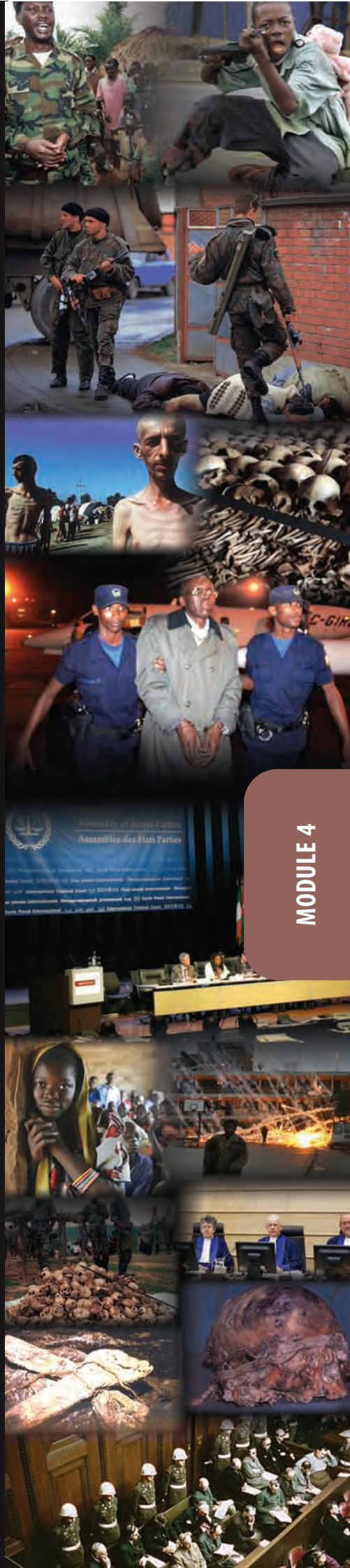
Module 4

The International Criminal Court



MODULE 4

The International Criminal Court

Teaching notes

This module begins with an introductory section that discusses the historical evolution of the International Criminal Court (ICC), as well as its first decade of operation. In doing so, this section highlights some of the key controversies surrounding the ICC, notably the role of the UN Security Council in bringing cases to it, as well as its focus on African conflicts to date. Depending on the level of instruction, some time could be spent considering these contentious issues in more detail.

The module then provides an overview of the ICC's structure, before considering the crucial and related issues of jurisdiction and admissibility. Given its centrality, the question of jurisdiction should be addressed in detail. In doing so, students' attention should be drawn to the causal relationship between the controversies discussed in the introductory section and the ICC's jurisdictional regime. Drawing students' attention to the parallels between the court's jurisdiction and the discussion of jurisdiction in Module 2, as well as domestic jurisdiction in Module 5, will also be helpful in consolidating their understanding.

The issue of admissibility of situations and cases is unique to international courts. As a result time should be devoted to ensuring that students are familiar with the requirements for admissibility, and do not confuse admissibility of situations and cases with admissibility of *evidence* in domestic courts. The key 'take-home' from this section is the principle of complementarity which students should be familiar with but must be able to apply in concrete cases through a proper understanding of admissibility. This will require students to understand the difference between *situations* and *cases*.

The stages of proceedings are discussed next. The purpose of this section is to give students a comprehensive overview of the ICC's operation. It is not, however, crucial that students are familiar with the court's procedure in great detail.

The final two sections address the related questions of cooperation with the ICC by states, and the relevance of immunity to the court's exercise of jurisdiction and the concommitant obligations on states to cooperate. As far as cooperation is concerned, the focus is on the obligations to arrest and surrender persons to the ICC (although other cooperation obligations should be pointed out). Further, students should be made aware of the distinction between cooperation obligations under the Rome Statute and how those obligations are incorporated into domestic law (which only five African countries have done).

The question of immunity under the Rome Statute is controversial and as such the discussion of this issue is lengthy and complex. At the very least, students should be clear on the apparent conflict between articles 27 and 98 of the Rome Statute. The more advanced students should be familiar with the different arguments raised by academics regarding how to resolve this conflict.

LEARNING OUTCOMES

At the end of this module students must be able to:

- Give a brief history of the ICC and how its development has impacted on its structure, jurisdiction and so on.
- Give an overview of the ICC's structure.
- Understand the different bases of jurisdiction, as well as how jurisdiction can be triggered.
- Understand the different admissibility requirements and how, when and by whom it can be raised.
- Discuss the different stages of proceedings.
- Delineate the cooperation obligations placed on states parties under the Rome Statute.
- Understand the controversy surrounding the question of immunity, and briefly outline the arguments made in this regard.

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The International Criminal Court

1. GENERAL INTRODUCTION

1.1 Brief history

The 'revolutionary institution'[1] that is the ICC is the culmination of efforts that began well over a century ago in 1872 when Gustave Moynier (one of the founders of the ICRC) proposed the establishment of an international tribunal to punish violations of the Geneva Convention (1864).[2] In addition to the well-known antecedents of article 227 of the Treaty of Versailles (post-World War I) and the IMTs at Nuremberg and Tokyo (post-World War II),[3] there was other important state practice in support of an international criminal court during the inter-war period, including in the form of the work undertaken by the League of Nations' Advisory Committee of Jurists in the 1920s and the League's Convention for the Prevention and Punishment of Terrorism (1937).[4]

Following World War II, the project was re-invigorated. An initial draft of the Genocide Convention (1948) included a proposal for a permanent or ad hoc international court to punish crimes of genocide, although neither was included in the final version.[5] However, on the same day that the Genocide Convention was adopted, the UN General Assembly passed a resolution calling on the International Law Commission (ILC) to 'study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes'.[6] The ILC's work stalled in 1954, primarily as a consequence of difficulties associated with the question of defining aggression.[7] It was not until 1983 that the ILC returned to the issue (on its own accord) when the General Assembly invited it to continue its work on a Draft Code of Offences Against the Peace and Security of Mankind, which had stalled in 1954 also.[8] The General Assembly did not formally re-engage the ILC on this issue until 1989, following a proposal by Trinidad and Tobago relating to 'illicit trafficking in narcotic drugs across national frontiers and other transnational criminal activities'.[9]

While the ILC was working on this latter proposal during the early 1990s, another development took place that would significantly influence the establishment of an international criminal court in a number of ways: the establishment of the ICTY and ICTR by the UN Security Council.[10] In this regard, Schabas notes that: 'The so-called ad hoc tribunals became a kind of laboratory for

The ICC is the culmination of efforts that began well over a century ago

Rome Statute Conference
15 June – 17 July, 1988.

120 states adopted the Rome Statute of the International Criminal Court on 17 July 1998

international criminal justice, highlighting problems and difficulties, and in some cases making determinations that those negotiating the [ICC] statute specifically chose not to emulate.'[11]

In 1994 the ILC completed a draft of what would become the Rome Statute. Schabas notes:

> Some of the basic issues that would characterize the final version of the *Rome Statute* were already taking shape. The 1994 draft statute conceived of an independent court, in a relationship with the United Nations, that was "complementary" to national courts, and that would operate only when national trial procedures "may not be available or may be ineffective". It would have subject-matter jurisdiction only over "the most serious crimes of concern to the international community as a whole"… Membership in the Court would not give it jurisdiction over crimes committed in a particular state… [rather] this would require some additional declaration of acceptance, possibly on a case-by-case basis. … Actual prosecution could be initiated either by Security Council referral or by a "complaint" from a state party.[12]

The draft was, however, 'relatively modest' in comparison to what would be agreed upon in Rome fours years later.[13] In response, the General Assembly first established an Ad Hoc Committee, then later a Preparatory Committee, for the establishment of an international criminal court[14] in order to comment upon and refine the text of the draft treaty.[15] Finally, the General Assembly convened the UN Diplomatic Conference of Plenipotentiaries on the Establishment of a Permanent International Criminal Court in Rome from 15 June to 17 July 1998 to negotiate and agree the final text of the draft treaty.

As a result of these marathon efforts, 120 states adopted the Rome Statute of the International Criminal Court on 17 July 1998.[16] As was examined in Module 3, the Rome Statute empowers the ICC to prosecute the crimes of genocide, crimes against humanity, war crimes, and probably the crime of aggression from 2017 onwards. According to its Preamble, one of its primary purposes is to 'establish an independent permanent International Criminal Court …, with jurisdiction over the most serious crimes of concern to the international community as a whole' in order to 'put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes'.[17]

The reasons why so many states, with clearly divergent interests, supported the court's establishment are complex. Certainly, the powerful rhetoric of ending impunity played an important role, as did the very effective lobbying of civil society organisations. However, this diversity of interests was not overcome entirely at Rome and remains evident in the structure of the ICC (and the role of the UN Security Council in particular).

In this regard, when considering the ICC's establishment, it is necessary to take account of the 'unhappy and extravagant' objections of the US to the court.[18] The US, as is well known, has always opposed the court[19] and does not stand alone in such opposition: it has some rather unlikely allies in the form of China, Iraq and Libya; and a more predictable ally in the form of Israel.[20]

The most divisive issue at Rome – which continues to shape the court's operation and undermine its acceptance amongst some states – is the role played by the UN Security Council. On the one side are those 'like-minded countries' that

argued for a progressive prosecutorial regime whereby the prosecutor could undertake *proprio motu* prosecutions, with a minimal role for the UN Security Council. These included African states that channelled their collective efforts through the Southern African Development Community (SADC) Common Principles[21] and the Dakar Declaration.[22] On the other side are the UN Security Council veto-bearing states who predictably sought a court that would be subject to UN Security Council control.

In the end, the Rome Statute reserved power for the UN Security Council to refer 'situations' to the ICC pursuant to article 13(b) of the Rome Statute. This referral power has far-reaching implications for many states, particularly for the court's detractors. In particular, by its operation, the court potentially has jurisdictional reach over the territory of every state in the world, whether or not it is a state party.[23] This extraordinary and controversial jurisdiction stems from the binding nature of Chapter VII UN Security Council resolutions upon all UN member states. In addition, the compromise that gives the UN Security Council the power to refer situations to the court under its Chapter VII mandate (article 13(b)), further affords it the ability to defer investigations for a renewable 12-month period (article 16). These provisions are the product of hard-fought compromises which left many states dissatisfied.[24] As Schabas suggests, the real reason for the US' opposition to the ICC most likely is the peripheral role played by the UN Security Council in the court's functioning.[25]

With respect to the views of African states, while many of them were unhappy with any role for the UN Security Council, even a limited one, during the treaty negotiations in 1998 they regarded this as a necessary concession in order to enable the ICC to come into being and to secure the support of certain powerful states. In recent years, however, this compromise has become increasingly untenable to African states. As such, the role of the UN Security Council remains the seminal concern of African states today.

Furthermore, many African states pushed for the inclusion of the crime of aggression within the court's jurisdiction. Although this was not immediately achievable during the Rome Conference, they and other states did manage to ensure that the crime of aggression might be prosecutable by the court at some future date subject to subsequent agreement being reached by states on its definition and the jurisdictional terms under which it would be prosecuted.[26] This was achieved in Kampala in 2010.[27]

The significance of the influence exerted by African states in shaping the final text of the Rome Statute is best evidenced by the rate at which African states ratified it after its adoption, with Senegal being the first to do so.

Senegal was the first country to ratify the Rome Statute on 2 February 1999.

1.2 The ICC's first 10 years: an African experiment?

The relationship between African states and the ICC is both complex and contested. As noted previously, the participation of African states in negotiations at Rome in 1998 was crucial to both the court's inception and its relative independence. Since then, 33 African countries have signed up to the ICC, making it one of the largest signatory blocs. Since the court came into being in 2002, African states have continued to play a key role in operationalising and strengthening it, most recently through their participation in the Kampala review

In the 1998 negotiations, many African states were unhappy with any role for the UN Security Council

In 2009 the AU Assembly decided that African states will not cooperate with the ICC in the arrest and surrender of Sudanese president Omar al-Bashir

conference where agreement on the definition of the crime of aggression was reached, against international expectations.

Despite these positive features, the court has been criticised for focussing disproportionately on African states during the first decade of its operation, with all of the situations currently being investigated or prosecuted by the ICC arising from Africa (Libya and Côte d'Ivoire being the most recent additions).[28] Such an allegation of the ICC 'targeting' Africa is, however, more perception than reality. In truth this is a reflection of other realities, including the sad preponderance of conflicts in Africa; the hostile political conditions and jurisdictional limitations that prevent the court from pursuing more deserving cases from other parts of the world (viz. Gaza); and the fact that as the biggest regional bloc of states the chances of cases being generated from Africa are far more likely.[29]

However, those who oppose the ICC generally, or the situations under consideration in particular, have not wasted the opportunity to allege an anti-African bias on the part of the court. Unfortunately, this allegation has gained traction over the past few years and, through concerted political machinations by the ICC's opponents on the continent, has been marshalled into an institutional position against the court at the level of the African Union (AU).[30]

The low-point of this fracas undoubtedly has been the decisions of the AU Assembly that African states will not cooperate in the arrest and surrender of Sudanese president Omar al-Bashir[31] or former (now deceased) Libyan leader, Muammar Gaddafi.[32] This has put African states that are ICC signatories in a difficult position. As will be seen below, states parties are obliged under the Rome Statute to 'cooperate fully with the Court in its investigation and prosecution of crimes' within the ICC's jurisdiction. However, the AU's Constitutive Act warns that the failure of a member state to comply with decisions of the AU may result in sanctions being imposed on the defaulting state.[33] These difficulties, together with broader concerns about international criminal justice and the abuse of universal jurisdiction by certain European states in particular,[34] continue to complicate the work of the ICC in Africa.

1.3 Overview of the Rome Statute

At the heart of the Rome Statute is the principle of complementarity, under which the court will only be able to admit a case before it (where the other jurisdictional bases of nationality and territoriality are present) if the state party concerned is unwilling or unable to prosecute the offender nationally. This principle – reflected in articles 1 and 17, as well as the Preamble to the Rome Statute – is a novel idea. Effectively, it affords states parties primary jurisdiction over international crimes committed within their jurisdiction, and is the opposite of the ICTY and ICTR, which enjoy primacy over national legal systems. The effect of this principle is to not allow any state party to frustrate the prosecution of individuals by using their primary jurisdiction as a shield. Article 17(2) of the Rome Statute expressly prevents such a scenario and obliges states parties to prosecute offenders or else surrender them to the ICC so that it may do so; accordingly, the court's ability to exercise its jurisdiction over particular suspected crimes is limited by this principle.[35]

The principle of complementarity represents far more than a presumption in favour of local prosecutions; rather, it ensures that the ICC reinforces the criminal

Omar al-Bashir, the president of Sudan, Addis Ababa, Ethiopia, 2009.

justice systems of states parties at a national level, as well as the broader system of international criminal justice. The principle proceeds from the belief that national courts should be the first to act. Aside from assuaging the concerns of states over the potential usurpation of their national sovereignty, the principle carries with it other important consequences, such as recognition of the need for full participation by victims; the practicality of local prosecutions; and the practical limitations of a court with potentially universal jurisdiction.

The Rome Statute performs two distinct roles: the first is to set out the structure, powers, and functions of the ICC in prosecuting the crimes of genocide, crimes against humanity, war crimes, and aggression; the second is to establish a cooperation regime for states parties to assist the ICC in fulfilling this mandate.[36] The first part of this module will set out the structure, power, and functions of the court. The second part considers important practical and legal aspects of its operation, especially the matter of state cooperation and the related issue of immunities.

Inaugural ceremony of the ICC's judges, 2003.

2. STRUCTURE OF THE COURT

2.1 Presidency

Under article 34 of the Rome Statute, the ICC is composed of four organs: the Presidency, Chambers, the Office of the Prosecutor (OTP), and the Registry. The Presidency consists of the president of the court, together with his or her first and second vice-presidents.[37] The Presidency is primarily responsible for the proper administration of the ICC. This role, however, does not include the administration of the OTP, which is reserved for the prosecutor under article 42.[38]

The president, first vice-president, and second vice-president, who are elected by an absolute majority of the judges of the ICC, serve for a term of three years or until the end of their respective terms of office as judges (whichever expires earlier) and are eligible for re-election once.[39] Unlike the other judges, those who are elected to the Presidency serve on a full-time basis as soon as they are elected.[40]

2.2 Chambers

The judges' Chambers are divided into three divisions: an appeals division, a trial division, and a pre-trial division.[41] The appeals division is composed of the president and four other judges[42] who sit on a single appeals chamber.[43] The trial division is composed of not less than six judges,[44] three of whom make up each pre-trial chamber.[45] The pre-trial division consists of not less than six judges.[46] Although three judges sit on each pre-trial chamber, certain functions of this division are carried out by a single judge in relation to the state(s) concerned and various procedural aspects (e.g. the disclosure of evidence prior to trial) under the Rules of Procedure and Evidence.[47]

The ICC has 18 full-time judges who are nominated and elected under a complex procedure set out in article 36.[48] Briefly, the Assembly of States Parties (ASP) (see infra) elects the judges by secret ballot from candidates nominated by states parties to the Rome Statute,[49] who are not necessarily a national of a nominating state. There are two lists: one comprising individuals with 'established

The ICC is composed of four organs: the Presidency, Chambers, the Office of the Prosecutor, and the Registry

ICC Prosecutor, Luis Moreno-Ocampo and deputy prosecutor, Fatou Bensouda, 2011.

competence in criminal law and procedure';[50] the other detailing candidates with 'established competence in relevant areas of international law'.[51] Judges must be 'persons of high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices'.[52] Furthermore, in selecting judges, states must consider the need for representation of the principal legal systems of the world; equitable geographical representation; and a fair representation of female and male judges.[53]

Judicial terms are for nine years and, ordinarily, are not eligible for re-election,[54] although a judge assigned to a trial or appeals chamber 'shall continue in office to complete any trial or appeal the hearing of which has already commenced before that Chamber.[55] Judges assigned to the appeals division 'serve in that division for their entire term of office', while judges assigned to the trial and pre-trial divisions shall serve in those divisions for a period of three years, after which they will be re-assigned.[56] Finally, no two judges may be nationals of the same state.[57]

Once elected, judges are assigned to a division 'based on the nature of the functions to be performed by each division and the qualifications and experience of the judges elected to the Court, in such a way that each division shall contain an appropriate combination of expertise in criminal law and procedure and in international law.'[58] Article 52 mandates judges to adopt Regulations of the Court 'necessary for its routine functioning'. Article 41 sets out the procedure for excusing and disqualifying judges.

2.3 Office of the Prosecutor

The OTP is a separate organ of the ICC. Headed by the prosecutor, it is responsible for receiving referrals and any substantiated information on suspected crimes falling within the jurisdiction of the court, for examining them, and for conducting investigations and prosecutions before the ICC.[59] The prosecutor and deputy prosecutor – who must be of different nationalities – are elected by secret ballot by the ASP for a non-renewable nine-year term.[60] Both must be persons of high moral character, be highly competent, and have extensive practical experience in the prosecution or trial of criminal cases.[61]

In order to guarantee its independence, the prosecutor has full authority over the management and administration of the OTP, including the staff, facilities, and other resources thereof.[62] The issue of the independence of the prosecutor and the OTP was raised recently in the context of the introduction of an Independent Oversight Mechanism by the ASP (see infra).

To guarantee its independence, the prosecutor has full authority over the management and administration of the OTP

2.4 Registry

The Registry is responsible for the 'non-judicial aspects of the administration and servicing of the Court'.[63] It is headed by the registrar, who falls under the authority of the president of the ICC. The registrar is elected by secret ballot by the judges of the court, for a five-year term of office which is renewable once.[64]

One of the key functions of the registrar is the establishment of a Victims and Witnesses Unit within the Registry.[65] According to the Rome Statute:

> This Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses. The Unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence.[66]

2.5 Assembly of States Parties

The ASP is not an organ of the ICC, yet is a key part of its structure. The ASP was a relative latecomer in the negotiations leading up to the adoption of the Rome Statute. As Bos notes, 'only at the very end of the discussion in the PrepCom was serious attention given to ... [its] establishment'.[67] Perhaps for this reason, in the final version of the Rome Statute the ASP's role is defined functionally (by what it does) rather than conceptually (by what it is). In particular, article 112 sets out different tasks assigned to the ASP as well as how the body shall be constituted and operate. This provision is supplemented by other articles that assign additional tasks to the ASP.[68]

As a result, there is little in the Rome Statute regarding what the ASP cannot do; instead it is open-ended, reflected in the catch-all clause in article 112(2)(g) which gives the ASP the power to '[p]erform any other function consistent with this Statute or the Rules of Procedure and Evidence'. That said, there is one important limitation on the ASP's role with respect to issues of judicial independence. As the debates during the negotiations, and subsequent wording, of article 112 (and article 119) reveal, there was a deliberate choice to preclude the ASP from considering matters of a judicial nature.[69]

The lack of a clearly defined role has led to an oversimplification of the ASP (at least in the media) as the 'political body' of the ICC. In fact, the numerous tasks assigned to the ASP under the Rome Statute can be divided into three categories – administrative, legislative, and operational:

- The administrative functions of the ASP are mostly set out in article 112 and include: providing management oversight to the Presidency, the prosecutor, and the registrar regarding the administration of the ICC; budgetary matters; and the inspection, evaluation, and investigation of the court in order to enhance its efficiency and economy. The ASP is responsible also for a host of other administrative tasks under the Rome Statute.[70]

- The ASP's legislative functions are both specific and general. The ASP was assigned specific legislative tasks that could not be completed during the Rome Conference. In this sense it was the successor to the conference, reflected within article 112(2)(a) which states that the ASP is to '[c]onsider and adopt, as appropriate, recommendations of the Preparatory Commission', thereby progressing and where possible concluding certain unfinished business (including defining the crime of aggression). In addition to these, the ASP has a general legislative authority that is reflective of the fact that the Rome Statute is a treaty and, as such, may be subject to amendment and modification by its states parties. In this regard, articles 121 – 125 set out the procedures to be

The numerous tasks assigned to the ASP under the Rome Statute can be divided into three categories: administrative, legislative, and operational

Ambassador Christian Wenaweser, ASP president from Nov 2008 – October 2011.

followed for amending the Rome Statute and establish the ASP as the forum for the adoption of amendments.

