melbourne Law School and oversees a graduate coursework training programme for all ADF legal officers – regular and reserve. Professor McCormack acts as *amicus curiae* on international law matters to the judges of Trial Chamber III of the International Criminal Tribunal for the former Yugoslavia in The Hague for the trial of Slobodan Milosevic. He is Editor-in-Chief of the TMC Asser Instituut's Yearbook of International Humanitarian Law and is co-Editor-in-Chief (with Christopher Greenwood) of the International Humanitarian Law Series by Martinus Nijhoff Publishers. Professor McCormack publishes extensively in international criminal law and has edited *The Law of War Crimes: National and International Approaches* with Dr Gerry Simpson. He participated in the Australian Delegation to the Diplomatic Conference for the negotiation of the Rome Statute in 1998 and was actively involved in the campaign for Australian participation in the ICC.

Andreas O'Shea

An honorary professor at the University of KwaZulu-Natal, Andreas O'Shea completed his PhD thesis at the University of the Witwatersrand. The thesis topic was: 'Towards the development of principles on the limitation of national amnesty laws'. From 1989 to 1991 Professor O'Shea completed the Licence Speciale (Intern. and Euro. Law) (distinction) at the University of Louvain La Neuve, University of Liege, and in 1992 he was called to the Bar of England and Wales (member of Lincoln's Inn). He has published substantially in the field of international law and organisation and amnesty for crime in international law and practice. Professor O'Shea is currently practising before the International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone.

Kimberly Prost

Kimberly Prost is a gold medallist from the University of Manitoba Law School and is called as a barrister and solicitor in Ontario, Canada. She practiced with the Federal Department of Justice from 1981 to 1987 as a prosecutor doing trial and appellate work. From 1987-1990 she worked as head of the Baltic team in the Department's Crimes against Humanity and War Crimes Unit in Ottawa. From 1990 till 2000 she was with the International Assistance Group (IAG), which acts on behalf of the Minister of Justice as Canada's central authority for international criminal co-operation matters (extradition and mutual legal assistance), serving as IAG Director from 1994. She participated in the negotiation of over 40 bilateral extradition and mutual legal assistance treaties for Canada and was a member of the Canadian delegation for the negotiation of the Rome Statute of the ICC and the Rules of Procedure and Evidence. Since July 2000 Ms Prost has been the Head of the Criminal Law Section, Deputy Director, Legal and Constitutional Affairs Division at the Commonwealth Secretariat in London, England. In March 2005 Ms. Prost will join the United Nations Office on Drugs and Crime in Vienna.

Darryl Robinson

Darryl Robinson currently serves in the ICC Office of the Prosecutor as a legal adviser on issues of jurisdiction, complementarity and co-operation. From 1997-2003 he worked in the Canadian Department of Foreign Affairs and International Trade on international criminal justice issues, where he was a member of the Canadian delegation to the ICC Preparatory Committee, Diplomatic Conference, Preparatory Commission and Assembly of States Parties. He also taught international human rights law at the University of Ottawa from 1999-2003. Mr Robinson obtained his LLM at New York University School of Law and has several publications in the field of international criminal law.

William A Schabas

William A Schabas is Director of the Irish Centre for Human Rights at the National University of Ireland, Galway, where he also holds the chair in human rights law. He holds BA and MA degrees from the University of Toronto and LLB, LLM and LLD degrees from the University of Montreal. Professor Schabas is the author of 12 books and more than 150 articles in academic journals, principally in the field of international human rights law. He is also editor-in-chief of *Criminal Law Forum*, the quarterly journal of the International Society for the Reform of Criminal Law. In May 2002 the President of Sierra Leone appointed Professor Schabas to the country's Truth and Reconciliation Commission, on the recommendation of Mary Robinson, the United Nations High Commissioner for Human Rights. From 1991 to 2000 Professor Schabas was professor of human rights law and criminal law at the Département des sciences juridiques of the Université du Québec à Montréal, a Department he chaired from 1994-1998; he now holds the honorary position of *professeur associé* at that institution. He is a member of the Quebec Bar and was a member of the Quebec Human Rights Tribunal from 1996 to 2000.