- The operational role of the ASP is its most controversial one. Notwithstanding the ICC's independence, the Rome Statute provides for some limited role for the ASP in the operation of the court. The first is in terms of enforcing states' obligations under the Rome Statute, namely under article 87 read together with article 112(2)(f).

The issue of the ICC's jurisdiction was one of the most divisive ones considered during the Rome Conference, and remains contentious to this day

The Rome Statute further provides (in article 119) that the ASP will play a role in the settlement of disputes. Article 119, which relates to general disagreements, provides for two distinct procedures. First, disputes regarding the judicial functions of the ICC must be settled by the court itself. Second, disputes that do not pertain to judicial functions – that arise between two or more states parties – and relate to the interpretation or application of the Rome Statute, shall be referred to the ASP.[71] In such circumstances the ASP may: (a) seek to settle the dispute itself; or (b) make recommendations on further means of dispute settlement, which notably includes referral to the International Court of Justice (ICJ). Here too the drafters were careful to ensure that the ASP was prevented from considering judicial questions – that role was left to the ICC.[72] However, there is uncertainty regarding the distinction between disputes relating to 'judicial functions' and 'other disputes' arising between two or more state parties.

3. JURISDICTION

3.1 Introduction

The term jurisdiction is used with imprecision in the Rome Statute to cover different conceptions of the term without always distinguishing between them. The predominant focus here is on the ICC's jurisdiction in the sense of its power to exercise (prescriptive) criminal jurisdiction over individuals in respect of specified international crimes.

The issue of the ICC's jurisdiction was one of the most divisive ones considered during the Rome Conference, and remains contentious to this day. The sticking points on jurisdiction were: under what conditions prosecutions would be initiated (and therefore jurisdiction would be exercised); and what the basis of such jurisdiction would be. With reference to the former issue, in one camp were like-minded countries that argued for a progressive prosecutorial regime whereby the prosecutor could undertake *proprio motu* prosecutions. In the other camp were UN Security Council veto-bearing states, especially China and the US, that sought, somewhat predictably, a court that would be subject to UN Security Council control.

This matter overlapped with the second issue of controversy, namely the basis upon which the ICC would exercise jurisdiction. Some states (notably Germany) pushed for automatic, universal jurisdiction, whereas others sought to limit the court's jurisdiction to those states (and their nationals) who sign up to the Rome Statute. The result of these negotiations was a primarily consent-based

Staff of the ICC's field office in Bunia, DRC.

jurisdictional regime – including options of both permanent and ad hoc consent to jurisdiction by states – with a special referral power for the UN Security Council; but with some limitations on how jurisdiction can be triggered.

Phakiso Mochochoko, head of Jurisdiction Complementarity and Cooperation Division in the ICC OTP, 2011.

3.2. Triggering the ICC's jurisdiction

Before considering these bases of ICC jurisdiction in more detail, two further preliminary issues must be addressed. The first is to distinguish the different ways in which jurisdiction is triggered or exercised, from the bases of jurisdiction themselves.

From the outset, it is necessary to distinguish between the bases on which the ICC may exercise jurisdiction, and the conditions that trigger the court's exercise of them. Although these two are conceptually distinct, in practice this distinction is blurred when the ICC exercises jurisdiction on the basis of an article 13(b) referral by the UN Security Council. Here one must distinguish between the ordinary jurisdiction of the ICC in respect of states parties to the Rome Statute and its ad hoc, extraordinary jurisdiction by way of non-state party and UN Security Council referrals.

3.2.1 Ordinary trigger mechanisms

In the case of ordinary jurisdiction, the key provision is article 12 which states that: 'A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5' (i.e. the four core crimes). Therefore, in the case of a state party, the ICC has permanent territorial and personal jurisdiction over such states under this provision. However, just because the court has jurisdiction over a particular crime does not mean it can exercise such jurisdiction; rather its jurisdiction must be triggered in one of two ways.

First, the exercise of jurisdiction may be triggered by way of the self-referral of a situation by a state party under article 14. This allows states parties to refer 'a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed' to the prosecutor so that he or she may 'investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes'.[73] Under this provision a referral may be made of any situation in which article 5 crimes appear to have been committed, regardless of how the ICC comes to exercise jurisdiction (i.e. under ordinary bases of jurisdiction or extraordinary ad hoc state consent to jurisdiction). Such self-referrals may be made to the ICC prosecutor for investigation and possible prosecution when any of the core crimes: (i) occur on the territory of the referring state(s); or (ii) are committed by its nationals.[74] During the drafting of the Rome Statute, it was not anticipated that this jurisdictional trigger would be readily used due to the improbability of states referring crimes committed on their territory or by their nationals which, by their nature, involved state perpetration, toleration, and/or acquiescence. In practice, however, it has been used twice already and, until recently, was the single most common jurisdictional trigger.

Alternatively, the exercise of the ICC's ordinary jurisdiction over states parties may be triggered by the prosecutor's *proprio motu* powers under article 15. This

Just because the ICC has jurisdiction over a particular crime does not mean it can exercise such jurisdiction; rather its jurisdiction must be triggered

ICC pre-trial chamber in session, April 2011.

provision empowers the prosecutor to initiate an investigation – and trigger the exercise of jurisdiction – on his or her own accord 'on the basis of information on crimes within the jurisdiction of the Court'.[75] The exercise of this power is not unfettered. Rather, the prosecutor must first obtain authorisation from the pre-trial chamber before he or she can proceed with an investigation. The pre-trial chamber will only sanction such an investigation if it concludes that 'there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court'.[76] The prosecutor exercised this power for the first time in respect of the post-electoral violence which occurred in Kenya (a state party) in 2007, after receiving authorisation from the pre-trial chamber in March 2009.[77]

3.2.2 UN Security Council referrals

The abovementioned provisions are triggers in the limited sense, in that they trigger the exercise of jurisdiction that the ICC already has in respect of a state party under article 12(1); they are not the legal basis of jurisdiction. The situation is different regarding the exercise of extraordinary jurisdiction following a UN Security Council referral. This will generally (although not necessarily) involve the exercise of jurisdiction in circumstances where the ICC will not otherwise have jurisdiction (i.e. over non-states parties). In this sense, article 13(b) serves to both trigger and found the ICC's jurisdiction simultaneously.

3.3 Jurisdictional bases

This section considers the four possible jurisdictional bases under the Rome Statute for the prosecution of the three core crimes which are the focus here:

- The territorial jurisdiction over states parties (jurisdiction *rationae loci*).
- Personal jurisdiction over nationals of states parties (jurisdiction *rationae personae*).
- Ad hoc consent-based jurisdiction in respect of non-states parties.
- Conferred jurisdiction by the UN Security Council.

The first two are basically the same as the traditional domestic bases of jurisdiction by the same name, as adopted and applied by the ICC. The latter two are unique to international law and, in the case of jurisdiction conferred by the UN Security Council, to the Rome Statute. Each of these bases will be outlined briefly, before discussing the ICC's subject-matter jurisdiction (*ratione materiae*) and temporal jurisdiction (*ratione temporis*).

3.3.1 Territorial jurisdiction (ratione loci)

As noted above, the ordinary bases of jurisdiction are jurisdiction *ratione personae* and *loci* which correspond with the traditional bases of state jurisdiction in international law. Under article 12(2)(a), the ICC may exercise its jurisdiction if '[t]he State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft' is a party to the Rome Statute. In effect, this gives the ICC

The prosecutor exercised his *proprio motu* power for the first time in respect of Kenya's 2007/8 post election violence

territorial jurisdiction over all states parties. As noted above, this jurisdiction may be exercised either upon self-referral by the state party concerned under article 14, or when the prosecutor initiates an investigation in respect of such a crime under article 15.

Côte d'Ivoire accepted the ICC's jurisdiction in a declaration in 2003.

3.3.2 *National jurisdiction* (ratione personae)

Similarly, under article 12(2)(b) the ICC may exercise its jurisdiction if '[t]he State of which the person accused of the crime is a national' of a state party. In effect, this gives the ICC personal jurisdiction over all such nationals. Once again, this jurisdiction may be exercised either upon self-referral by the state party concerned under article 14, or when the prosecutor initiates an investigation in respect of such a crime in exercise of his or her powers under article 15.

3.3.3 *Ad hoc referrals by non-states parties*

Article 12 of the Rome Statute makes provision also for a non-state party to accept the exercise of the ICC's jurisdiction over a crime within the subject matter jurisdiction of the court that either took place on the territory of that state or else was committed by one of its nationals. In such circumstances, article 12(3) provides that when a non-state party accepts the ICC's jurisdiction it must do so by lodging a declaration to this effect with the registrar. Further, under this provision, the 'accepting state' must cooperate with the ICC 'without any delay or exception in accordance with Part 9' of the Rome Statute.

Once again the difficulties of retrospectivity emerge within the context of this provision, because arguably the jurisdiction of the ICC over such a crime is applied retrospectively from the date upon which the declaration was made. Therefore, despite the fact that the jurisdiction has been assigned to the court by a state, the limitations placed on the temporal jurisdiction of the ICC (see below) may make such a construction difficult to sustain.

3.3.4 *UN Security Council referrals*

Under article 13(b), the UN Security Council can refer 'a situation in which one or more [article 5] ... crimes appears to have been committed' to the ICC for investigation and possible prosecution. This referral power potentially has far-reaching implications for many states, particularly for the ICC's detractors. In particular, through this provision the court's jurisdictional reach may extend to the territory and nationals of every state in the world, whether or not they are a party to the Rome Statute.[78] This extraordinary and unsurprisingly controversial jurisdiction stems from the binding nature of Chapter VII UN Security Council resolutions on all UN member states.[79]

Article 13(b) of the Rome Statute is especially important in relation to intra-state conflicts involving non-states parties such as Sudan, because without it such states, even if directly or indirectly involved in the alleged atrocities committed, would be beyond the jurisdictional reach of the ICC. Consequently, Cassese calls this article the 'sledgehammer' of the ICC which 'may prove to be the most

Article 12(3) provides that when a non-state party accepts the ICC's jurisdiction it must do so by lodging a declaration with the ICC registrar

For a UN Security Council referral to be lawful, the situation referred to the ICC must constitute a 'threat to peace and security' within the international community

effective to seize the Court whenever situations similar to those in the former Yugoslavia and Rwanda occur'.[80]

However, in order for the referral to be lawful it must be exercised in accordance with Chapter VII, that is, the situation referred to the ICC must constitute a 'threat to peace and security' within the international community as understood with respect to article 39 of the UN Charter. When the Rome Statute was drafted, and even after it came into force, such UN Security Council referrals were considered to be unlikely, especially given the initial negative responses to the ICC by some P5 states, specifically the US and China. However, to date the UN Security Council has utilised this article on two occasions already, once in respect of Darfur by way of Resolution 1593 (2005), and more recently in respect of Libya by way of Resolution 1970 (2011).

The UN Security Council and article 16 Rome Statute deferrals

In addition to the power to refer a matter to the ICC, article 16 of the Rome Statute grants the UN Security Council the discretion to defer or halt any investigation or prosecution by the ICC for a period of one year where this is deemed to be necessary for the maintenance of international peace and security under Chapter VII of the UN Charter.

As noted above, any involvement by the UN Security Council in the operation of the ICC has been contentious from its outset – with simultaneous calls for an expansive and more limited role. Notably, the final text of article 16 was a compromise that significantly diluted the power of the UN Security Council from what had been proposed initially. The original text of the ILC draft prohibited the ICC from prosecuting a case 'being dealt with by the Security Council as a threat to or breach of the peace or an act of aggression under Chapter VII of the Charter, unless the Security Council otherwise decides' (draft article 23(3)). Under such wording, the ICC would have been unable to proceed with the prosecution of a case without explicit UN Security Council authorisation whenever a situation was 'being dealt with by the Security Council'. Although supported by the permanent members of the UN Security Council (P5), this version was criticised heavily, in particular because it allowed the judicial function of the ICC (of which a core characteristic must be independence and impartiality) to be subject to the decision-making processes of a political organ.

The compromise reflected in article 16, therefore, reduces the authority of the UN Security Council significantly by requiring it to act to prevent a prosecution, rather than to act to authorise one. In other words, article 16 requires the UN Security Council to take preventive action through a resolution under Chapter VII of the UN Charter requesting that no investigation or prosecution be commenced for a renewable period of 12 months. In the parlance of the UN Security Council, this means that a deferral will require the approval of nine of its members and the lack of a contrary vote by any of the P5.

The AU has requested the UN Security Council to exercise its deferral power under article 16 in respect of the ICC's proceedings in Sudan since 2009, but to no avail. Recently, it made similar requests in respect of the proceedings in Kenya and Libya. As a result of the UN Security Council's decision not to grant this request in relation to Sudan, the AU has taken the unprecedented step of proposing that the Rome Statute be amended to diffuse the power of the UN Security Council to defer proceedings, and that such authority be given instead to the UN General Assembly. The amendment was placed on the agenda for consideration at the 9th ASP in New York in 2010, and has been assigned to a working group to undertake informal consultations before the ICC's 10th Session scheduled for December 2011. At its 16th Ordinary Session in January 2011, the AU Assembly

Ibrahim Dabbashi at the UN Security Council meeting on Libya, February 2011.

reiterated its support for the article 16 amendment and called on all African ICC states parties that have not yet done so to 'co-sponsor the proposal for the amendment to Article 16 of the Rome Statute and indicate such willingness to the UN Secretary General, the Depository of the Rome Statute, with copy to the AU Commission'. Further, it requested 'the Group of African States Parties in New York to ensure that the proposal for amendment to Article 16 of the Rome Statute is properly addressed during the forthcoming negotiations and to report to the Assembly through the Commission'.

3.4 Subject-matter jurisdiction *(ratione materiae)*

As previously noted, article 5(1) sets out the four core crimes which come within the ICC's jurisdiction. Importantly, article 5(2) qualifies the court's jurisdiction in respect of the crime of aggression by stating that the ICC 'shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime', with the added proviso that '[s]uch a provision shall be consistent with the relevant provisions of the Charter of the United Nations'.

3.5 Temporal jurisdiction *(ratione temporis)*

The ICC's jurisdiction is limited temporally in two respects. First, under article 11(1), the court itself only has jurisdiction with respect to crimes committed after 1 July 2002, the date on which the Rome Statute entered into force.[81] This is a general temporal limitation on the ICC's jurisdiction, based on the *nullen crimen, nullen poena* principle discussed above. Second, article 11(2) limits its temporal jurisdiction in respect of those states that ratified the Rome Statute after 1 July 2002. It states that '[T]he Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State'. An exception is created in circumstances when the state concerned has made a declaration to the registrar under article 12(3) accepting the ICC's jurisdiction, subject to the potential difficulty of retrospectivity as explained previously.

3.6 Challenging the ICC's jurisdiction

Challenges to the jurisdiction of the ICC may be brought by a person for whom a warrant of arrest or summons to appear has been issued, or against whom charges had been confirmed (i.e. an accused);[82] and by those states which ordinarily would have jurisdiction over the case. Such a challenge by a defendant may be brought only once, and must be brought before or at the commencement of the trial phase, unless exceptional circumstances can be shown.[83] If it is a state bringing the challenge, then article 19(5) provides that it must be brought 'at the earliest opportunity'.

The Rome Statute also allows the prosecutor to seek a ruling on the question of jurisdiction.[84] In addition, the ICC itself must address the issue of jurisdiction even if it is not raised by the parties. This can be deduced from the wording of article

The ICC only has jurisdiction with respect to crimes committed after 1 July 2002, the date on which the Rome Statute entered into force

ICC registrar, Silvana Arbia, during a press conference at Harambee House, Nairobi, 2011.

On 30 May 2011, the ICC's pre-trial chamber rejected the Kenyan government's admissibility challenge in the case of the 'Ocampo six'.

19(1), which states that: 'The Court shall satisfy itself that it has jurisdiction in any case brought before it'. Finally, article 19 also allows 'those who have referred the situation under article 13' (presumably the UN Security Council) and victims to 'submit observations to the Court' in this regard.[85]

If a challenge is brought simultaneously on admissibility and jurisdictional matters, then under rule 58(4) of the Rules of Procedure and Evidence the ICC 'shall rule on [the] ... challenge or question of jurisdiction first'.

4. ADMISSIBILITY

4.1 Introduction

The issue of admissibility is conceptually and procedurally different from that of jurisdiction. Despite this, due to the manner in which the Rome Statute is set out, they are often confused and conflated.

Procedurally, admissibility differs from jurisdiction in that there are two different stages at which it may be challenged under the Rome Statute: at the preliminary stage, before the prosecutor has identified specific cases for prosecution, a challenge can be brought under article 18 in respect of the situation under investigation. Once the prosecutor has identified specific cases, challenges to admissibility must be brought under article 19 in respect of each of these specific cases. Notably these procedures differ in substance also and not merely in terms of when they are brought.

4.1.1 Admissibility challenges in respect of situations

Preliminary challenges to admissibility under article 18 may be brought by any state that 'would normally exercise jurisdiction over the crimes concerned'. In this regard, article 18 requires the prosecutor – once he or she has determined that there is a reasonable basis to initiate an investigation (either after a state referral or based on his or her *proprio motu* power) – to notify all states parties and any other states with jurisdiction over a particular case, before beginning an investigation.[86]

Such notification is important due to the principle of complementarity (see infra), under which such states can in effect render the situation inadmissible before the ICC by informing the prosecutor, within one month of receipt of the notification, 'that it is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes referred to in article 5 and which relate to the information provided in the notification to States'.[87] This deferral is subject to periodic review in case there is 'a significant change of circumstances based on the State's unwillingness or inability genuinely to carry out the investigation'.[88] Article 18 explicitly excludes any investigations by the prosecutor pursuant to UN Security Council referrals under this provision, which arguably extends also to non-states party referrals although the text here is ambiguous.

4.1.2 Admissibility challenges in respect of cases

Admissibility can be raised under article 19 also in respect of specific cases, even if it was raised unsuccessfully under article 18 when there are 'additional significant

Due to the manner in which the Rome Statute is set out, admissibility and jurisdiction are often confused and conflated

facts or [a] significant change of circumstances'.[89] The procedure for challenging admissibility under article 19 is substantially the same as for challenging jurisdiction (discussed supra). As with challenges to jurisdiction, under article 19 admissibility may be challenged by a person against whom a warrant of arrest or summons to appear has been issued or against whom charges have been confirmed; or by any state[s] ordinarily with jurisdiction over the case 'on the ground that it is investigating or prosecuting the case or has investigated or prosecuted [it]'.[90]

Admissibility challenges normally may be brought only once and must be before or at the commencement of the trial phase. In exceptional cases they will be allowed after the commencement of a trial, or subsequently with the leave of the ICC, but only if they are based on the *non bis in idem* (double jeopardy) principle.[91] In addition, the prosecutor may 'seek a ruling' on the question of admissibility.[92] Finally, article 19(10) provides that '[i]f the Court has decided that a case is inadmissible under article 17, the Prosecutor may submit a request for a review of the decision when he or she is fully satisfied that new facts have arisen which negate the basis on which the case had previously been found inadmissible under article 17'. To this extent, the issue of admissibility may be the subject of ongoing review and assessment.

Kenya's Attorney General, Githu Muigai, announced in January 2012 that the government intends to again challenge the admissibility of the ICC's two cases against high-profile suspects.

4.2 Complementarity-based admissibility challenges

The notion of complementarity is the key organising principle of the Rome Statute. It is for this reason that if a case already being investigated or prosecuted by a state is brought before the ICC, under article 17 it 'shall determine that [such] a case is inadmissible', notwithstanding the fact that the court may otherwise have jurisdiction in respect of the case. There are, however, two exceptions to this general rule: the ICC will not make a finding of inadmissibility if the state concerned is either unwilling or unable genuinely to carry out the investigation or prosecution. The principle applies equally in respect of any decision reached by a state not to proceed with a prosecution after investigating the matter. Here, the ICC still may declare such a case to be admissible if it believes that such a decision resulted from the state's unwillingness or inability genuinely to prosecute the case.[93]

Article 17(2) elaborates the factors to be considered by the ICC when determining whether or not a state genuinely is unwilling to prosecute as case. They are as follows:

(a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5.
(b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice.
(c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.[94]

Admissibility challenges normally may be brought only once and must be before or at the commencement of the trial phase

Thomas Lubanga is accused of enlisting and conscripting children under the age of 15 to kill members of the Lendu ethnic group in the DRC.

Similarly, in determining the inability of a state, article 17(3) provides that: 'In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.'

The ICC prosecutor has taken a proactive position as far as complementarity is concerned, explaining that:

> The admissibility assessment is an on-going assessment that relates to the specific cases to be prosecuted by the Court. Once investigations have been carried out, and specific cases selected, the OTP (Office of the Prosecutor) will assess whether or not those cases are being, or have been, the subject of genuine national investigations or prosecutions. In making this assessment the OTP will respect any independent and impartial proceedings that meet the standards required by the Rome Statute.[95]

4.3 Gravity-based admissibility challenges

A further factor which may impact upon the admissibility of a potential case is its gravity. Under article 17(1)(d), the ICC is required to rule that a case is inadmissible where it 'is not of sufficient gravity to justify further action by the Court'.

As with complementarity, gravity appears to be an ongoing assessment. In its decision of March 2010 which authorised the prosecutor to investigate the post-electoral violence in Kenya, the pre-trial chamber considered gravity 'against the backdrop of the likely set of cases or "potential case(s)" that would arise from investigating the situation', because at that stage there were no concrete cases presented by the prosecutor. According to the chamber, the consideration of gravity at this stage involves an examination of '(i) whether the persons or groups of persons that are likely to be the object of an investigation include those who may bear the greatest responsibility for the alleged crimes committed; and (ii) the gravity of the crimes allegedly committed within the incidents, which are likely to be the object of an investigation'.[96]

The pre-trial chamber, however, declined explicitly to consider gravity again in its subsequent decision in the Kenya matter in which it issued summons, despite the fact that there were actual cases to consider. Instead, in respect of admissibility generally, it found:

> Regarding admissibility, the second sentence of article 19(1) of the Statute dictates that an admissibility determination of the case is only discretionary at this stage of the proceedings, in particular when triggered by the *proprio motu* powers of the Chamber. Accordingly, the Chamber shall not examine the admissibility of the case at this phase of proceedings.

4.4 Double jeopardy (*non bis in idem*)

The final ground upon which admissibility may be challenged is that of *non bis in idem* (double jeopardy). In this regard, article 17(1)(c) states that the ICC shall determine a case to be inadmissible if: 'The person concerned has already been

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The ICC's case against DRC warlord Thomas Lubanga Dyilo highlights the gravity of recruiting, enlisting and conscripting child soldiers

tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under [article 20(3)]'. This latter provision states that:

> No person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:
> (a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or
> (b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognised by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

This ground differs from the others in that it can only be raised in respect of a case, not a situation generally.

Amnesty, complementarity, and *non bis in idem*

One issue likely to come before the ICC is the relationship between amnesty and complementarity. Amnesty might take the form of conditional amnesty as part of an alternative justice process, or a blanket amnesty as part of a political settlement. An example of the former is South Africa's Truth and Reconciliation Commission established to address the atrocities of apartheid.

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

On the one hand, the repercussions of an accused being granted amnesty under national law might be interpreted by the ICC as a decision 'not to prosecute' or, arguably as an 'unwillingness' to prosecute. In this respect the provisions of article 17(2)(a) will come to the fore as the article provides that an 'unwillingness to prosecute' would exist where '[t]he proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility'. On the other, while amnesties do not in principle bar the ICC from exercising criminal jurisdiction over an individual who has been granted amnesty, the political reality is that in some instances it might be expedient or a requirement of justice not to push ahead with the prosecution of such a person. As the South African experience demonstrates, the prospect of amnesty in exchange for truth is a good incentive to the guilty to provide detailed accounts of the acts they have committed.

No clear rules can be enunciated to distinguish between permissible and impermissible amnesties under international law, but it has been suggested that 'international recognition might be accorded where amnesty has been granted as part of a truth and reconciliation ('TRC') inquiry and each person granted amnesty has been obliged to make full disclosure of his or her criminal acts as a precondition of amnesty and the acts were politically motivated'.[97] The blanket amnesty in Chile passed by the Pinochet regime would thus not meet the required standard, while the South African amnesties granted by a quasi-judicial amnesty committee functioning as part of a TRC process established by a democratically elected government, may well do so.

Others argue that the nature of certain offences (such as the core crimes) precludes the granting of amnesty to their perpetrators. The Preamble to the Rome Statute, while binding only in respect of

The Truth and Reconciliation Commission of South Africa, 1996.

South Africa's TRC granted conditional amnesty in exchange for full disclosure of criminal acts perpetrated under apartheid

ICC Prosecutor Luis Moreno-Ocampo (left) meets Kenyan President Kibaki (centre) and Prime Minister Raila Odinga (right) in Nairobi, 2011.

parties to it, confirms this trend when it declares that 'it is the duty of every state to exercise criminal jurisdiction over those responsible for international crimes'. In this respect, the Human Rights Committee has held that: 'Amnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future.'[98]

5. STAGES OF PROCEEDINGS

5.1 Pre-trial

5.1.1 Investigation

The prosecutor initiates an investigation under article 53 once he or she is satisfied that, on the information available, there is:

(a) A reasonable basis to believe that a crime within the jurisdiction of the ICC has been or is being committed; and
(b) The case is or would be admissible, unless 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'.[99]

If, upon further investigation, the prosecutor concludes that there are insufficient grounds to launch a prosecution – based on inter alia the factual and legal basis of the case, issues of admissibility, and/or the interests of justice – in accordance with article 53(2), he or she shall inform the pre-trial chamber and either the state that referred the situation under article 14 or the UN Security Council under article 13(b), whichever is applicable.[100] This decision is reviewable by the pre-trial chamber – either at the request of the referring party or, under certain circumstances, by the pre-trial chamber *mero motu*.[101] Importantly, the prosecutor him or herself may 'reconsider a decision whether to initiate an investigation or prosecution based on new facts or information'.[102]

In addition, article 54 sets out the duties and powers of the prosecutor with respect to investigations; article 55 sets out the rights of suspects during this phase (see infra); and article 56 establishes a special procedure to be followed in the case of a 'unique investigative opportunity'.

Throughout this phase of the proceedings, it is the pre-trial chamber that is responsible for the efficient administration of justice. Its functions and powers are detailed in article 57, which include: issuing such orders and warrants as may be required for the purposes of investigation; issuing requests for cooperation from states; assisting the suspect in obtaining the necessary information and evidence for his or her defence; facilitating the prosecutor's investigation where appropriate; and other specific functions under the Rome Statute and Rules of Procedure and Evidence.

The prosecutor may reconsider a decision whether to initiate an investigation or prosecution based on new facts or information

5.1.2 Arrest and surrender, summons and voluntary surrender

If the prosecutor, upon investigation, decides to proceed to trial with a particular case, there are two procedures available to him or her to secure the accused's presence in court for any proceedings.

5.1.2.1 Arrest and surrender

The first involves the issuance of an arrest warrant for the suspect under article 58. The prosecutor can apply to the pre-trial chamber for an arrest warrant at any time after the initiation of the investigation.[103] In deciding whether or not to grant such an application, the pre-trial chamber must be satisfied that: 'There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court',[104] and that the issuance of an arrest warrant is necessary to ensure the accused's presence at trial, to ensure that the person does not obstruct or endanger the investigation or court proceedings, or to prevent the continued commission of the crime or a related crime which is within the jurisdiction of the ICC and which arises out of the same circumstances.[105]

Notably, the issuance of an arrest warrant alone appears to be insufficient to place an obligation on states in respect of arrest and surrender. Rather, on a literal interpretation, the Rome Statute appears to require a further request for cooperation to be made by the ICC to the state[s] concerned under articles 89 and 91, in addition to the issuance of the arrest warrant.[106] The reason for such an additional requirement is not immediately clear from the Rome Statute; nor is it clear what the status (or relevance) of a warrant is in the absence of such an additional request. Nevertheless, the ICC appears to have glossed over this anomaly in practice by treating it as a mere formality and ordering the registrar to communicate such requests to all states parties, as well as certain other states, without further consideration.[107] While this approach eliminates the clumsy two-stage process in the Rome Statute in practice, its legality is not unassailable.[108]

5.1.2.2 Summons and voluntary surrender

An alternate, less coercive, means available to the prosecutor to secure the attendance of the suspect before the ICC is to request the pre-trial chamber to issue a summons for his or her appearance under article 58(7). Such a request will only be granted if the pre-trial chamber is satisfied that 'there are reasonable grounds to believe that the person committed the crime', and that the summons alone will be sufficient to secure the accused's attendance.

The first person to appear voluntarily before the ICC under this procedure was Bahr Idriss Abu Garda, in May 2009, on the basis of a summons issued by Pre-Trial Chamber I on 7 May 2009 relating to an attack on peacekeepers in Sudan. During the initial hearing, the prosecutor indicated that he would not be seeking an arrest warrant because Abu Garda had indicated his willingness to appear voluntarily. He was followed by Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, who appeared voluntarily in June 2010 pursuant to a summons issued in August 2009 in connection with the same attack. On 8 February 2010, Pre-Trial Chamber I refused to confirm the charges against Abu Garda, while the charges

Bahr Idriss Abu Garda, the first person to appear voluntarily before the ICC in relation to an attack on peacekeepers in Sudan, May 2009.

The prosecutor can apply to the pre-trial chamber for an arrest warrant at any time after the initiation of the investigation

Court proceedings during the confirmation of charges hearing of Kenya's 'Ocampo Six', 2011.

against Banda and Jerbo were confirmed unanimously by Pre-Trial Chamber I on 7 March 2011.

The procedure has been followed again in a different, more recent case when, in April 2011, six Kenyans appeared before Pre-Trial Chamber II following the issuance of summonses in respect of their alleged roles in the 2007-8 post-electoral violence in that country.

5.1.2.3 Initial appearance of the suspect

Once the suspect's presence has been secured – whether by way of an arrest warrant, pursuant to a summons, or through voluntary surrender – article 60 sets out the procedure that the pre-trial chamber must follow during the suspect's initial appearance. This includes ensuring that the suspect is aware of the crimes which he or she is alleged to have committed, and that he or she has been informed of his or her rights under the Rome Statute, which include the right to apply for interim release.[109] In the event that the pre-trial chamber denies interim release, the suspect may appeal that decision in the same way that conversely the prosecutor may appeal a decision to grant such release.[110]

5.1.3 Confirmation of charges

The next stage of the proceedings is the confirmation of charges hearing, which must take place 'within a reasonable time after the person's surrender or voluntary appearance before the Court'.[111] At this stage, the prosecutor must adduce sufficient evidence to establish 'substantial grounds to believe that the person committed the crime' with respect to each charge.[112] The burden of proof on the prosecutor at this stage ('substantial grounds to believe') is more onerous than that at the arrest warrant phase of proceedings ('reasonable grounds to believe'), but a lower burden than the one applicable at the trial ('beyond a reasonable doubt').

At the confirmation of charges hearing, the suspect may challenge the charges and present evidence in support of it. After considering the evidence presented by the prosecutor, and any submission made by the suspect(s) in response to it, the pre-trial chamber will either confirm or decline to confirm the charge(s) (in whole or in part) or request further evidence from the prosecutor in respect of specific charges. In addition, the pre-trial chamber may amend the charges on the basis that the evidence establishes that a different crime within the ICC's jurisdiction has been committed.[113]

Notably, and notwithstanding the fact that article 61(1) states that the confirmation of charges hearing 'shall be held in the presence of the Prosecutor and the person charged, as well as his or her counsel', there is a procedure for such a hearing to take place without the presence of the accused in exceptional circumstances. Under article 61(2), the prosecutor may request a confirmation of charges hearing in absentia if the suspect has waived his or her right to be present, or has '[f]led or cannot be found and all reasonable steps have been taken to secure his or her appearance before the Court and to inform the person of the charges and that a hearing to confirm those charges will be held'. In addition, the pre-trial chamber can elect to undertake a confirmation of charges hearing *in absentia* in the same conditions.

The confirmation of charges hearing must take place within a reasonable time after the person's surrender or voluntary appearance before the court

Once the charges have been confirmed, but before the trial has begun, the prosecutor may approach the pre-trial chamber to amend the charges provided that if additional charges are preferred, the confirmation of those charges takes place *de novo*.[114]

5.2 Trial

Following the confirmation of charges, the Presidency assigns the case to a trial chamber in order for the trial phase to commence.[115] Once this has been done, it becomes that chamber's responsibility, in consultation with the parties, to lay the ground rules for the fair and expeditious conduct of proceedings.[116] This includes providing for the disclosure of documents or information; ruling (if applicable) on the joinder of proceedings; and addressing any other preliminary issues that arise before the trial proper commences.[117] In addition, according to article 19(6), any challenges to the admissibility of a case or the jurisdiction of the ICC under that provision must be referred to the trial chamber from this point onwards.

After the trial commences, the presiding judge is responsible for the conduct of proceedings and will, as appropriate: rule on any questions of admissibility and evidential matters; maintain order in the course of the hearing; call witnesses and order the production of certain documents; rule on the protection of confidential information; protect the accused, witnesses, and victims; and rule on any other relevant matters.

Furthermore, article 64(2) places a special obligation on the trial chamber to 'ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses'. To this end, when the trial starts the accused must be read the confirmed charges, and the trial chamber must ensure both that the accused understands the charges and that he or she is afforded an opportunity to plead in this respect.

In addition, articles 66 and 67 set out the rights of an accused, which include the right to a prompt, impartial and fair hearing; the right to prepare a defence (including the right to counsel); the right to cross-examine witnesses and present evidence; the right to remain silent; and, perhaps most importantly, the right to be presumed innocent until proven guilty beyond reasonable doubt. Further notable provisions include article 64(7), which provides for proceedings to be heard in camera in special circumstances; and article 63, which unequivocally precludes trials in absentia.

Where an accused decides to make an admission of guilt, the trial chamber must ensure that he or she understands the nature and consequences of this admission; that the admission was made voluntarily; and that it is supported by the facts of the case based on the available evidence. Having done so, it may convict the accused of the crime or order the continuation of the trial.[118] In the event that the accused pleads not guilty and the case goes to a full trial, at the end of the trial the judges of the trial chamber must reach a decision based on the evaluation of the evidence and the entire proceedings.[119] In this regard, the court may not exceed the facts and circumstances described in the charges and must base its decision only on the evidence submitted before it during the trial.[120] The decision of the trial chamber shall be taken by the majority of the judges, although the Rome Statute

The decision of the trial chamber shall be taken by a majority of the judges, although the Rome Statute encourages them to achieve unanimity where possible

Judges of the ICC trial chamber at the Lubanga trial, 2009.

ICC outreach to victims in Ituri, DRC, 2008.

encourages them to achieve unanimity where possible, failing which the minority decision must be included in the court's judgement.[121]

Furthermore, the Rome Statute itself contains detailed provisions relating to evidence (article 69, e.g. its weight, relevance, and admissibility); offences against the administration of justice (article 70, e.g. giving false testimony); sanctions for misconduct before the court (article 71, e.g. disruption of proceedings); and protection of national security information (article 72). These provisions are elaborated in much more detail by the Rules of Procedure and Evidence.

One final aspect of the trial phase, which warrants further mention here, is the prominent role given to victims and witnesses under the Rome Statute. Article 68 ensures that victims and witnesses are given an active role in proceedings, which includes the right of victims under article 68(3) to present their views and concerns in respect of matters of personal interest (through legal representatives where appropriate). Further, article 75 provides that the ICC may make an order against a convicted person specifying 'appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation'.[122] This can be done directly or else through the trust fund established under article 79.

5.3 Sentencing

If the trial chamber convicts the accused, then it proceeds to sentencing through the imposition of penalties available under article 77. These include: imprisonment for a specified period not exceeding 30 years;[123] imprisonment for life if 'justified by the extreme gravity of the crime and the individual circumstances of the convicted person';[124] in addition to a fine[125] and/or the forfeiture of proceeds from the crime.[126]

In determining an appropriate sentence, the trial chamber must consider factors such as the gravity of the crime, and the individual circumstances of the convicted person.[127] With respect to the former, rule 145(1)(c) of the Rules of Procedure and Evidence lists additional factors to be considered here, which include: the extent of the damage caused, in particular the harm caused to the victims and their families; the nature of the unlawful behaviour and the means employed to execute the crime; the degree of participation of the convicted person; the degree of intent; the circumstances of manner, time and location; and the age, education, social and economic condition of the convicted person.

As far as potential mitigating factors are concerned, these are listed in rule 145(2) as: circumstances falling short of constituting grounds for exclusion of criminal responsibility, such as substantially diminished mental capacity or duress; the convicted person's conduct after the act, including any efforts by the person to compensate the victims; and any cooperation with the ICC.

Finally, the Rules of Procedure and Evidence list the following as aggravating factors:[128] any relevant prior criminal convictions for crimes under the jurisdiction of the ICC or of a similar nature; abuse of power or official capacity; commission of the crime where the victim is particularly defenceless; commission of the crime with particular cruelty or where there were multiple victims; commission of the crime for any motive involving discrimination; and other circumstances which, although not enumerated above, by virtue of their nature are similar to those mentioned.

The Rome Statute gives a prominent role to victims and witnesses during the trial phase

In addition to considering the evidence presented and submissions made during the trial, the trial chamber may call further upon the parties to make submissions and adduce evidence relating specifically to the issue of sentencing.[129]

5.4 Appeals on conviction and sentencing

Under the Rome Statute, when an accused person is convicted by the trial chamber, he or she has a right to appeal to the appeals chamber against the decision, the sentence, or both.[130] Similarly, the prosecutor has a corresponding right of appeal. In respect of convictions or acquittals, the accused's right of appeal is broader than that of the prosecutor, with the ability to appeal against any decision of the trial chamber based on an error of law, an error of fact, a procedural error, or '[a]ny other ground that affects the fairness or reliability of the proceedings or decision'.[131] The prosecutor has the same right of appeal in respect of the first three grounds, but not the final one.

In terms of possible outcomes of an appeal, if the appeals chamber finds that a decision or sentence was materially affected by any error of fact, law, or procedure, it may reverse or amend the decision or sentence, or order the trial *de novo*.[132] As far as appeals against sentences are concerned, both the convicted person and the prosecutor can appeal on the grounds of 'disproportion between the crime and the sentence'.[133] In the event that the appeals chamber finds that the sentence is in fact disproportionate to the crime, it may revise the sentence as it deems fit.[134]

6. STATE COOPERATION WITH THE ICC

6.1 Introduction

The previous sections considered key provisions, powers, and functions of the ICC. The reality is that many of its ideals and its potential will be unrealisable without effective cooperation with states. As Cassese noted: 'The principal problem with the enforcement of international humanitarian law through the prosecution and punishment of individuals is that the implementation of this method ultimately hinges on, and depends upon, the goodwill of states'.[135]

States that have ratified the Rome Statute are obliged to cooperate with the ICC in the arrest and surrender of suspects, investigation of crimes, and other forms as required by Part 9 of the Statute. The issue of state cooperation was a controversial one during the treaty negotiations in Rome in 1998. Consequently, the final text strikes a delicate balance between recognising the constraints of the ICC as a treaty-based mechanism (*contra* the ICTY and ICTR),[136] and creating a progressive cooperation regime that enables the ICC to operate effectively.

The resultant cooperation regime as specified in Part 9 is a hybrid between a horizontal model and a vertical model of cooperation: the former denoting the relatively weaker form of inter-state cooperation, and the latter being used to describe the more robust system of cooperation that exists between the ad hoc tribunals and states: the supra-state model.[137] As a result, aside from the general obligation on states created by article 86 to 'cooperate fully with the Court', the question of whether or not the ICC can compel cooperation may only be

ICC Prosecutor Luis Moreno-Ocampo and President Museveni of Uganda.

States that have ratified the Rome Statute are obliged to cooperate with the ICC

The provisions of the Rome Statute concerning surrender of persons differ from those governing other forms of cooperation which contain grounds for the denial of a request

determined with reference to the specific form of cooperation involved and its corresponding provisions.

Under article 87, the ICC may 'make requests to States Parties for cooperation'. This implies that states' obligations to cooperate are 'generally to be discharged upon a request *by the Court*'.[138] As far as action available to the ICC for non-compliance is concerned, article 87(7) states that:

> Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council.

Some scholars were critical of the state cooperation regime adopted at Rome. In this regard Cassese laments that:

> … the framers of the Rome Statute were not sufficiently bold to jettison the sovereignty-oriented approach to state cooperation with the Court and opt for a "supra-national" approach. Instead of granting the Court greater authority over states, the draughtsmen have left too many loopholes permitting states to delay or even thwart the Court's proceedings.[139]

6.2 Cooperation in arrest and surrender

The Rome Statute empowers the pre-trial chamber, on the application of the prosecutor, to issue a warrant of arrest for a person if there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the ICC and his or her arrest appears necessary in the circumstances.[140] Such arrest will necessarily have to be effected by states within their territories. However, the issuance of an arrest warrant does not itself place an obligation on states in respect of arrest and surrender. Rather, the Rome Statute requires a further request for cooperation to be made by the ICC under articles 89 and 91, in addition to the warrant.[141]

It is not immediately clear why it requires an additional request to be made by the ICC to trigger state cooperation in respect of the arrest and surrender of a person or persons subject to an arrest warrant; nor is it clear what the exact legal status (or relevance) of a warrant is in the absence of such an additional request. The answer might lie in a conceptual distinction between the exercise of jurisdiction by the ICC, and the obligation to cooperate placed on states parties.[142] The ICC appears to have glossed over this distinction in practice by treating it as a mere formality and ordering the registrar to communicate such requests to all states parties, as well as certain other states, without further consideration. To this end, when it issued both arrest warrants for al-Bashir, the pre-trial chamber directed the registrar to transmit such article 89 requests to 'competent Sudanese authorities ..., to all States Parties to the Statute and all the United Nations Security Council members that are not States Parties to the Statute'.[143] The registrar promptly did so on both occasions.[144]

While such an approach eliminates the more cumbersome two-stage process which appears to be required by the Rome Statute, its legality is not unassailable.

Malawi is a state party to the Rome Statute but did not arrest and surrender President Bashir, an ICC indictee, when he visited in 2011.

More specifically, although rule 176(2) of the Rules of Procedure and Evidence authorises the registrar to 'transmit the requests for cooperation made by the Chambers and ... receive the responses, information and documents from requested States', it is not at all clear that such requests can be made *en masse* as they were in the case of al-Bashir. On the contrary, the wording on article 89 – '[t]he Court may transmit a request for the arrest and surrender of a person ... to any State on the territory of which that person may be found' – suggests that any such request should be made in relation to the specific state on whose territory it is believed that the accused can be found and apprehended.

Be that as it may, according to the ICC's jurisprudence, states parties are under the following obligations in respect of individuals subject to an arrest warrant and request for surrender: aside from the general obligation to 'cooperate fully' with the ICC contained in article 86, article 59(1) enjoins '[a] State Party which has received a request for provisional arrest or for arrest and surrender [to] ... immediately take steps to arrest the person in question in accordance with its laws and the provisions of Part 9'. Further, article 89(1) states, in the relevant part, that 'States Parties shall, in accordance with the provisions of this Part and the procedure under their national law, comply with requests for arrest and surrender'.[145] Further, in terms of rule 184 of the ICC's Rules of Procedure, states are under a positive obligation to 'immediately inform the Registrar when the person sought by the Court is available for surrender'.

Crucially, the obligation to cooperate in respect of arrest and surrender is not subject to the same exceptions as other forms of cooperation,[146] rather the provisions on surrender are unique in this regard. As Swart notes:

> As far as surrender is concerned, the fundamental achievement of the Statute is that the duty of States Parties to comply with requests of the Court is not made subject to a number of exceptions which are normal in extradition law and practice. In this regard, the situation of the Court resembles that of the *ad hoc* Tribunals.[147]

Therefore, the provisions of the Rome Statute concerning surrender of persons differ from those governing other forms of cooperation which contain grounds for the denial of a request. The fact that such exceptions were not made applicable to the surrender of persons is indicative of the drafters' approach to this important aspect of the ICC's functioning. There is, of course, the well-known general exception to the state cooperation regime contained in Part 9, the exact nature of which has become perhaps the most controversial aspect of the Rome Statute: that is article 98, which deals with immunities.[148]

In order to facilitate their cooperation, the Rome Statute requires states parties to 'ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under [the Rome Statute]'.[149] The operation of South Africa's Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 ('the Rome Statute Act') is illustrative here. It contains a number of provisions relating to cooperation with the ICC. As far as the execution of ICC arrest warrants is concerned, section 8 of the Rome Statute Act states that when South Africa receives a request from the ICC for the arrest and surrender of a person for whom the ICC has issued a warrant of arrest, it must refer the request to the director-general of the Department of Justice and

The Rome Statute requires states parties to ensure that there are procedures available under their national law for all the forms of cooperation specified under the Statute

Although Kenya has domesticated the Rome Statute, President Bashir, an ICC indictee, was not arrested and surrendered to the court when he visited Kenya in 2010.

Former Ivory Coast president Laurent Gbagbo is the first former head of state to be surrendered to the ICC, 2011.

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.[150] The director-general must then forward the request (together with the necessary documentation) to a magistrate who must endorse the ICC's warrant of arrest for execution in any part of the Republic.[151]

Following the arrest of the suspect, a magistrate must make a committal order in order to effect his or her surrender to the ICC. Before doing so, the magistrate must be satisfied that: (a) the person before the court is the individual named in the warrant;[152] (b) the person has been arrested in accordance with the procedures set down by domestic law;[153] and (c) the arrestee's rights, as contemplated in the Bill of Rights, have been respected.[154] In this regard Du Plessis notes:

> The nature of these three requirements makes it clear that surrender to the ICC is different to extradition in international law. There is no mention of the double criminality rule which has become so central to extradition proceedings. And unlike many extradition proceedings, there is no requirement in the [Rome Statute Act] that a prima facie case be shown against the suspect. Section 10(5) of the [Rome Statute Act] provides as the primary test that, if, after considering the evidence adduced at the inquiry the magistrate is satisfied that the three requirements outlined above are met, then the magistrate "must issue an order committing that person to prison pending his or her surrender to the Court".[155]

6.3 Other forms of cooperation under article 93

In addition, article 93 of the Rome Statute requires states parties to provide 'other forms of cooperation' to the ICC in relation to its investigation and prosecution of crimes within its jurisdiction. This includes: the identification and whereabouts of persons or the location of items; the taking of evidence, including testimony under oath, and the production of evidence, including expert opinions and reports necessary to the ICC; the questioning of any person being investigated or prosecuted; the service of documents, including judicial documents; facilitating the voluntary appearance of persons as witnesses or experts before the ICC; the examination of places or sites, including the exhumation and examination of grave sites; the execution of searches and seizures; the protection of victims and witnesses and the preservation of evidence; and the identification, tracing, and freezing or seizure of proceeds, property, and assets and instrumentalities of crimes for the purpose of eventual forfeiture.

Pursuant to article 88, Part 2 of South Africa's Rome Statute Act sets out a variety of circumstances in which the 'relevant competent authorities in the Republic' must 'cooperate with, and render assistance to, the Court in relation to investigations and prosecutions'.[156] In addition, section 6 provides the South African president with the power to declare any place in the Republic as the seat of the ICC at the request of the ICC and by proclamation in the Government Gazette.[157]

6.4 Cooperation in the enforcement of sentences

The effective cooperation of states is not limited to such activities as the execution of arrest warrants, rather it is equally necessary in relation to the enforcement of any sentences passed by the ICC. This is reflected within article 103 of the Rome

Surrender to the ICC is different to extradition in international law

Statute which states that: 'A sentence of imprisonment shall be served in a State designated by the Court from a list of States which have indicated to the Court their willingness to accept sentenced persons.'[158]

Further, the Rome Statute adds that: 'States Parties should share the responsibility for enforcing sentences of imprisonment, in accordance with principles of equitable distribution'.[159] After sentencing an offender, the ICC will designate the state where the term is to be served, taking into account such factors as: the views of the sentenced prisoner; his or her nationality; the 'widely accepted international treaty standards governing the treatment of prisoners'; and 'other factors regarding the circumstances of the crime or the person sentenced, or the effective enforcement of the sentence, as may be appropriate in designating the State of enforcement'.[160] 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.[161]

ICC deputy prosecutor Fatou Bensouda greets Ivory Coast president Ouattara, June 2011.

7. IMMUNITY UNDER THE ROME STATUTE

7.1 Introduction: immunities under international law

Immunities have long been considered a legitimate and necessary feature of international law. As Cryer et al note:

> The law of immunities has ancient roots in international law, extending back not hundreds, but thousands, of years. In order to maintain channels of communication and thereby prevent and resolve conflicts, societies needed to have confidence that their envoys would have safe passage, particularly in times when emotions and distrust were at their highest. Domestic and international law developed to provide both inviolability for the person and premises of a foreign State's representatives and immunities from the exercise of jurisdiction over those representatives.[162]

That said, the utility of such immunities has decreased over time with modern communication technology and a professional diplomatic corps. What is more, the rise of ICL sometimes can produce a competing good: prosecuting those most responsible for international crimes. As a result, there is often an inevitable tension between these two imperatives and, although there is some movement towards resolving this tension in favor of combating impunity, immunities continue to be an absolute (if temporary) bar to prosecution in certain instances.

Immunities can be divided into functional immunity (also known as 'immunity *ratione materiae*' or 'subject-matter immunity') and personal immunity (also known as 'immunity *ratione personae*' or 'procedural immunity'). Immunity *ratione materiae* relates to conduct carried out on behalf of a state. This form of immunity is based on the notion that 'a State may not sit in judgment on the policies and actions of another State, since they are both sovereign and equal'.[163] For this reason, functional immunity does not attach to all conduct performed by state officials, rather it only applies to conduct carried out within their official capacity. However, immunity in respect of such conduct is permanent (i.e. immunity does not lapse when the official ceases to hold office) and cannot be waived by the state

Immunities can be divided into functional immunity and personal immunity

As far as ICL is concerned, there is near universal acceptance that international crimes cannot be covered by functional immunity before international or domestic tribunals

concerned, because it is the conduct itself and not the office bearer that forms the basis of that immunity. This form of immunity is more commonly raised in civil matters.[164]

In contrast, immunity *ratione personae* 'provides complete immunity of the person of certain officeholders while they carry out important representative functions'.[165] In contrast to functional immunity, personal immunity is absolute (i.e. it covers both private and public acts committed by officials), but temporary (i.e. it only applies insofar as the person holds the office in question) and can be waived by the state concerned.

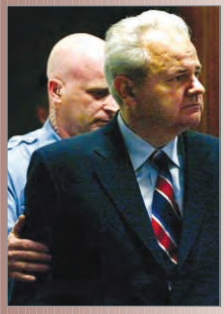
As far as ICL is concerned, there is near universal acceptance of the principle that international crimes cannot be covered by immunity *ratione materiae*, before international or domestic tribunals, albeit for differing reasons. The IMT at Nuremberg held that such immunity does not apply to 'acts condemned as criminal by international law'.[166] Similarly, both the ICTY and ICTR statutes contain a provision stating 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.'[167]

The same is true of much of domestic jurisprudence on immunity *ratione materiae*. The most famous decision on the irrelevance of functional immunity was the *Pinochet* case where, albeit for different reasons, the UK House of Lords found that General Pinochet could not rely on functional immunity in order to avoid being extradited for allegations of torture.[168] The best explanation of the inapplicability of such immunity in respect of international crimes was given by Lords Browne-Wilkinson and Hutton, to the effect that 'functional immunity does not protect certain international crimes because international law does not protect the same acts that it prohibits and condemns'.[169]

The relevance of immunity *ratione personae* in the prosecution of international crimes is more complex. Here one must separate proceedings before international courts and tribunals and those before domestic courts.[170]

Support for the proposition that immunity *rationae personae* based on customary international law does not apply to individuals in proceedings before international courts and tribunals can be found in the jurisprudence of a number of such courts, as well as academic writings. Since the failed prosecution of Kaiser Willem under the Treaty of Versailles of 1919, international tribunals have either expressly or by implication considered such immunities to be irrelevant for their purposes.[171] The statute of the post-World War II Nuremberg Tribunal stated that: 'Leaders, organisers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.'[172]

Although the ICTY and ICTR Statutes did not contain a specific provision addressing immunity *ratione personae*, the ICTY indicted Slobodan Milosevic while he was a still a sitting head of state. Similarly, the hybrid Special Court for Sierra Leone (but not without controversy) held that: '[T]he principle seems now established that the sovereign equality of states does not prevent a Head of State from being prosecuted before an international criminal tribunal or court'.[173] Finally, in the *Arrest Warrant* case the ICJ stated that:



The ICTY indicted former Yugoslav president Slobodan Milosevic in 1999.

> [A]n 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 resolutions under Chapter VII of the United Nations Charter, and the future International Criminal Court created by the 1998 Rome Convention.[174]

General Pinochet with Margaret Thatcher in 1999 – the same year the UK House of Lords found that he could not rely on functional immunity.

The reason for such immunities being removed before international courts and tribunals is not subject to the same unanimity. For some, this removal is automatic (and axiomatic) given the supranational nature of these courts, which precludes the rationale for granting such immunity in the first place from applying to them (i.e. to facilitate diplomatic correspondence *between states*). Others take a more cautious (and, in the opinion of the author, correct) view, noting that the question of whether such immunities are removed depends on the provisions of the founding instrument of the court in question, and the manner in which it was established.[175]

In this regard, the ICC is different from all previous international tribunals in that it was established by a universal, multilateral treaty (i.e. the consent of states) and not by a Chapter VII UN Security Council Resolution (e.g. as in the case of the ICTY and ICTR), or a special agreement between a state and the UN (e.g SCSL), or an agreement between victorious powers, or by a peace treaty.[176] As will be seen below, this issue has important consequences for the question of whether the non-availability of immunity before international courts and tribunals extends to the cooperation of states in arresting and surrendering individuals to such courts.

As to the scope of personal immunity, clearly it applies to heads of state. Additionally, according to the ICJ in the *Arrest Warrant* case, it extends to foreign ministers also:

> [T]he 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.[177]

It remains to be determined jurisprudentially, however, which – if any – other officials enjoy this form of immunity while in office.

7.2 The Rome Statute and immunity

7.2.1 Articles 27 and 98

As was noted earlier, one of the most controversial issues under the Rome Statute relates to what many regard to be its *prima facie* conflicting provisions regarding immunity. Article 27(1) states:

> This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, 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, nor shall it, in and of itself, constitute a ground for reduction of sentence.

One of the most controversial issues under the Rome Statute relates to its *prima facie* conflicting provisions regarding immunity

The primary difficulty relating to the application of article 27(2) comes when trying to reconcile it with the wording of article 98(1)

This provision is generally understood to refer to functional immunity,[178] making it clear that it is inapplicable to any individual before the ICC. It is based on article 7(2) of the ICTY Statute (and article 6(2) of the ICTR Statute). For the purposes of the Rome Statute, this is not controversial as it simply restates the now accepted position under international law.[179] Admittedly, this provision is not a model of clarity, and is not limited to functional immunity alone.

The Rome Statute's personal immunity provision proper is article 27(2), which states that: '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*.'

This provision makes it clear that such immunities do not apply when the ICC is exercising jurisdiction over an individual. This is not of itself controversial, illustrated by the fact that in the *Arrest Warrant* case the ICJ explicitly cited article 27(2) as an exception to the diplomatic immunity that certain state officials enjoy under customary international law.[180] It is novel, however, not least because the ICTY and ICTR statutes do not contain a correlative provision.

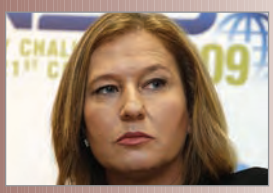
The primary difficulty relating to the application of article 27(2) comes when trying to reconcile it with the wording of article 98(1), which states:

> The 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.

This apparent contradiction is compounded by the fact that article 98 is unclear on who decides when it applies, and whether its conditions in article 98 are met. It states that 'the Court may not proceed', but it does not explicitly give the ICC the power to determine or explain when this might be the case. An argument could be made that it is the responsibility of states themselves (and not the ICC) to determine the applicability of their international obligations to other states. However, article 97 suggests that this is probably not the case due to the central role played by the ICC. This provision requires a state party that receives a request from the court 'in relation to which it identifies problems which may impede or prevent the execution of the request' to '*consult* with the Court without delay in order to resolve the matter'. Once again though, this provision is not terribly clear or definitive, including whether – if it is the decision of the ICC – states are bound by its determination.

According to rule 195(1) of the ICC Rules of Procedure and Evidence, it is the court that decides whether article 98 applies,[181] but the procedure for doing so remains unclear.[182] As to whether the state concerned is bound by this determination, no such explicit power is given to the ICC under this article (or Part 9 generally) and to imply such a far-reaching power would seem to be an over-stretch of article 98.[183] Once again, the issue regarding the proper distinction between article 27 and article 98 re-emerges here.

Under article 119 of the Rome Statute – which deals with the settlement of disputes – any dispute 'concerning the judicial function of the Court … shall be settled by the decision of the Court'.[184] On the one hand, those who favour the article 27 waiver argument would most likely regard any interpretative disputes



In 2009 a UK court issued an arrest warrant for the Israeli opposition leader, Tzipi Livni, on war crimes charges, but later withdrew it.

relating to article 98 as falling within the scope of the ICC's judicial functions.[185] On the other hand, those who maintain a strict separation between the exercise of the ICC's jurisdiction and the cooperative obligations on states parties might consider such a dispute as a non-judicial one, governed by article 119(2) of the Rome Statute. Notably, the AU has adopted the latter position,[186] while national implementing legislation remains generally equivocal on the matter.[187]

7.2.2 The article 27 waiver argument

Different approaches have been adopted attempting to reconcile this contradiction, with varying impact upon the integrity of the two provisions.[188] The approach favoured by most academics[189] has been to interpret article 27 as a waiver by a state party of any immunity that might otherwise apply to their officials before the ICC, thereby seeking to limit the application of article 98(1) to the officials of non-states parties. Proponents of this approach generally argue that – as a matter of logic, and under the doctrine of effective construction – 'the removal of immunity in Article 27 must be understood as applying not only in relation to the ICC itself, but also in relation to states acting at the request of the ICC'.[190]

The upshot of this interpretation is that the ICC has a bifurcated immunity system: one for the officials of states parties; and one for the officials of non-states parties. With respect to the former, neither functional nor personal immunity applies in relation to any ICC proceedings, because the state has waived any potential immunity rights of such officials by virtue of signing up to inter alia article 27. In relation to the latter, since non-states parties have not adopted the provisions of the Rome Statute, including article 27, as a matter of treaty law they have not waived any immunities enjoyed by their officials. Therefore, article 98(1) preserves their immunity and provides that their arrest and surrender can only be carried out by a state party if 'the Court can first obtain the cooperation of that third State for the waiver of the immunity'.

The same result can be reached through another interpretative approach that focuses on article 98 rather than on article 27. On this approach, set out by Gaeta, the reference in article 98 to 'third states' should be interpreted as meaning non-states parties.[191] The end result is the same, with the exception that instead of regarding article 27(2) as the waiver by states parties of the obligations on all other states under article 98 to grant diplomatic immunity *ratione personae*, the reading of article 98 is restricted to only recognising that obligation in respect of non-states parties. Of the two possible approaches, the former (article 27 waiver argument) is preferable, but neither one is entirely satisfactory.

One of the main problems with the article 27 waiver approach is that its proponents – to varying degrees – fail to distinguish adequately between the ICC's exercise of its jurisdiction, and the obligation of cooperation residing on states. Some see no distinction – merging the two concepts completely – while others acknowledge the formal distinction, yet gloss over it in practice, losing sight of its significance in the process.[192] All supporters of this approach overstate the effect of separating the exercise of jurisdiction from cooperative obligations on the ICC's efficacy in combating impunity for international crimes. The implicit assumption of these constructions of the article 27/98 relationship is that the distinction itself is of no value, or at least not of sufficient value to give these provisions their own

Most academics have interpreted article 27 as a waiver by a state party of any immunity that might otherwise apply to their officials before the ICC

The AU raised the article 98 issue in its objections to the ICC's arrest warrant for President Bashir of Sudan.

UN Security Council meeting that referred the Darfur situation to the ICC, 2005.

distinct purpose. As will be seen below, there is support for maintaining this distinction in the Rome Statute, with at least one example of this separation in practice.

One of the principal weaknesses of this argument is that its proponents invoke the doctrine of effective construction in an incorrect manner in order to justify their interpretation of articles 27 and 98. This doctrine – based on the maxim *ut res magis valeat quam pereat*[193] – takes on different forms, but can best be understood as requiring that one 'avoid[s] interpretations which would leave any part of the provision to be interpreted without effect'.[194] Proponents of the article 27 waiver argument use it as the basis for reading down the effect of article 98(1), as Akande notes:

> [R]eading Article 27 as applying only to actions by the Court would render parts of that provision practically meaningless … because the Court has no independent powers of arrest. A proclamation that immunities shall not bar the exercise of jurisdiction by the Court while leaving such immunities intact with respect to arrests by national authorities would mean that the Court would hardly be in a position to apply Article 27 and exercise its jurisdiction …[195]

The problem with relying on this doctrine is two-fold. First, it misconstrues the provision by favouring an interpretative approach that increases (or at least does not decrease) the Rome Statute's ability to achieve its primary purpose, rather than focusing on making the provisions themselves more effective. Employing the doctrine of effective construction in this manner, with respect, conflates it with the teleological approach to interpretation.[196] Second, if proper consideration is given to the distinction between the exercise of jurisdiction by the ICC, and the obligations on states parties to cooperate, there can be no argument that they must be read together in order for each to have an effect, because their function lies in regulating oftentimes related but nevertheless distinct aspects of the Rome Statute.

What is more, the proper application of the doctrine might well have the opposite effect to that intended, because the article 27 waiver argument leaves article 98(1) considerably less effective. This is particularly true if one considers the article 27 waiver argument as applied to states referred to the ICC by the UN Security Council, which is considered next.

The article 27 waiver approach – which creates a two-tier immunity system for states parties and non-states parties – was shaken by events on the ground, namely the issuance of the arrest warrant for President al-Bashir of Sudan in March 2009. The problem is that the strict application of this interpretative approach would mean that al-Bashir – as the head of state of a non-state party (or a 'third state') – would benefit from article 98(1). For this reason, the reach of the article 27 waiver approach was extended to states such as Sudan by arguing that referrals by the UN Security Council effectively place their subject-states in the same position as states parties insofar as immunities are concerned.[197] The argument here is that the effect of any UN Security Council decision which confers jurisdiction on the ICC under the Rome Statute means that every one of the Statute's provisions apply to the state being referred, including all jurisdictional ones such as article 27(2). The only real difference between this and the article 27 waiver approach is that for non-states parties such as Sudan the legal source of their obligations under the Rome Statute is derived from article 25 of the UN Charter rather than from the treaty itself.

The strict application of the article 27 waiver approach would mean that Bashir – as the head of state of a non-state party – would benefit from article 98(1)

Consequently, the immunities of President al-Bashir (and more recently Muammar Gaddafi) are removed by article 27. Therefore, for example, states parties are not required to seek a waiver of head of state immunity for President al-Bashir from Sudan prior to arresting and surrendering him to the ICC under article 98.

As will be discussed further below, any concerns that this argument conflates the exercise of jurisdiction by states and obligations of cooperation on states is even more convincing insofar as UN Security Council referrals are concerned. This is because the two legal concepts are by no means coextensive in such circumstances: UN Security Council Resolutions 1593 and 1970 implicitly recognise this. Even though the UN Security Council is empowered to compel states to cooperate with the ICC,[198] it chose not to impose cooperative obligations on any states other than Sudan and Libya respectively, merely urging them to do so.

The main problem with such an addition based on the President al-Bashir et al scenario to the waiver argument is that, on its proponent's construction of the article 27/98 relationship, it in effect renders article 98 meaningless in practice. The only other way that such a matter could come under the ICC's jurisdiction would be through an ad hoc self-referral by a non-state party under article 12 of the Rome Statute. In such circumstances, the state concerned would be bound under the treaty to 'cooperate with the Court without any delay or exception in accordance with Part 9'.[199] The practical application of article 98 would be limited to circumstances where an official of a non-state party is sought by the ICC for crimes committed on the territory of a state party – thus, the ordinary jurisdictional base (territoriality) would apply.

Such a scenario is possible. For example, Jean-Pierre Bemba – a national of the DRC – is currently being tried by the ICC for crimes allegedly committed in the Central African Republic. At the time the ICC issued the warrant for his arrest in 2008, he was no longer in office as one of the four vice presidents in the DRC's transitional government and, therefore, was no longer the beneficiary of personal immunity. Similarly, Charles Taylor, the former president of Liberia, is standing trial for his part in the Sierra Leone war. However, this leaves very little for article 98(1) to do.

It is worth noting that proponents of both versions of the waiver argument cite state practice in support of this construction. As Akande notes: 'The view that Article 98(1) applies only to officials of nonparties has been taken by scholars and by some ICC parties. This view is reflected in the legislation of a number of ICC parties implementing their obligations under the ICC Statute.'[200]

Although it is not suggested that such practice amounts to a subsequent agreement between states parties as to the interpretation of these provisions – pursuant to article 31(3)(b) VCLT[201] – it is nevertheless persuasive.[202]

Charles Taylor, former president of Liberia, has been on trial at the SCSL since 2007.

Proponents of both versions of the waiver argument cite state practice in support of this construction

7.2.3 The article 98 argument

The alternate interpretative approach to the article 27/article 98 relationship is to maintain a strict separation between 'the power of an international court to exercise its jurisdiction over an individual' and 'the powers and obligations of states when requested to carry out coercive acts against individuals protected by personal

Former vice-president of the Democratic Republic of the Congo, Jean Pierre Bemba, was arrested in Brussels in 2008 and is currently on trial at the ICC.

immunities',[203] and argue that article 27 of the Rome Statute refers only to the former, and article 98 to the latter. In this regard, as Gaeta correctly notes:

> ... the "inapplicability" of the rules of customary international law on personal immunities before international criminal courts does not *per se* imply the "inapplicability" of said rules when it comes to the arrest and surrender to an international criminal court by the competent national authorities of a given state.[204]

Despite this approach being the less favoured one amongst academics, this interpretation has much to commend it. Textually, the wording of article 27(2) is such that it is not unreasonable to interpret it narrowly in a manner that focuses on the ICC's exercise of jurisdiction rather than on the cooperation regime invoking the rights and obligations of states. Interestingly, article 27(1) refers to the Rome Statute, while article 27(2) refers to the ICC's jurisdiction.

As far as article 98(1) is concerned, it must be noted that it applies to 'requests for surrender or assistance', therefore its scope is wider than, and not coextensive with, that of article 27. Furthermore, contextually, articles 27 and 98 are from different sections of the Rome Statute. Although some provisions relating to states' obligations appear in other parts of the Statute, they should be limited to Part 9. First, Part 9 is headed 'International Cooperation and Judicial Assistance'. Second, article 88 states that 'States Parties shall ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under this Part'. No such provision exists in relation to any other part of the Rome Statute.

Furthermore, while the issue of requests for surrender and the exercise of jurisdiction are easy to conflate – because they seem to be part of one and the same process – jurisdictional provisions conceptually are separate from cooperative provisions. Returning to first principles, article 27 confirms that the existence of immunity *ratione personae* is neither a bar to the ICC's prescriptive jurisdiction (loosely, article 27(1)), nor to its enforcement jurisdiction (article 27(2));[205] whereas, obligations arising under article 98 on states to exercise, inter alia, their enforcement jurisdiction in respect of foreign officials enjoying immunity is conditional on its waiver by that third state.

The separation of the exercise of jurisdiction by the ICC, and the creation (and qualification) of cooperative obligations, is recognised in other parts of the Rome Statute and has been upheld by the ICC itself in the form of arrest warrant proceedings. Although the provisions relating to arrest warrants are formulated clumsily, the ICC has interpreted them in a manner whereby the mere issuance of an arrest warrant under article 58 does not by itself trigger obligations to arrest. Rather, there is the requirement for an additional request for cooperation to be issued by the ICC Registry under article 89. In this regard, Sluiter notes:

> Strictly speaking, one should distinguish the arrest warrant from the request for arrest and surrender. The former is not susceptible to review at the national level, whereas the latter is subject to the requirements of Article 91(2)(c), and must be supported by sufficient evidence. An interim release on account of insufficient evidence is, therefore, not based on the ultra vires character of the warrant, but on an alleged court violation of Article 91(2)(c).[206]

Article 98(1) applies to requests for surrender or assistance, therefore its scope is wider than, and not coextensive with, that of article 27

Therefore, similar to article 27, at first glance an arrest warrant under article 58 that is conditional on an additional provision contained in Part 9 in order to create an obligation of arrest on states seems illogical, because the two provisions are regarded as being one and the same. It makes more sense, however, if one considers article 58 as the legal basis of the ICC's power to exercise its enforcement jurisdiction through the issuance of an arrest warrant; and article 89 as the legal basis of obligations arising on states to cooperate in enforcing that warrant.

Proponents of the article 27 waiver argument would most likely contend that such an understanding is a conservative, overly technical and restrictive interpretation of the Rome Statute, especially regarding the relationship between the ICC's jurisdiction and states' cooperative obligations. However, one might counter such criticisms by arguing that such a strict separation is not only clear, but necessary (and progressive) in some respects.

As noted above, although the two provisions often operate simultaneously – most times, but not always – they are not coextensive. There are at least two (possibly three) practical examples of when the ICC's jurisdiction must be separate from, or more than, the obligations of states to give effect to it.

The first is under a UN Security Council referral, where the ICC's ability to exercise jurisdiction is extended beyond the scope of the obligations on states parties to cooperate under the Rome Statute. Not only is this separation necessary to allow the ICC to exercise jurisdiction following UN Security Council referrals, but viewing these two elements as coextensive (therefore mutually limiting) would render the ICC far less effective on cooperative aspects insofar as such referrals are concerned. This is because the UN Security Council has the power to make all states – whether or not they are states parties to the Rome Statute – cooperate with an investigation and prosecution by virtue of article 13(b), thereby expanding the cooperation obligations regime beyond states parties to the Rome Statute.[207]

Although, as previously discussed, the UN Security Council has refrained so far from doing so – e.g. in respect of the Darfur and Libyan referrals[208] – it has done so previously in respect of the ICTY and ICTR, with no obvious reason as to why it may not do likewise in respect of the ICC.[209] The second practical example is in circumstances of voluntary surrender.[210] The third possible scenario where the ICC may exercise jurisdiction in situations where no cooperative obligations on states exist is through surrender by a non-state actor. Although there is no provision for it in the Rome Statute, there is precedent for regional and international peace enforcement operations arresting and surrendering accused persons to international courts.[211]

In all three of these instances Part 9 of the Rome Statute (which contains states' cooperation obligations) in no way conditions the ICC's exercise of jurisdiction, as the two are conceptually separate. If this were not the case, then the court would not be able to exercise jurisdiction over such individuals. If this is the case, then by parity of reasoning the exercise of article 27 should not condition the application of article 98. Considered in this light, it is difficult to accept the *article 27 waiver* proponents' contention that article 98(1) must be read down in order to give article 27(2) purpose, as it functions in at least two if not three instances where article 98 is not even in play.

The UN Security Council has the power to make all states cooperate with an investigation and prosecution of the ICC

Libya was the second situation to be referred to the ICC by the UN Security Council.

Ahead of President Zuma's inauguration in 2009, a local magistrate endorsed an arrest warrant for President Bashir, who subsequently did not attend the celebrations.

7.2.4 The ICC's position on articles 27 and 98

Unfortunately, there is as yet no definitive ruling from the ICC on the relationship between articles 27 and 98 of the Rome Statute and the effect of those provisions for non-states parties. The ICC's consideration of this issue to date has been somewhat opaque and, as a result, it is not clear exactly what approach it has taken. For example, in its decision regarding the issuing of an arrest warrant for President al-Bashir, the pre-trial chamber noted, perhaps a little casually, that: '[T]he current position of Omar Al Bashir as Head of a state which is not a party to the Statute, has no effect on the Court's jurisdiction over the present case'.[212] The ICC went on to give some tentative justifications for this position, although none of them address the central issue regarding the proper construction of the relationship between articles 27(2) and 98(1), which is somewhat disappointing, not least in terms of providing some measure of jurisprudential clarity on this important matter.

Notably, in response to al-Bashir's visit to Kenya (a state party) in August 2010, the ICC elected to rely on both the Rome Statute and the UN Charter in support of the 'clear obligation' on Kenya to 'cooperate with the Court in relation to the enforcement of such warrants of arrest'.[213] Then, in October 2010, when al-Bashir was expected to visit Kenya once again, the pre-trial chamber (noting article 97) asked Kenya to 'inform the Chamber … about any problem which would impede or prevent the arrest and surrender of Omar al-Bashir in case he visits the Republic of Kenya'.[214] The impact of the ICC's statement on the immunity question is once again unclear. On the one hand, it could be read either as a rhetorical statement; on the other, it might be read as an indirect request to Kenya to '[notify] the Court that a request for surrender or assistance raises a problem of execution in respect of article 98' as required under rule 195 of the ICC Rules of Evidence and Procedure.

The upshot of this is that as yet there is no definitive ruling from the ICC on the relationship between articles 27 and 98 of the Rome Statute and, therefore, on the correct scope of these provisions on non-states parties.

Immunity and cooperation under South Africa's Rome Statute Act (2002)

South Africa is the only state in southern Africa that has adopted ICC implementing legislation – its Rome Statute Act (2002).

In contrast to the implementating legislation of Uganda and Kenya, the Rome Statute Act (2002) is silent on the issue of immunity in relation to cooperation requests, including on the relationship between articles 27 and 98. Instead, its immunity provision focuses on the impact of immunity in domestic prosecutions and makes no mention of immunity in relation to cooperation with the ICC.

Under section 8 of the Rome Statute Act (2002), when South Africa receives a request from the ICC for the arrest and surrender of a person, it must refer the request to the director-general of the Department 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 ICC. No mention is made of article 98 of the Rome Statute.

It is also notable that in practice the South African government has interpreted the legal position to be that immunity is not a bar to cooperation, as evidenced by the belated and somewhat reluctant revelation that the al-Bashir arrest warrant had been endorsed by a South African magistrate and that President al-Bashir would be arrested should he be present in the Republic.

As yet there is no definitive ruling from the ICC on the relationship between articles 27 and 98 of the Rome Statute

Further reading

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NOTES

1 A Cassese, The Statute of the International Criminal Court: Some Preliminary Reflections, *European Journal of International Law* 10(1) (1999), 144-171, 145.

2 G Moynier, Note sur la création d'une institution judiciaire internationale propre à prévenir et à réprimer les infractions à la Convention de Genève, *Bulletin international des Sociétés de secours aux militaires blessés,* Comité international 11 (1872), 122. See further CK Hall, The First Proposal for a Permanent International Criminal Court, IRRC 322 (1998), 57-74.

3 See Module 2.

4 W Schabas, *The International Criminal Court: a Commentary on the Rome Statute*, Oxford, Oxford University Press, 2010, 3.

5 Schabas, *The International Criminal Court*, 6.

6 General Assembly Resolution 260 B (III) (9 December 1948).

7 Schabas, *The International Criminal Court*, 8.

8 Schabas, *The International Criminal Court*, 9.

9 General Assembly Resolution 44/39 (4 December 1989). See Schabas, *The International Criminal Court*, 11.

10 See Module 2.

11 Schabas, *The International Criminal Court*, 16.

12 Schabas, *The International Criminal Court*, 17-18.

13 Ibid.

14 See General Assembly 50/46 (11 December 1995).

15 Schabas, *The International Criminal Court*, 19-20.

16 Seven voted against the final text, with 21 abstentions.

17 Preamble, Rome Statute 1998 (hereinafter 'Rome Statute').

18 J Crawford, The drafting of the Rome Statute, in P Sands (ed), *From Nuremberg to The Hague* Cambridge University Press: Cambridge, 2003, 109.

19 For a discussion of US opposition to the ICC, see M du Plessis, Seeking an International International Criminal Court, *South African Journal of Criminal Justice* 3 (2002), 301-320.

20 M Scharf, The United States and the International Criminal Court: The ICC'c Jurisdiction over the Nationals of Non-party States: A Critique of the US position, *Law and Contemporary Problems* 64 (2001).

21 In particular, the SADC Common Statement on the ICC negotiations called for a prosecutor that operated 'without influence from states or the Security Council' and stressed that the Court 'must not be unduly prejudiced by political considerations' insofar as UN Security Council involvement is concerned. See further S Maqungo, Establishment of the International Criminal Court: SADC's Participation in the Negotiations, *African Security Review* 9(1) (2000), 42-53.

22 The 'Dakar Declaration for the Establishment of the International Criminal Court', assented to by 25 African states on 6 February 1998, stated that: 'the International Criminal Court shall be the judge of its own jurisdiction ... [and] ... shall operate without being prejudiced by actions of the Security Council';

and '[t]hat the independence of the Prosecutor and his functions must be guaranteed'. Dakar Declaration for the Establishment of the International Criminal Court (1998).

23 LN Sadat and S Richard Carden, The International Criminal Court: An Uneasy Revolution, *Georgetown Law Journal* 88 (2000), 381-457, 404.

24 For an overview of the different groupings at the 1998 Rome Conference see P Kirsch and J Holmes, The Rome Conference on an International Criminal Court: The Negotiating Process, *American Journal of International Law* 93 (1999), 2-12, 4.

25 W Schabas, United States Hostility to the International Criminal Court: Its All About the Security Council, *European Journal of International Law* 15(4) (2004), 701-720.

26 See article 5(2), Rome Statute.

27 For a discussion of the amendment see C Gevers and A du Plessis, Africa and the Codification of Aggression: a Pyrrhic Victory, *African Legal Aid Quarterly* 4 (2010), 28-39.

28 Libya was referred to the ICC by the UN Security Council under Resolution 1970 (26 February 2011).

29 The Central African Republic, the DRC, and Uganda all referred themselves to the ICC under article 12 Rome Statute. Kenya was brought within the court's jurisdiction through the prosecutor's exercise of his propio motu powers under article 15 of the Rome Statute. Sudan and Libya came before the ICC by means of an article 13(b) referral by the UN Security Council, under Resolutions 1593 (2005) and 1970 (26 February 2011) respectively. Cote d'Ivoire has made a declaration under article 12(3) accepting the ICC's jurisdiction.

30 Established in 2001 to replace the Organisation of African Unity. See Constitutive Act of the African Union (2001), <http://www.au.int/en/sites/default/files/Constitutive_Act_en_0.htm> (accessed 7 September 2011).

31 The AU Decisions were purportedly in response to the refusal by the UN Security Council to accede to the request by the AU that it defer the prosecutor's proceedings in Darfur for a period of one year under article 16 of the Rome Statute. In February 2011, it made a similar request in respect of the ICC's investigation into the 2008 post-electoral violence in Kenya. See African Union, Decision on the Implementation of the Decisions on the International Criminal Court, Assembly/AU/Dec.334(XVI), 30-31 January 2011, Addis Ababa, paras 3, 6. See also AU, Decision on the meeting of African states parties to the Rome Statute of the International Criminal Court (ICC), Assembly/AU/Dec.245(XIII), 3 July 2009, Sirte, para 10. See M du Plessis and C Gevers, Making Amend(ment)s: South Africa and the International Criminal Court from 2009 to 2010, *South African Yearbook of International Law* (2010), 1-28.

32 Prosecutor v. Muammar Mohammed Abu Minyar Gaddafi, Warrant of Arrest, ICC-01/11-01/11 (27 of June 2011).

33 See article 23, AU Constitutive Act (2001).

34 In this regard see C Jalloh, Universal Jurisdiction, Universal Prescription? A Preliminary Assessment of the African Union Perspective on Universal Jurisdiction, *Criminal Law Forum* 21(1) (2010), 1-65.

35 See D Sarooshi, The Statute of the International Criminal Court, *International and Comparative Law Quarterly* 48 (1999), 387-404, 395.

36 In addition, the Statute provides for financial and administrative matters.

37 Article 38(1), Rome Statute.

38 Further, article 38(4) states: 'In discharging its responsibility ... the Presidency shall coordinate with and seek the concurrence of the Prosecutor on all matters of mutual concern.'

39 Article 38(1), Rome Statute.

40 Article 35(2), Rome Statute.

41 Article 34(b), Rome Statute.

42 Article 39(1), Rome Statute.

43 Article 39(2)(b)(i), Rome Statute.

44 Article 39(1), Rome Statute.

45 Article 39(2)(b)(ii), Rome Statute.

46 Article 39(1), Rome Statute.

47 Article 39(2)(b)(iii), Rome Statute.

48 Article 36(2)(a) provides that: 'The Presidency, acting on behalf of the Court, may propose an increase in the number of judges specified in paragraph 1, indicating the reasons why this is considered necessary and appropriate. The Registrar shall promptly circulate any such proposal to all States Parties.'

49 Article 36(6)(a), Rome Statute.

50 Article 36(3)(b)(i), Rome Statute.

51 Article 36(3)(b)(ii), Rome Statute.

52 Article 36(3)(a), Rome Statute.

53 Article 36(8)(a), Rome Statute.

54 Article 36(9)(a), Rome Statute.

55 Article 36(10), Rome Statute.

56 Article 39(3), Rome Statute.

57 Article 36(7), Rome Statute.

58 Article 39, Rome Statute.
59 Article 42(1), Rome Statute.
60 Article 42(4), Rome Statute.
61 Article 42(3), Rome Statute.
62 Article 42(2), Rome Statute.
63 Article 43(1), Rome Statute.
64 Article 43(4), Rome Statute.
65 Article 43(6), Rome Statute.
66 Ibid.
67 A Bos, Assembly of States Parties, in A Cassese, P Gaete, and J Jones (eds), *The Rome Statute of the International Criminal Court: A commentary*, Oxford: Oxford University Press, 2002, 300.
68 See articles 2-3, 9, 36, 42-44, 49, 51, 79, 113, 117, 119-123, Rome Statute.
69 See Bos, Assembly of States Parties, 305; Schabas, *The International Criminal Court*, 1121-1122.
70 See Schabas, *The International Criminal Court*, 1124.
71 Provided that such matters are not settled by negotiation within three months of their commencement. See article 119, Rome Statute.
72 In this regard, Pellet notes: '[P]aragraph 1 is based on substantial criterion (disputes "concerning the judicial functions of the Court"), while paragraph 2 lies on a ratione personae distinction (disputes "between two or more States Parties"). However, it must be noted that the first criterion seems to have precedence over the second, since paragraph 2 expressly reserves the competence of the Assembly of States Parties over any disputes other than those mentioned in paragraph 1, which means that, should two or more State Parties have a dispute concerning the judicial functions of the Court, the latter would be competent to rule on the dispute.' A Pellet, Settlement of disputes, in A Cassese, P Gaete, and J Jones (eds), *The Rome Statute of the International Criminal Court: A commentary*, Oxford: Oxford University Press, 2002, 1843.
73 Article 14(1), Rome Statute.
74 According to article 14(2): 'As far as possible, a referral shall specify the relevant circumstances and be accompanied by such supporting documentation as is available to the State referring the situation.'
75 Article 15(1). Article 15(2) adds: 'The Prosecutor shall analyse the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organisations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court.'
76 Articles 15(3) and 15(4), Rome Statute.
77 *Decision Pursuant to Article 15, Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya*, ICC-01/09, ICC Pre-Trial Chamber II (31 March 2010).
78 Sadat and Carden, The International Criminal Court, 404; S Bourgon, Jurisdiction ratione loci, in A Cassese, P Gaete, and J Jones (eds), *The Rome Statute of the International Criminal Court: A commentary*, Oxford: Oxford University Press, 2002, 556.
79 Article 25, UN Charter (1945).
80 Cassese, The Statute of the International Criminal Court, 161.
81 Article 11(1), Rome Statute.
82 Article 19(2)(a), Rome Statute.
83 Article 19(4), Rome Statute.
84 Article 19(3), Rome Statute.
85 Article 19(3), Rome Statute.
86 Article 18(1), Rome Statute.
87 Article 18(2). That article goes on to state: 'At the request of that State, the Prosecutor shall defer to the State's investigation of those persons unless the Pre-Trial Chamber, on the application of the Prosecutor, decides to authorize the investigation.'
88 See articles 18(3)-(6) and rules 52–57, ICC Rules of Procedure and Evidence.
89 Article 18(7), Rome Statute.
90 Articles 19(2)(b) and (c), Rome Statute.
91 Article 19(4), Rome Statute.
92 Article 19(3), Rome Statute.
93 Article 17(1)(b), Rome Statute.
94 Article 17(2), Rome Statute.
95 Report of the Prosecutor of the ICC to the UN Security Council Pursuant to UNSCR 1593 (29 June 2995), 4.
96 *Decision Authorizing*, para 188. The pre-trial chamber went on to find that, on the evidence presented, the gravity threshold had been met.
97 J Dugard, Conflicts of Jurisdiction with Truth Commissions, in A Cassese et al (eds), *The Rome Statute of the International Criminal Court: A Commentary* (2002), 700.
98 UN Human Rights Committee, General Comment No 20, 1992.
99 Article 53(1), Rome Statute.

100 Article 53(2), Rome Statute.
101 Article 53(3), Rome Statute.
102 Article 53(4), Rome Statute.
103 Article 58(1), Rome Statute.
104 Article 58(1)(a), Rome Statute.
105 Article 58(1)(b), Rome Statute.
106 Article 91(2) sets out modalities for: '[A] request for the arrest and surrender of a person for whom a warrant of arrest has been issued by the Pre-Trial Chamber under article 58 ...'. Moreover, under article 58(5): 'On the basis of the warrant of arrest, the Court may request the provisional arrest or the arrest and surrender of the person under Part 9.'
107 For example, when the pre-trial chamber issued an arrest warrant for President al-Bashir of Sudan, it directed the registrar to transmit such article 89 requests to 'competent Sudanese authorities ..., to all States Parties to the Statute and all the United Nations Security Council members that are not States Parties to the Statute'. The registrar promptly did so on both occasions. *See Supplementary Request To All States Parties To The Rome Statute For The Arrest and Surrender of Omar Hassan Ahmad al Bashir,* ICC-02/05-01/0 (21 July 2010).
108 Although Rule 176(2) of the ICC Rules of Procedure and Evidence authorises the registrar to 'transmit the requests for cooperation made by the Chambers and ... receive the responses, information and documents from requested States', it is not at all clear that such requests can be made en masse as they were in the case of al-Bashir. On the contrary, the wording on article 89 – that '[t]he Court may transmit a request for the arrest and surrender of a person ... to any State on the territory of which that person may be found' – suggests that such request should be made in respect of specific states where the presence of an accused is proved or anticipated. If this were not the case, and if it could be made generally, then the phrase would be tautologous as it would merely give the ICC the power to transmit requests to any state whose territory potentially could house human life – a very low threshold, although certainly one which all states would easily and permanently meet.
109 Article 60(1), Rome Statute.
110 Article 82(1)(b), Rome Statute.
111 Article 61(1), Rome Statute.
112 Article 61(5), Rome Statute.
113 Article 58(6), Rome Statute.
114 Article 61(9), Rome Statute.
115 Article 61(11), Rome Statute.
116 Article 64(3), Rome Statute.
117 In this regard, article 64(4) states: 'The Trial Chamber may, if necessary for its effective and fair functioning, refer preliminary issues to the Pre-Trial Chamber or, if necessary, to another available judge of the Pre-Trial Division.'
118 Article 65, Rome Statute.
119 Article 74(1), Rome Statute.
120 Article 74(2), Rome Statute.
121 Article 74(5), Rome Statute.
122 Article 75(2), Rome Statute.
123 Article 77(1)(a), Rome Statute.
124 Article 77(1)(b), Rome Statute.
125 Article 77(2)(a), Rome Statute.
126 Article 77(2)(b), Rome Statute.
127 Article 78(1), Rome Statute.
128 Rule 145(2), Rules of Procedure and Evidence.
129 Article 76(2), Rome Statute.
130 Article 81, Rome Statute.
131 Article 81(1)(b)(iv), Rome Statute.
132 Article 83(2), Rome Statute.
133 Article 81(2)(a), Rome Statute.
134 Article 83(3), Rome Statute.
135 A Cassese, On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law, *European Journal International Law* 9(1) 1998, 2-17, 2.
136 As Swart notes: 'Here lies the most fundamental difference between the duty of States to cooperate under the Statute and the duty to cooperate with the ad hoc tribunals under their Statutes. Since the ad hoc Tribunals have been established pursuant to resolutions of the Security Council, decisions by the ICTY and the ICTR come within the provision of Article 103 UN Charter.' In *Tadic*, the ICTY discussed the nature of the UN Security Council's Chapter VII power and stated that: 'These powers are coercive vis-à-vis the culprit State or entity. But they are also mandatory vis-à-vis the other Member States, who are under an obligation to cooperate with the Organization (Article 2, paragraph 5, Articles 25, 48) and with one another (Articles 49), in the implementation of the action or measures

decided by the Security Council'. *Prosecutor v. Dusko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-T (2 October 1995), para 31.

137 See Cassese, The Statute of the International Criminal Court, 164-165. See further B Swart, General Problems, in A Cassese, P Gaete, and John Jones (eds), *The Rome Statute of the International Criminal Court: A commentary*, Oxford: Oxford University Press, 2002, 1594-1598.

138 A Ciampi, The Obligation to Cooperate, in A Cassese, P Gaete, and J Jones (eds), *The Rome Statute of the International Criminal Court: A commentary,* Oxford: Oxford University Press, 2002, 1613. (author's emphasis).

139 Cassese, The Statute of the International Criminal Court, 170.

140 See article 58, Rome Statute.

141 Article 91(2) sets out modalities for 'a request for the arrest and surrender of a person for whom a warrant of arrest has been issued by the Pre-Trial Chamber under article 58 ...'. Moreover, under article 58(5): 'On the basis of the warrant of arrest, the Court may request the provisional arrest or the arrest and surrender of the person under Part 9.'

142 See immunity discussion below.

143 *Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, Al Bashir*, Pre-Trial Chamber I, ICC-02/05-01/09 (4 March 2009), 28.

144 See *Supplementary Request To All States Parties To The Rome Statute For The Arrest and Surrender of Omar Hassan Ahmad al Bashir*, ICC-02/05-01/0 (21 July 2010); *The Prosecutor v. Omar Hassan Ahmad Al Bashir ("Omar Al Bashir"),* Registrar, *Request to the Republic of Sudan for the arrest and surrender of Omar Al Bashir,* No. ICC-02/05-01/09-5 (5 March 2009); *Request to all states parties to the Rome Statute for the arrest and surrender of Omar Al Bashir*, No. ICC-02/05-01/09-7 (6 March 2009); *Request to all United Nations Security Council members that are not states parties to the Rome Statute for the arrest and surrender of Omar Al Bashir*, No. ICC-02/05-01/09-8 (6 March 2009).

145 The full text of article 89(1) is: 'The Court may transmit a request for the arrest and surrender of a person, together with the material supporting the request outlined in article 91, to any State on the territory of which that person may be found and shall request the cooperation of that State in the arrest and surrender of such a person. States Parties shall, in accordance with the provisions of this Part and the procedure under their national law, comply with requests for arrest and surrender.'

146 These include article 93(3) (if execution of a cooperation measure clashes with a 'fundamental legal principle of general application'); article 72 read together with 93(4) (national security exception in respect of documents); and 'with respect to a request by the Court for a type of assistance which is not specified under Article 93(1)(a)-(k), where the obligation is limited to assistance 'which is not prohibited by the law of the requested State' (Article 93(1)(l))'. Ciampi, Obligation to Cooperate, 1630.

147 Swart, General Problems, 1596.

148 See discussion below.

149 Article 88, Rome Statute.

150 Section 8(1), Rome Statute Act (2002).

151 Section 8(2), Rome Statute Act (2002). Section 9 details the second scenario (an arrest in terms of a warrant issued by the national director of prosecutions). In this situation the director-general of Justice and Constitutional Development is mandated to receive a request from the ICC for the provisional arrest of a person who is suspected or accused of having committed a core crime, or has been convicted by the ICC. The director-general is then obliged under the ICC Act to immediately forward the request to the national director of public prosecutions, who must then apply for the warrant before a magistrate. See section 9(1), Rome Statute Act (2002).

152 Section 10(1)(a), Rome Statute Act (2002).

153 Section 10(1)(b), Rome Statute Act (2002).

154 Section 10(1)(c), Rome Statute Act (2002).

155 Section 10(5) of the Rome Statute Act (2002) provides that in addition to these three requirements, the magistrate must also be content that the person concerned may be surrendered to the ICC: (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 ICC.

156 See section 14, Rome Statute Act (2002).

157 Section 6, Rome Statute Act (2002). See section 7, Rome Statute Act (2002).

158 Article 103(1)(a), Rome Statute.

159 See article 103(3)(a), Rome Statute, as well as Rule 201, Rules of Procedure and Evidence.

160 Article 103(3), Rome Statute. If no state offers its prison services, the host state of the ICC – the Netherlands – will perform the task (see article 103(4), Rome Statute).

161 Article 106(2), Rome Statute. In the instance of South Africa, in order to give effect to this enforcement scheme, the Rome Statute Act (2002) 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. If the Republic is placed on the list of states and is designated as a state in which an offender is to serve a prison sentence, then such a person must be committed to prison in South Africa. The provisions of

the Correctional Services Act 111 1998 and South African domestic law then apply to that 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 Rome Statute. See sections 31 & 32, Rome Statute.

162 R Cryer, H Friman, D Robinson, and E Wilmhurst, *Introduction to international criminal law and procedure*, Cambridge: Cambridge University Press, 2007, 422.

163 Ibid. The ICTY appeals chamber explains the rational for functional immunity as follows: 'State officials acting in their official capacity ... are mere instruments of a State and their official actions can only be attributed to the State. They cannot be the subject of sanctions and penalties for conduct that is not private but undertaken on behalf of a State. In other words, State officials cannot suffer the consequences of wrongful acts which are not attributable to them personally but to the State on whose behalf they act: they enjoy so- called "functional immunity."' *Prosecutor v Blaskic,* (Appeal) *Judgment on the request of the Republic of Croatia for review of the Decision of Trial Chamber II of 18 July 1997,* IT-95-14-AR108bis (29 October 1997), at para 38. Akande adds to this, that: '[T]he immunity of state officials in foreign courts prevents circumvention of the immunity of the state through proceedings brought against those acting on behalf of the state. In this sense, this immunity operates as a jurisdictional or procedural bar and prevents courts from indirectly exercising control over acts of the foreign state through proceedings against the official who carried out the act'. D Akande, International Law Immunities and the International Criminal Court, *American Journal of International Law* 98(3) (2004), 407-433, 413.

164 Ibid.

165 Cryer et al, *Introduction to international criminal law and procedure*, 422. Precisely which officials benefit from such immunity is not clear and subject to some debate. Heads of state and government clearly do, and the ICJ has added to this foreign ministers. Further, the ICC's finding that 'diplomatic and consular agents, [and] certain holders of high ranking office in a State, *such as* the Head of State, Head of Government and Minister for Foreign Affairs' enjoy immunity *ratione personae* suggests that more officials might be added to this list. ICJ, *Arrest Warrant* case, 51. (author's emphasis)

166 *The High Command Case*, (1946) 13 International Law Reports 203, 221. See further *Arrest Warrant* case, Dissenting Opinion of Judge Van den Wyngaert, 36.

167 Article 7(2), ICTY Statute; and 6(2), ICTR Statute.

168 *R v Bow Street Metropolitan Stipendiary Magistrate and others ex parte Pinochet Ugarte* (No 3) [1999] 2 All ER 97, HL.

169 Cryer et al, *Introduction to international criminal law and procedure*, 430. See further C Chinkin, Regina v Bow Street Stipendiary Magistrate, Ex Parte Pinochet Ugarte (No 3), *American Journal of International Law* 93 (2003), 703-711. For an alternative view, see Akande, International Law Immunities, 414-415.

170 See discussion on immunity under domestic law in Module 5.

171 Article 227 Treaty of Versailles 1919 states: 'The Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties. A special tribunal will be constituted to try the accused, thereby assuring him the guarantees essential to the right of defence. It will be composed of five judges, one appointed by each of the following Powers: namely, the United States of America, Great Britain, France, Italy and Japan …'

172 Article 6, Charter of the International Military Tribunal (1946).

173 *Prosecutor v. Charles Taylor*, Immunity from Jurisdiction, No. SCSL-03-01-I (31 May 2004), para 52.

174 *Arrest Warrant* case, para 61.

175 Akande notes: 'Whether or not those wanted for prosecution by an international criminal tribunal may rely on international law immunities to exempt themselves from its jurisdiction depends, firstly, on the provisions of the statute establishing that tribunal … [and secondly] on the nature of the tribunal: how it was established and whether the state of the official sought to be tried is bound by the instrument establishing the tribunal.' Akande, International Law Immunities, 417.

176 For this reason, Akande argues, in respect of the ICC, that: '[S]ince only parties to a treaty are bound by its provisions, a treaty establishing an international tribunal cannot remove immunities that international law grants to officials of states that are not party to the treaty. Those immunities are rights belonging to the nonparty states and those states may not be deprived of their rights by a treaty to which they are not party.' Ibid. See, however, Gaeta, Official Capacities and Immunities, in A Cassese, P Gaeta, and J Jones (eds), *The Rome Statute of the International Criminal Court: A commentary,* Oxford: Oxford University Press, 2002, 300.

177 *Arrest Warrant* case¸ para 45.

178 See Module 5 for further analysis of jurisdictional and immunity issues.

179 However, it does impact upon South Africa's Rome Statute Act (2002).

180 *Arrest Warrant* case, para 61.

181 The rule states: 'When a requested State notifies the Court that a request for surrender or assistance raises a problem of execution in respect of article 98, the requested State shall provide any information

relevant to assist the Court in the application of article 98. Any concerned third State or sending State may provide additional information to assist the Court.'

182 Akande suggests: '[O]n a matter of such importance, it can only be assumed that the state concerned is entitled to a decision by the pretrial chamber. Although this issue is not specifically covered in the list of functions of the pretrial chamber in Article 57 of the Statute, Rule 195 arguably grants procedural rights to concerned third states or sending states in any hearings before the pretrial chamber.' Akande, International Law Immunities, 431.

183 Ibid.

184 Article 119 allows for two distinct procedures to be followed in the event of such disagreement. First, disputes over the judicial functions of the court must be settled by the court itself. Secondly, disputes that do not pertain to judicial functions – that arise between two or more states parties – and relate to the interpretation or application of the Rome Statute, shall be referred to the Assembly of States Parties who may: (a) seek to settle the dispute itself; or (b) make recommendations on further means of dispute settlement, notably including referral to the International Court of Justice in conformity with the Statute of that court. See further Pellet, Settlement of disputes, 1843.

185 See, for example, Akande, International Law Immunities, 431.

186 See Ministerial Meeting of African States Parties to the Rome Statute of the ICC, 8-9 June 2009, Addis Ababa, MinICC/Legal. The AU have raised the article 98 issue – although not consistently – in its objections to the al-Bashir arrest warrant, as has the Arab League.

187 Akande notes: 'The national statutes that deal with the immunity of foreign officials when a request for arrest has been made by the ICC reveal that states have taken differing views on the identity of the body entitled to decide the issue.' Akande, International Law Immunities, 431.

188 Prosaically, this apparent contradiction can be explained by the fact that article 27 and article 98 were drafted by different committees in Rome.

189 See Akande, International Law Immunities, 425. B Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law*, Oxford: Oxford University Press, 2003, 145; Gaeta, Official Capacities and Immunities, 993-96; S Wirth, Immunities, Related Problems and Article 98 of the Rome Statute, Criminal Law Forum 12 (2001), 429-455, 452-54.

190 For example, Akande notes: '[A]n interpretation that allows officials of states parties to rely on international law immunities when they are in other states would deprive the Statute of its stated purpose of preventing impunity and ensuring that the most serious crimes of international concern do not go unpunished. Furthermore, the removal of immunity from the exercise of the Court's jurisdiction contained in Article 27 would be nullified in practice if Article 98(1) were interpreted as allowing parties to rely on the same immunities in order to prevent the surrender of their officials to the Court by other states. This argument is supported by the principle that "[a]n interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility." Thus, the removal of immunity in Article 27 must be understood as applying not only in relation to the ICC itself, but also in relation to states acting at the request of the ICC. This argument is supported by the fact that, as discussed above, the removal is contained not only in Article 27(2)-which stipulates that immunities are not to bar the ICC from exercising jurisdiction-but also in Article 27(1).' Akande, International Law Immunities, 423-424.

191 See also Gaeta, Official Capacities and Immunities, 993-4.

192 See Akande, International Law Immunities, 420.

193 Translation: 'That the thing may rather have effect than be destroyed.'

194 *Maxwell on Statutory Interpretation* (12th ed), London: Sweet and Maxwell, 1969, 45. The doctrine has been employed by the ICJ and the Appeals Chamber of the ICTY. See *Prosecutor v Krstic*, Appeals Chamber, IT-98-33-A (19 April 2004), para 139. See too Oppenheim's International Law (9th ed, London: Longman, 2000, Vol 1, Parts 2-4, 1280; *Chorzow Factory Case* (1927) PCIJ Series A, Vol 2, No. 8, at 2; and the Corfu Channel case, ICJ Rep 1949, at 4.

195 Akande notes further: 'To read the treaty in this way would be contrary to the principle of effectiveness in treaty interpretation. According to this principle, a treaty interpreter must read all applicable provisions of a treaty in a way which gives meaning to all of them harmoniously and "is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility"." D Akande, The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities, *Journal of International Criminal Justice* 7(2) (2009), 333-352, 338.

196 That is not to say that its proponents cannot make a teleological argument in favour of their interpretation, but this would be much less persuasive then one based on the terms of the Statute itself. Notably, Akande acknowledges that: '[T]he fact that a denial of immunity may be desirable to make the ICC more efficacious is not a sufficient reason to imply such a waiver of immunity'. Akande, International Law Immunities, 423.

197 See in particular Akande, The Legal Nature of Security Council Referrals. Note, not every proponent of the article 27 waiver argument supports its extension to Security Council referrals. See P Gaeta, Does President Al Bashir Enjoy Immunity from Arrest?, *Journal of International Criminal Justice* 7(2) (2009), 315-332.

198 See article 25 UN Charter and Security Council Resolution 827 (25 May 1993).
199 Article 12(3), Rome Statute.
200 Akande goes on to list section 23(1) of the International Criminal Court Act 2001 (UK), as well as the 'identical provisions and language are used in the relevant legislation of Malta and Ireland'. He notes also that the implementation legislation of Canada and New Zealand 'goes even further and appears to provide that no person may rely on international law immunities in proceedings instituted pursuant to an ICC request for arrest and surrender'. Akande, International Law Immunities, 422.
201 Article 31(1)(b) provides that in interpreting a treaty 'any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation' must be taken into account.
202 See Akande, International Law Immunities, 425-426.
203 Gaeta, Does President Al Bashir Enjoy Immunity from Arrest?, 325.
204 Ibid.
205 O'Keefe notes: 'Jurisdiction is not a unitary concept. On the contrary, both the long-standing practice of states and doctrinal writings make it clear that jurisdiction must be considered in its two distinct aspects, viz. jurisdiction to prescribe and jurisdiction to enforce. Jurisdiction to prescribe or prescriptive jurisdiction ... refers, in the criminal context, to a state's authority under international law to assert the applicability of its criminal law to given conduct, whether by primary or subordinate legislation, executive decree or, in certain circumstances, judicial ruling. Jurisdiction to enforce or enforcement jurisdiction ... refers to a state's authority under international law actually to apply its criminal law, through police and other executive action, and through the courts. More simply, jurisdiction to prescribe refers to a state's authority to criminalize given conduct, jurisdiction to enforce the authority, inter alia, to arrest and detain, to prosecute, try and sentence, and to punish persons for the commission of acts so criminalized'. R O'Keefe, Universal Jurisdiction: Clarifying the basic concept, *Journal of International Criminal Justice* 2 (2004), 735-760, 736-737.
206 G Sluiter, The Surrender of War Criminals to the International Criminal Court', *Loyola of Los Angeles International and Comparative Law Review* 25 (2003), 605-651, 624-625.
207 In this regard, Sluiter sets out three possible models of cooperation available to the UN Security Council insofar as international judicial mechanisms are concerned: 'First, the Council could simply refer a situation without any reference to cooperation; this would mean that the "normal" regime of the Statute applies and that only obligations for states parties can be established. In case the Council opts for the imposition of obligations for states non-parties there would be the choice, as to the substance of the duties, to apply the ICC Statute mutatis mutandis, or to develop a separate, possibly more demanding regime.'
208 The UN Security Council clearly intended that only the referred states themselves were under an obligation under Chapter VII to 'cooperate fully', because the Resolution merely urges all states and concerned regional and other international organisations to cooperate fully. See Security Council Resolutions 1593 (31 March 2005) and 1970 (26 February 2011). The use of 'urges' with regard to the latter in contrast to 'decides' and 'shall' with regard to the former is significant. This is because the importance of language in determining the UN Security Council's intention cannot be overstated.
209 UN Security Council Resolution 827 – which established the ICTY – states that: '... all States shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal and that consequently all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by a Trial Chamber under Article 29 of the Statute'. (para 4). This phrase was repeated verbatim in UN Security Council Resolution 995 (26 May 1995) establishing the ICTR.
210 See discussion on voluntary surrender above.
211 Both KFOR and UNMIK arrested ICTY suspects and transferred them to The Hague under UN Security Council Resolution 1244 (10 June 1999) which (at para 14) '[demanded] full cooperation by all concerned, including the international security presence, with the International Tribunal for the Former Yugoslavia'. See *Prosecutor v. Nikolic*, Interlocutory Appeals Decision, No. IT-94-2-AR73 (June 5, 2003). See further Akande, International Law Immunities.
212 *Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, Al Bashir*, Pre-Trial Chamber I, ICC-02/05-01/09 (4 March 2009), para 41.
213 *Decision informing the United Nations Security Council and the Assembly of States parties to the Rome Statute about Omar Al-Bashir's presence in the territory of the Republic of the Kenya*, Pre-Trial Chamber I, ICC-02/05-01/09-107.
214 ICC Press Release, Pre-Trial Chamber I requests observations from Kenya on the enforcement of warrants of arrest against Omar Al Bashir, UN Doc ICC-CPI-20101026-PR589 (26 October 2010).

Module 5

Domestic prosecution of international crimes

MODULE 5

Domestic prosecution of international crimes

Teaching notes

This module deals with the prosecution of international crimes in domestic courts generally, and in South Africa, Botswana and Malawi in particular. The module begins with a lengthy discussion of the principles governing the exercise of jurisidiction by states under international law. It is essential that students are familiar with the different bases of jurisdiction (namely territoriality, nationality, passive personality and universal jurisdiction) and their contours insofar as the prosecution of international crimes is concerned. Of particular importance is the exercise of universal jurisdiction, which remains controversial, both in terms of its status under international law and the conditions under which it can be exercised.

The module then goes on to discuss the principle of *aut dedere aut judicare* (extradite or prosecute) and whether or not it takes the form of an obligation when the individual concerned is suspected of committing war crimes, crimes against humanity or genocide. The final issue discussed at a general level is that of immunity *ratione personae* as a bar to the exercise of jurisdiction by domestic courts. Here students must be familiar with the difference between immunity *ratione materiae* and *ratione personae*, and their rationale.

Finally, the module considers the legal frameworks in Botswana, Malawi and South Africa for the prosecution of international crimes. Here it is important to note that South Africa has provided a framework for such prosecutions in its implementing legislation in respect of the ICC, while Botswana and Malawi have not. In discussing the different legal frameworks, a distinction is made between the substantive law application in each country, and the relevant procedure to be followed in undertaking such prosecutions.

LEARNING OUTCOMES

At the end of this module students must be able to:

- List the different bases of jurisdiction under international law.
- Understand, in broad terms, the difference between *prescriptive* and *enforcement* jurisdiction.
- Understand the development of the principle of universal jurisdiction, and the continuing controversy over its exercise (i.e. the difference between 'pure' and 'conditional' universal jurisdiction).

- Be familiar with the principle of *aut dedere aut judicare* and its relevance to the prosecution of war crimes, crimes against humanity and genocide.
- Critically reflect on the continuing relevance of immunity *ratione personae* insofar as the prosecution of these crimes by domestic courts is concerned.
- Set out, in some detail, the legal framework for prosecuting international crimes in their respective countries.

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Domestic prosecution of international crimes

1. INTRODUCTION

South Africa's parliament passed the Implementation of the Rome Statute of the ICC Act in July 2002.

As noted in Module 2, international crimes may be prosecuted both domestically and internationally. Therefore, this module begins by discussing jurisdictional issues, and related controversies, which may arise with respect to the domestic prosecution of an international crime. It then considers the related, but distinct, principle of *aut dedere aut judicare* which, under certain circumstances, obliges a state either to extradite a person accused of certain crimes or to exercise criminal jurisdiction over them. Related to this is an examination of the issue of immunity for certain officials as a bar to the exercise of jurisdiction by a state and the limits of this doctrine. Finally, having discussed the general legal parameters for the domestic prosecution of international crimes, the module examines these key principles in practice, and the related specific legislative regimes in Botswana, Malawi and South Africa.

2. JURISDICTION

2.1 Principles of jurisdiction

In the context of domestic criminal law, the term 'jurisdiction' is used in its traditional sense, referring both to the entity exercising jurisdiction (states), and to its application (prescribing and enforcing criminal sanctions).[1] More specifically, Shaw states that it relates to: '[T]he power of the state under international law to regulate or otherwise impact upon people, property and circumstances and reflects the basic principles of state sovereignty, equality of states and non-interference in domestic affairs'.[2]

The ability of a state to exercise jurisdiction over international crimes is the foremost preliminary issue that arises with respect to any domestic prosecution of such crimes. Whether or not states are permitted under international law to exercise jurisdiction will depend upon the ground(s) on which they claim it, which range from the traditional, less controversial one of territoriality, to the more controversial exercise of universal jurisdiction. Each will be discussed in turn. Before doing so, it is helpful to recall the different powers covered by the term

Mengistu Haile Mariam, former ruler of Ethiopia, was convicted (in absentia) of genocide by an Ethiopian court in 2006.

'jurisdiction' (discussed in Module 2), and the relationship between them. In this regard O'Keefe notes:

> Jurisdiction is not a unitary concept. On the contrary, both the long-standing practice of states and doctrinal writings make it clear that jurisdiction must be considered in its two distinct aspects, viz. jurisdiction to prescribe and jurisdiction to enforce. Jurisdiction to prescribe or *prescriptive jurisdiction* ... refers, in the criminal context, to a state's authority under international law to assert the applicability of its criminal law to given conduct, whether by primary or subordinate legislation, executive decree or, in certain circumstances, judicial ruling. Jurisdiction to enforce or *enforcement jurisdiction* ... refers to a state's authority under international law actually to apply its criminal law, through police and other executive action, and through the courts. More simply, jurisdiction to prescribe refers to a state's authority to criminalise given conduct, jurisdiction to enforce the authority, *inter alia*, to arrest and detain, to prosecute, try and sentence, and to punish persons for the commission of acts so criminalised.[3]

A state may exercise both prescriptive and enforcement jurisdiction over international crimes which were committed within its own territory

Due to a paucity of scholarship and judicial guidance regarding the relationship between these two sub-components of prescriptive and enforcement jurisdiction, they are often conflated by courts, academics, and states. This may have considerable consequences not only on the proper exercise of jurisdiction (especially universal jurisdiction), but also on the related issues of immunity and application of the *aut dedere aut judicare* principle. The crucial point to note in this regard is that jurisdiction to prescribe and jurisdiction to enforce are 'logically independent of each other' conceptually and legally,[4] yet are 'intertwined' in practice.[5]

As it is accepted generally that the jurisdiction to enforce in criminal matters is limited territorially,[6] debates regarding jurisdiction in the context of international crimes focus primarily on jurisdiction to prescribe (i.e. to extend one's laws to given conduct).[7] Therefore, unless stated otherwise, the term 'jurisdiction' is used throughout the remainder of this module to refer to prescriptive jurisdiction.

2.2 Territorial jurisdiction

The principal ground of jurisdiction in criminal matters is territoriality.[8] As Shaw notes: '[A]ll crimes committed (or alleged to have been committed) within the territorial jurisdiction of a state may come before the municipal courts and the accused if convicted may be sentenced. This is the case even when the offenders are foreign citizens'.[9] As such, there is little doubt that a state may exercise both prescriptive and enforcement jurisdiction over international crimes which were committed within its own territory, provided that it has the necessary domestic legal framework to do so.[10] The same is true in respect of crimes which, by their nature (such as drug trafficking), are not committed wholly within the territory of a single state.[11]

The exercise of jurisdiction (both prescriptive and enforcement) over events that occur in the territory of a state is a function of sovereignty and – with the exceptions of basic human rights law norms,[12] immunity for foreign officials, and (possibly) certain international crimes – states largely are free to exercise territorial jurisdiction (or not) as they please.[13] In this sense, a state's power to exercise

jurisdiction within its territory is absolute. At the same time, and subject to the exceptions that exist in respect of certain international crimes (see below), ordinarily criminal jurisdiction is limited territorially.

By 2004, domestic courts in Rwanda had processed about 10 000 trials for offences related to the genocide in that country.

2.3 Extraterritorial jurisdiction

States may, however, exercise prescriptive jurisdiction over conduct that takes place outside their territory under certain circumstances. The founding principles for the exercise of prescriptive jurisdiction extraterritorially were set out in the *Lotus* case, by the Permanent Court of International Justice (PCIJ) which stated that:

> [T]he 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 by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention …
>
> It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law. Such a view would only be tenable if international law contained a general prohibition to States to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, and if, as an exception to this general prohibition, it allowed States to do so in certain specific cases. But this is certainly not the case under international law as it stands at present. Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion, which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.[14]

States may exercise prescriptive jurisdiction extraterritorially in respect of international crimes based on: nationality, passive personality, and universal jurisdiction

The first part of the cited passage, which addresses the limits of a state's enforcement jurisdiction, is relatively uncontroversial. Simply put, the basic rule is that 'a state may not exercise its enforcement jurisdiction on the territory of another state, absent that state's consent'.[15] It is the second passage, addressing the limits of a state's prescriptive jurisdiction – i.e. 'the application of their laws and the jurisdiction of their courts to persons, property, and acts'[16] – that remains the subject of considerable controversy.

The central issue here is the PCIJ's 'philosophical approach in treating states as possessing very wide powers of jurisdiction, which could only be restricted by another rule of international law prohibiting the action concerned'.[17] Shaw goes so far as to suggest that '[i]t is widely accepted today that the emphasis lies the other way around'.[18] Further, Cryer et al note that 'even if that was the position in 1927 (which is doubtful), it does not reflect state practice since, which is to assert a positive ground for the exercise of jurisdiction, rather than to rely on the absence of a prohibition'.[19] Some, however, reject this more restrictive formulation of jurisdiction and continue to assert the permissive formulation outlined in *Lotus*. Others still, argue that the difference between the two is one of emphasis.[20]

Doctrinal disputes aside, there are three bases upon which states may exercise prescriptive jurisdiction extraterritorially that have become accepted generally in

In 2006, seven British soldiers were court-martialled for war crimes committed in Iraq in 2003. One soldier, Corporal Payne, was convicted.

State practice of domestic prosecutions of international crimes on the basis of the nationality of the perpetrator is scarce

respect of international crimes: nationality, passive personality, and universal jurisdiction. Each will be considered in turn.

2.3.1 Nationality jurisdiction

With regard to nationality jurisdiction (also called 'active personality' jurisdiction), the link between the state and the conduct in question is the nationality of the perpetrator. Generally speaking, states with a legal system based on the civil law model exercise this form of extraterritorial criminal jurisdiction regularly; while states of the common law legal tradition often limit the exercise of this jurisdictional ground to certain 'serious' crimes,[21] into which category the core international crimes under examination here would most certainly fall.

Notably, the Rome Statute's jurisdictional provisions extend to those crimes committed by nationals of a state party in its ordinary jurisdiction.[22] Consequently, the domestic implementing legislation of many of these states includes this ground of jurisdiction over war crimes, crimes against humanity, and genocide.[23] This ground is extended by some states to incorporate permanent residents as well as nationals, which includes South Africa under its Rome Statute Act (2002).[24]

That said, state practice of domestic prosecutions of international crimes on the basis of the nationality of the perpetrator is scarce. This is perhaps unsurprising given that the nature of international crimes is such that when they are committed by a state's nationals abroad, it is often – although not always – the case that these have been committed in some official capacity and/or with some element of that state's knowledge or consent. Indeed, historically even where jurisdiction on the basis of nationality has been exercised, sometimes this has been employed as a means of shielding a state's nationals from prosecution in the territorial states or other fora.[25] Nevertheless, under the principle of complementarity in the Rome Statute (discussed in Module 4), such prosecutions and investigations by states parties are expected to take place as the norm, with the intervention of the ICC being exceptional.[26]

2.3.2 Passive personality jurisdiction

The second ground upon which states may exercise (prescriptive) criminal jurisdiction extraterritorially is the nationality of the victim, called 'passive personality' jurisdiction. In contrast with nationality jurisdiction, states may use this ground of jurisdiction to prosecute international crimes committed against their nationals.

While this jurisdictional ground was controversial amongst states for some time,[27] the current position appears to be that expressed in the ICJ's *Arrest Warrant* case in the Joint Separate Opinion of Judges Higgins, Kooijmans, and Buergenthal who noted that: 'Passive personality jurisdiction, for so long regarded as controversial, is now reflected not only in the legislation of various countries ..., and today meets with relatively little opposition, at least so far as a particular category of offences is concerned'.[28]

Although the ICC does not assert passive personality jurisdiction over the nationals of states parties, some of the latter's implementing legislation for the Rome Statute includes this ground of jurisdiction. For example, article 4(3)(iv) of

South Africa's Rome Statute Act grants its courts jurisdiction over crimes committed outside the territory of South Africa by a non-national when 'that person has committed the said crime against a South African citizen or against a person who is ordinarily resident in the Republic'. Similarly, article 10(1) of the Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes against Humanity and all forms of Discrimination (2006) recognises this form of jurisdiction over crimes against humanity, genocide, and war crimes.[29]

By the end of the 1990s, some 25 cases were pending in Belgium's courts, where human rights advocates from around the world made use of its universal jurisdiction for international crimes.

2.3.3 Universal jurisdiction

By far the most controversial form of prescriptive extraterritorial jurisdiction is universal jurisdiction.[30] According to The Princeton Principles on Universal Jurisdiction (2001): '[U]niversal jurisdiction is criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction'.[31] Others define this form of jurisdiction in negative terms. Reydams, for example, suggests that universal jurisdiction 'means that there is no link of territoriality or nationality between the State and the conduct or offender, nor is the State seeking to protect its security or credit'.[32]

By far the most controversial form of prescriptive extraterritorial jurisdiction is universal jurisdiction

Despite no end of academic attention, the concept of universal jurisdiction remains controversial, not least in terms of its exact origin, its doctrinal basis, the crimes covered, the conditions under which it is exercised, and whether or not it is mandatory or voluntary.

Classically, the justification for the exercise of universal jurisdiction by states was considered to lie in the prosecution of piracy: simply put, individuals who commit international crimes, like pirates, are *hostis humanis generis* (enemies of all mankind). However, the relationship between piracy and universal jurisdiction has come under renewed scrutiny recently, such that any connection between the prosecution of international crimes and pirates is anecdotal at best.[33]

Instead, most scholars defend the exercise of universal jurisdiction on the basis that there exists a separate rule of customary international law, based on state practice and *opinio juris*, whereby states may[34] exercise prescriptive jurisdiction over war crimes, crimes against humanity, and genocide, regardless of the location of the crime or the nationality (or residential status) of the offender or the victim.[35]

The basis of this customary rule, however, is contested. In the ICJ's *Arrest Warrant* case, while the majority of the court[36] avoided the issue altogether, in their dissenting opinion, Judges Higgins, Kooijmans and Buergenthal undertook an extensive review of state practice in support of universal jurisdiction, concluding that: '[N]ational legislation and case law – that is, State practice – is neutral as to exercise of universal jurisdiction'.[37]

That said, the three ICJ judges failed to distinguish between prescriptive and enforcement jurisdiction in their Separate Opinion, which can (and did) cause them 'to underestimate the degree of state practice that exists in support of universal jurisdiction over crimes under general international law'.[38] For example, they discounted the existence of universal jurisdictional provisions within treaties on the basis that they were not sufficiently reflective of universal jurisdiction

Désiré Munyaneza was sentenced to life in prison by a Canadian court in 2009, for atrocities he committed during Rwanda's genocide.

proper, because 'only the contracting parties are entitled to exercise extraterritorial jurisdiction over offenders on their territory'.[39] Although the exercise of such jurisdiction is provided for explicitly within such treaties, such an approach is misleading because: 'The jurisdiction mandated by the relevant treaty provision is, in fact, universal jurisdiction – that is, prescriptive jurisdiction in the absence of any other recognised jurisdictional nexus'.[40] The judges did, in any event, endorse the idea of a 'gradual evolution' of international law towards permitting (or not prohibiting) the exercise of universal jurisdiction by states.[41]

State practice in support of universal justice since the *Arrest Warrant* decision cuts both ways. Following this decision Belgium amended, then effectively abolished, its universal jurisdiction legislation. On the other hand, the entry into force of the Rome Statute in 2002 resulted in a number of states (including South Africa) adopting implementing legislation providing for the exercise of universal jurisdiction provisions over international crimes by their domestic courts.

Furthermore, the existence of such jurisdiction is supported by the Preamble to the Rome Statute which '[a]ffirms that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation ...'. Significantly too, the AU has raised concerns in relation to the concept of universal jurisdiction, although these have been attributable more to its concerns regarding the principle's potential for abuse rather than its existence or grounds contesting its legality.[42]

While the exercise of universal jurisdiction remains contested, a growing number of states accept it as a basis for exercising jurisdiction

The current position is that universal consensus does not appear to exist in relation to the existence, characteristics, or operation of universal jurisdiction. Nevertheless, while the exercise of universal jurisdiction remains contested by some,[43] a growing number of states accept it as a basis for exercising jurisdiction, at least in principle. For the current purposes, Malawi and Botswana have provided explicitly for the exercise of universal jurisdiction over certain war crimes in their domestic law;[44] while South Africa does so in respect of crimes against humanity, genocide, and a much broader range of war crimes under its Rome Statute Act.[45]

The doctrinal basis of universal jurisdiction

At the heart of debates about universal jurisdiction is a generally unstated doctrinal dispute regarding the nature of criminal jurisdiction under international law and the structure of the international legal system. Most arguments are premised on a restrictive view of prescriptive jurisdiction – the reverse of the *Lotus* formulation – that ordinarily its exercise is limited territorially and only can be exercised extraterritorially (i.e. over crimes committed abroad) in exceptional circumstances. Simply put, *universal jurisdiction over crimes committed abroad cannot be exercised unless international law allows this,* either expressly or by inference.

On this basis, scholars then proceed to look for a positive rule of customary international law authorising the exercise of universal jurisdiction. Often these arguments position states as 'agents of the international community' which are empowered by international law to exercise jurisdiction on its behalf in respect of international crimes.[46] This is based on what Judges Higgins et al labelled a 'vertical notion of the authority of action',[47] where the international community grants jurisdiction to states to be exercised on its behalf.

Others take a more conservative approach, accepting the restrictive view of jurisdiction (contra *Lotus*), but maintaining the 'the horizontal system of international law envisaged in [*Lotus*]'.[48] On this construction, universal jurisdiction is exercised by states in terms of a permissive rule of international law allowing them to do so, not on a positive rule of law authorising them to do so. Indeed, as even Judges Higgins et al noted: 'There are ... certain indications that a universal criminal jurisdiction for certain international crimes is clearly not regarded as unlawful.'[49] The practice of states not objecting to universal jurisdiction provisions (or practice) is interpreted as permitting, by inference, the exercise of universal jurisdiction. Notably, this is the same manner that the jurisdictional bases of nationality and passive personality are said to have become permissible under international law. Both of these constructions accept that extraterritorial jurisdiction is exceptional, and that states must identify an international rule of law which either grants universal jurisdiction, or permits its exercise.

However, arguments as to whether, how, and to what extent international law provides for the exercise of extraterritorial jurisdiction on the basis of universality gloss over a more fundamental question of whether it needs to. Certainly a plain reading of the *Lotus Case* suggests it does not; rather the PCIJ held that international law leaves [not grants] states 'a wide measure of discretion' with regard to the exercise of extraterritorial jurisdiction 'which is only limited in certain cases by prohibitive rules', leaving states 'free to adopt the principles which it regards as best and most suitable.'[50] Under this construction, simply put, *universal jurisdiction over crimes committed abroad can be exercised unless international law says that it cannot be*.

As Higgins et al note, while the 'application of this celebrated dictum [in *Lotus*] would have clear attendant dangers in some fields of international law ... it represents a continuing potential in the context of jurisdiction over international crimes'.[51] In the final analysis, resolving (or at the very least acknowledging) these fundamental doctrinal disputes is essential given that state practice is not yet decisive on this issue.

In 2009, a Belgian court sentenced Rwandan Ephrem Nkezabera to 30 years in prison for war crimes committed during Rwanda's 1994 genocide.

The debate between 'pure' versus 'conditional' universal jurisdiction turns on the question of enforcement jurisdiction

For those who accept the exercise of universal jurisdiction, the debate has shifted to focussing on the necessary conditions for its exercise. Two forms of universal jurisdiction have emerged in this regard. The first is the so-called 'pure' (absolute) jurisdiction, where states are free to exercise universal jurisdiction irrespective of whether the accused is present on their territory or not (i.e. universal jurisdiction *in absentia*). The second is the so-called 'conditional' (strict) jurisdiction in terms of which the accused must be present on the territory of the state concerned in order for them to exercise jurisdiction in this regard. There is further disagreement regarding at which point the accused must be present (i.e. before an arrest warrant is issued, or after).

It is in the context of this debate that the problems which are attributable to a failure to distinguish between jurisdiction to prescribe and jurisdiction to enforce, as well as the relationship between them, are most evident. As noted above, when formulated properly, universal jurisdiction is 'a species of jurisdiction to prescribe'.[52] In contrast, the debate between so-called 'pure' versus 'conditional' universal jurisdiction turns on the question of enforcement jurisdiction, that is, it is concerned with 'a state's authority under international law actually to apply its criminal law, through police and other executive action, and through the courts'[53] (i.e. to arrest and detain, to prosecute, try and sentence, and to punish). Those who argue for 'conditional' universal jurisdiction either do not separate the jurisdiction to prescribe from the jurisdiction to enforce, thereby imposing the limits of the

In May 2011, two Rwandan Hutu leaders including Ignace Murwanashyaka went on trial in Germany on charges of crimes against humanity and war crimes allegedly committed in eastern DRC between 2008 and 2009.

The exercise of universal jurisdiction depends on whether the accused must be present as a matter of national policy; or whether states consider themselves obliged to do so as a matter of international law

latter on the former; or, even if they do make such a separation, they require states to have both forms of jurisdiction in order to exercise universal jurisdiction properly. Given the clear limitations on the extraterritorial application of the latter, this only can happen when the alleged perpetrator is present within the territory of the state seeking to exercise jurisdiction.

However, universal jurisdiction, when construed correctly, is a form of prescriptive jurisdiction which is conceptually separate from enforcement jurisdiction. In respect of the other less controversial bases of jurisdiction, it is not uncommon for states to have prescriptive but not enforcement jurisdiction over the same matter. As O'Keefe notes: '[A] state's jurisdiction to prescribe its criminal law and its jurisdiction to enforce it do not always go hand in hand. It is often the case that international law permits a state to assert the applicability of its criminal law to given conduct but, because the author of the conduct is abroad, not to enforce it'.[54] At the level of general principle, there is no requirement for states to have concurrent enforcement jurisdiction in order to exercise prescriptive jurisdiction. Conversely, due to the principle of *nullen crimen sine lege* (examined in Module 2), states may only exercise enforcement jurisdiction in relation to conduct over which they already have asserted prescriptive jurisdiction.[55] For these reasons, Cryer et al note that 'the distinction is nonexistent at a conceptual level'.[56]

As the two are logically independent, some scholars posit that enforcement jurisdiction is legally irrelevant for the purpose of properly exercising universal jurisdiction. As O'Keefe notes: 'The lawfulness of a state's enforcement of its criminal law in any given case has no bearing on the lawfulness of that law's asserted scope of application in the first place, or vice versa'.[57] Similarly, this is true of other grounds of extraterritorial jurisdiction (viz. nationality and passive personality). As a result, many commentators argue that the 'pure' versus 'conditional' universal jurisdiction debate is a policy rather than substantive legal one, driven by 'practical prudence, or as a result of political pressure, rather than as a matter of law'.[58] Such an approach, however, perhaps overstates the position. While at a general level it is true and logically compelling, nevertheless 'logic and the *opinio juris* of states do not always go hand in hand'.[59] Instead, states are free to condition the legality of the exercise of universal jurisdiction, in particular, on both the presence of prescriptive jurisdiction and on the proper and simultaneous exercise of enforcement jurisdiction (i.e. with the offender present in the state concerned).[60]

Ultimately, whether and in what form universal jurisdiction exists will depend on which doctrine one subscribes to (see box above). If the exercise of extraterritorial (prescriptive) jurisdiction is based on 'residual presumptive permission in the interstices of specific prohibitions', rather than on 'permissive rules set against a backdrop of a general prohibition',[61] then 'pure' universal jurisdiction is legal until the contrary is shown. If, on the other hand, its exercise relies on a permissive rule of law, then it is possible that the states concerned have made its exercise conditional on the existence of both prescriptive and enforcement jurisdiction. As state practice is equivocal on these issues, ultimately it would appear to depend on related *opinio juris*: i.e. do states require the accused to be present as a matter of their national policy; or because they consider themselves obliged to do so as a matter of international law?

If it is accepted that an accused's presence is necessary in order for universal jurisdiction to be exercised, then one final issue remains, namely at what stage of proceedings is this required? In this regard, Du Plessis notes:

> There are reasons of practice and logic which affirm that a suspect does not have to be physically present in the *forum deprehensionis* for an investigation to be initiated and for an arrest warrant to issue in anticipation of his or her physical arrival. First, if the entire investigation is subject to having established the presence of the accused, then logically there is a great risk that no prosecution would ever be undertaken.
>
> *Second*, because it is based on the location of the suspect and not on other circumstances of the case, a strict presence requirement is a "*blunt instrument*", imposing an imperfect limit on the exercise of universal jurisdiction and creating practical disadvantages by restricting the power to open an investigation to the point at which it can be proven that a suspect is within the territory of the state exercising universal jurisdiction.[62]

Certainly, due process rights, such as the right to be present during trial, are distinct from the law defining the legitimate exercise of jurisdiction, which does not require presence when proceedings first commence. Notably, South Africa's Rome Statute Act adopted an 'anticipated presence' approach which allows authorities to commence proceedings and issue warrants of arrest prior to the presence of the accused in South African territory.

Rwanda requested SA to extradite its former army chief of staff, Faustin Nyamwasa, for charges relating to a terrorist attack in Kigali in 2010. Spain and France have also issued arrest warrants for Nyamwasa for his alleged role in the Rwandan genocide in 1994.

Under certain treaties states must extradite or, alternatively, prosecute such crimes under their domestic law

3. OBLIGATION TO EXTRADITE OR PROSECUTE (*AUT DEDERE AUT JUDICARE*)

Closely related, but distinct, is the principle of *aut dedere aut judicare*. Its origin lies in the writings of Grotius, who coined the phrase '*aut dedere aut punire*' in *De Jure Belli ac Pacis* to 'describe a natural right of an injured state to exact punishment, either by itself or by the state hosting the suspect'.[63] In its modern form, however, it is interpreted more literally. Under the principle of *aut dedere aut judicare* – which has become an obligation under certain treaties – states must extradite or, alternatively, prosecute such crimes under their domestic law, or at least 'take steps towards prosecution'.[64] Whether these two alternatives are evenly weighted is disputed, and generally will depend on the formulation adopted in the treaty in question. Importantly, this principle does not confer jurisdiction, rather one of the jurisdictional grounds considered earlier must form the legal basis of its exercise.

As noted previously, ICL developed from an indirect system of enforcement at the national level to the current system of both international and national enforcement mechanisms. This principle of *aut dedere aut judicare* is a product of that history, developed before the concept of institutional ICL or the principle of complementarity came into being. Hence it has been included within a number of treaties – both multilateral and bilateral – with the aim of 'securing international cooperation in the suppression of certain kinds of criminal conduct'.[65] Regional and sub-regional organisations have adopted such provisions also.[66]

Conceptually speaking, the *aut dedere aut judicare* principle concerns the exercise of enforcement jurisdiction. The principle, when it takes the form of an obligation, requires states to extradite a suspect or, in the alternative, 'extend their

Rwanda has issued more than 40 extradition requests for genocide suspects residing in Europe. Sweden is the only country to have approved extradition of a suspect.

With respect to the crime of genocide, the Genocide Convention (1948) does not contain an *aut dedere aut judicare* provision per se

criminal jurisdiction' to that person,[67] whatever the basis of that jurisdiction might be. However, there is a tendency to conflate this principle with the enforcement element of universal jurisdiction – and even to term it as 'mandatory' universal jurisdiction – even though it does not rely on a specific jurisdictional ground. Such a tendency, however, is unsurprising because both share a common rationale: combating impunity.[68]

At the level of general international law, the principle of *aut dedere aut judicare* is just that – a principle. Whether this principle takes the form of an obligation depends on the specific context and crime, as does the form that any such obligation takes. That obligation may be founded in bilateral and multilateral treaty provisions.

As far as war crimes are concerned, all four of the Geneva Conventions (1949) contain a common article setting out an obligation either to prosecute individuals alleged to have committed or ordered the commission of war crimes, regardless of their nationality; or to 'hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case'.[69] In the *Arrest Warrant* decision Judge Higgins et al noted that: '[T]his is an early form of the *aut dedere aut prosequi* to be seen in later conventions ... [however] ... the obligation to prosecute is primary, making it even stronger'.[70] Notably, this obligation is limited to 'grave breaches' (i.e. a limited number of crimes committed in IAC) and does not extend to the full range of war crimes covered in article 8 of the Rome Statute, nor to those war crimes committed in NIAC.

With respect to the crime of genocide, the Genocide Convention (1948) does not contain an *aut dedere aut judicare* provision per se, but under certain circumstances it does oblige territorial states to prosecute the crime of genocide, and other states to extradite or transfer individuals accused of genocide within their territory to such states.

The question of whether the Genocide Convention (1948) contains a duty or obligation to prosecute divides many scholars. Although article I provides for the obligation to prevent and punish genocide, the exact contours of that obligation are highly contested. As is commonly the case with ICJ decisions, the *Genocide* case did not go as far as it might have done in terms of clarifying such matters.[71] It did, however, interpret article VI of the Genocide Convention to mean that an obligation exists on the territorial state only – i.e. the state on whose territory the genocide took place – to 'institute and exercise territorial criminal jurisdiction'.[72]

According to the ICJ, this obligation to prosecute under the Genocide Convention does not extend to other states, such as those on whose territory an accused is present (the custodial state). That said, arguably the Genocide Convention creates an obligation on custodial states to extradite a person suspected of genocide to a territorial state (presumably on its request) so that it can fulfil its obligation in this regard.[73] If so, this would create an obligation to extradite under certain circumstances, but not as an alternative to the obligation to prosecute.[74]

While a more expansive reading of the Genocide Convention – based on a generous reading of its terms, especially of its object and purpose – is certainly possible,[75] it would be difficult to square any such interpretation with the clear findings of the ICJ in the *Genocide* case. That said, those findings were limited (expressly by the court) to the Genocide Convention (article VI thereof), which

may have left open the possibility for an *aut dedere aut judicare* obligation in respect of genocide to be arguable under customary international law.

In relation to crimes against humanity, there is no provision providing for such an obligation in any treaty. The most promising possibility is the Preamble to the Rome Statute, which – as inter alia a non-operative part of the treaty – would be insufficient on its own to establish an *aut dedere aut judicare* obligation on states parties.

4. IMMUNITY BEFORE DOMESTIC COURTS

As noted in the discussion in Module 4, there is an emerging consensus that customary international law immunity *ratione personae* does not apply to international tribunals. The question of whether such immunity continues to apply before domestic courts is more complex.

Notwithstanding the growth of ICL over recent decades, and the inroads made into immunity for such crimes at an international level, there is considerable authority for the proposition that customary international law immunity *ratione personae* continues to apply in domestic proceedings.[76] As Cryer et al note: 'State practice and jurisprudence have consistently upheld personal immunity, *regardless of the nature of the charges*'.[77]

Most clearly (and authoritatively), in the *Arrest Warrant* case the ICJ held that Belgium had 'failed to respect the immunity from criminal jurisdiction and the inviolability which the incumbent Minister for Foreign Affairs of the Democratic Republic of Congo enjoyed under international law' when it had issued an arrest warrant for him for crimes against humanity and war crimes.[78] This interpretative approach has been confirmed by a number of domestic courts in subsequent decisions, including in the UK (in respect of General Pinochet,[79] albeit *obiter*), Belgium, France, Spain, and the United States.[80]

Therefore, under customary international law, heads of state and certain other officials enjoy absolute personal immunity, even for international crimes, before the domestic courts of other states. However, that does not automatically mean that courts will uphold such immunity under domestic law. As noted above, in Botswana, Malawi, and South Africa, customary international law forms part of domestic law to the extent that it does not conflict with domestic legislation and is consistent with the constitution. Therefore, if a legislative or constitutional provision of any of these three countries removes personal immunity for international crimes, then such a law will prevail over the customary international law rule of immunity for the purposes of domestic law.[81]

For example, South Africa's Rome Statue Act provides 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'.[82] Most commentators have interpreted this provision as removing the immunity of the specified persons before South African courts.[83] For example, Dugard and Abraham argue that section 4(2)(a) of the Rome Statute Act represents a choice by the South African

In 2002, the ICJ ruled against the Belgian arrest warrant for Abdoulaye Yerodia Ndombasi issued in 2000 for his role in the Congolese Rebellion of 1998 while he was the DRC's Minister of Foreign Affairs.

Under customary international law, heads of state and certain other officials enjoy absolute personal immunity, even for international crimes, before the domestic courts of other states

The question of immunity for heads of state has been raised by several African governments and the AU with regard to the ICC warrant for President Bashir of Sudan.

legislature not to follow the 'unfortunate' *Arrest Warrant* decision, 'of which it must have been aware'.[84]

Nevertheless, this provision is clearly modelled on article 27(1) of the Rome Statute – which deals with the irrelevance of official capacity as a defence or as a ground for the reduction of sentence – and not article 27(2), which deals with immunities.[85] It could be argued that while 4(2)(a) effectively removes functional immunity of persons (and lays the foundation for command responsibility), it does not address personal immunity, which therefore continues to apply under South African law as customary international law (in the absence of a contrary act of parliament),[86] unless such personal immunity may be shown to be contrary to South Africa's constitution.

SA's Rome Statute Act, which removes personal immunity for international crimes, prevails over the customary international law rule of immunity for the purposes of domestic law

5. PROSECUTIONS UNDER DOMESTIC LEGISLATION

5.1 Botswana[87]

5.1.1 Introduction

Despite the commitment that the Botswana government has expressed towards international criminal justice, Botswana's substantive criminal law is currently underdeveloped in respect of international crimes.[88] Crucially, while it ratified the Rome Statute on 8 September 2000, it has yet to adopt implementing legislation, although the current indications are that parliament will do so shortly.[89] It has, however, implemented the grave breaches regime of the Geneva Conventions (1949) through the Geneva Conventions Act (1970),[90] although to date 'no prosecutions of international crimes have taken place in Botswana'.[91]

5.1.2 International crimes under domestic law

Under Botswana's constitution, no act is punishable unless it is identified as such by a written law or by the penal code.[92] Significantly, the main piece of criminal law legislation in Botswana does not make any reference to the international crimes of genocide, crimes against humanity, and war crimes; nor does other key legislation refer to or define any international criminal crimes.

The only international crimes incorporated within Botswana's domestic legislation are a limited number of war crimes committed in IAC, under the Geneva Conventions Act (1970). This act criminalises, and grants Botswana courts jurisdiction to try grave breaches of the Geneva Conventions (1949),[93] namely acts 'committed against persons or property protected by the Convention'. These are: wilful killing; torture or inhuman treatment, including biological experiments; wilfully causing great suffering or serious injury to body or health and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; compelling a prisoner of war to serve in the forces of the hostile Power; wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention; 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 prescribed in the present Convention.[94]

Notably, article 3 of the Geneva Conventions Act (1970) establishes universal jurisdiction for these crimes, making grave breaches punishable in Botswana even when committed in another state. More specifically, article 3(1) criminalises grave breaches by '[a]ny person, whatever his nationality [committed] in or outside Botswana'; while article 3(2) states that: 'In the case of an offence under this section committed outside Botswana, a person may be proceeded against, indicted, tried and punished therefore in any place in Botswana as if the offence had been committed in that place.'

As far as modes of liability are concerned, the Act criminalises both the commission of such crimes, as well as aiding, abetting, or procuring the commission of such crimes by another.[95] Further, it provides that: '[I]n the case of such a grave breach ... involving the wilful killing of a person protected by the convention, a convicted person shall be sentenced to death or imprisonment, whereas those convicted of other breaches will be imprisoned for a term not exceeding 14 years'.[96]

Under the current domestic legislative framework, the courts of Botswana are limited in their ability to try international crimes. Most crimes over which the ICC could have jurisdiction in Botswana may only be tried as 'ordinary crimes' (such as murder, rape, assault), if at all. However, if such an ordinary crimes approach were to be adopted, a host of challenges are likely to arise. Until the Botswana courts are able to try and punish as international crimes those who have committed them, the only alternative will be for Botswana to arrest and surrender any fugitive criminals to the ICC or else extradite them to other countries with the necessary jurisdiction.

In 2009, Joseph Mpambara was convicted in a Dutch court of torture relating to his role in the Rwandan genocide, and sentenced to 20 years in prison.

Grave breaches of the Geneva Conventions are punishable in Botswana even when committed in another state

5.1.3 Procedural matters

The central person for the prosecution of crimes, including international crimes,[97] in Botswana is the director of public prosecutions (DPP), who is vested with absolute discretion to conduct criminal proceedings in the manner that he or she deems fit.[98] As far as prosecutions under the Geneva Conventions Act (1970) are concerned, the Act provides any accused person with a number of due process rights, which include: that any person brought to a court[99] shall have a right to legal representation;[100] and that the trial shall not proceed until 'a notice containing the [detailed] particulars ..., so far as they are known to the prosecutor, has been served not less than three weeks previously on the protecting power, and, if the accused is a protected prisoner of war, on the accused and the prisoner's representative'.[101] Notably, if such prosecutions raise 'any questions' relating to common article 2 of the Geneva Conventions – which sets out the conditions under which the Conventions apply – these 'shall be determined by the President'.[102]

5.2 Malawi

5.2.1 Introduction

The situation in Malawi is very similar to that of Botswana. Malawi ratified the Rome Statute on 9 September 2002, but has yet to adopt implementing legislation, nor are there any signs that it will do so in the near future. Like Botswana, Malawi criminalises grave breaches of the four Geneva Conventions (1949) (which it

In January 2012, after losing his 16-year legal battle to stay in Canada, Leon Mugesera was deported to Rwanda to face charges of genocide planning, incitement and distribution of arms during the 1994 Rwandan genocide.

ratified on 5 January 1968) under its Geneva Conventions Act 18 of 1967 (which has virtually identical terms to Botswana's corresponding Act).

5.2.2 International crimes under domestic law

As with Botswana, Malawi's Geneva Conventions Act (1967) criminalises grave breaches of the four Geneva Conventions (1949) committed by '[a]ny person, *whatever his nationality*, ..., whether within or without Malawi'.[103] The maximum sentence under the Act – for the somewhat differently phrased 'grave breach causing or resulting in or contributing to the death of a person protected by the Convention' – is life imprisonment,[104] in contrast to Botswana's maximum punishment of the death penalty. Similar to Botswana, Malawi's Geneva Conventions Act (1967) provides for universal jurisdiction to be exercised over such crimes.[105]

In addition, the Constitution of Malawi contains an enigmatic provision stating that 'acts of genocide are prohibited and shall be prevented and punished'.[106] However, no attempt has been made to elaborate on this provision and, somewhat surprisingly, Malawi is not even a party to the Genocide Convention (1948). As such, this provision is of little practical relevance to the prosecution of genocide in Malawi.

Similar to Botswana, Malawi's Geneva Conventions Act (1967) provides for universal jurisdiction to be exercised over relevant crimes

5.2.3 Procedural matters

Under the Geneva Conventions Act (1967), the director of public prosecutions is solely responsible for prosecuting grave breaches.[107] Notably, if such prosecutions raise 'any questions' under common article 2 of the Geneva Conventions (1949), these 'shall be determined by the Minister', rather than the president as is the case in Botswana.[108]

5.3 South Africa

5.3.1 Introduction

The situation in South Africa is very different to that just described in Botswana and Malawi. South Africa ratified the Rome Statute on 17 July 1998 and, in order to give effect to its related obligations, passed the Implementation of the Rome Statute of the International Criminal Court Act (2002) ('Rome Statute Act'). In addition to establishing a comprehensive cooperative scheme for South Africa vis-à-vis the ICC, the Act provides the basis for the national prosecution of crimes against humanity, genocide, and war crimes before a South African court, thereby giving effect to the principle of complementarity.

For instance, the Preamble to the Rome Statute Act speaks of South Africa's commitment to bring 'persons who commit such atrocities to justice … in a court of law of the Republic in terms of its domestic law where possible'. Further, 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 prosecute and the High Courts of the Republic to adjudicate in cases brought against any person accused of having committed a

crime in the Republic and beyond the borders of the Republic in certain circumstances'.

In this respect, it is useful to recall what the Constitutional Court said in *S v Basson*:

> As was pointed out at Nuremberg, crimes against international law are committed by people, not by abstract entities, so that only by punishing individuals who commit such crimes can the provisions of international law be enforced. Given the nature of the charges, the SCA [Supreme Court of Appeal] should have given appropriate weight and attention to these considerations, even in the absence of any argument on these issues by the state. Given the extreme gravity of the charges and the powerful national and international need to have these issues properly adjudicated, particularly in the light of the international consensus on the normative desirability of prosecuting war criminals, only the most compelling reasons would have justified the SCA in exercising its discretion to refuse to rule on the charges.[109]

In 2008, the Southern African Litigation Centre submitted the 'torture docket' (implicating 18 Zanu-PF officials in crimes against humanity in Zimbabwe), to SA's prosecution authority. Although SA's Rome Statute Act provides for universal jurisdiction, authorities have declined to investigate.

5.3.2 *International crimes under domestic law*

Section 4(1) of the Rome Statute Act provides that '[d]espite anything to the contrary in any other law in the Republic, any person who commits a [international] crime, is guilty of an offence'. Further, the drafters of this South African Act incorporated the Rome Statute's definitions of the core crimes directly into South African law through a schedule appended to it. In this regard, Part 1 of Schedule 1 to the Rome Statute Act replicates the definitions of genocide, crimes against humanity, and war crimes in articles 6, 7 and 8 of the Rome Statute respectively.[110] Consequently, these crimes now form part of South African law.

Under the Rome Statute Act there are four grounds upon which jurisdiction may be exercised over international crimes by South African courts. In addition to territorial jurisdiction, under the Act extraterritorial jurisdiction exists on the basis of nationality, active personality, and 'conditional' universal jurisdiction. Notably, nationality and active personality jurisdiction may be founded on citizenship or if the person concerned (either the perpetrator or victim respectively) is 'ordinarily resident in the Republic'.[111] As far as universal jurisdiction under the Rome Statute Act is concerned, it provides for conditional rather than 'pure' universal jurisdiction, because it is contingent on the person 'after the commission of the crime ... [being] present in the territory of the Republic'.[112] In such circumstances, section 4(3) deems that crime to have been committed in the territory of the Republic of South Africa.

SA's Rome Statute Act provides for conditional universal jurisdiction, because it is contingent on the person being present in the country after committing the crime

5.3.3 *Procedural matters*

The Rome Statute Act gives effect to the complementarity principle by creating the structure necessary for national prosecutions under it. Specifically, the procedure for the institution of prosecutions in South African courts is set out in section 5. This procedure involves different governmental departments and officials. Notably, in order that South Africa's obligations under the Act may be fulfilled, a Priority Crimes Litigation Unit (PCLU) has been established within the National Prosecuting Authority (NPA), which is headed by a special director of public prosecutions.[113] The special director has two powers: to 'head the Priority Crimes

Adv Anton Ackermann was appointed to head SA's Priority Crimes Litigation Unit (PCLU) in 2003.

Litigation Unit'; and to 'manage and direct the investigation and prosecution of crimes contemplated in the [ICC Act] …'. In this way, the unit is tasked specifically with dealing with the ICC crimes set out in the ICC Act, and the special director that heads the PCLU is empowered to 'manage and direct the investigation' of such crimes.

If the PCLU opens an investigation and issues a warrant of arrest, and the suspect is arrested, then the matter will move to the prosecution stage. As is the case with Botswana's and Malawi's grave breaches prosecutions, the Rome Statute Act stipulates that: 'No prosecution may be instituted against a person accused of having committed a [international] crime without the consent of the National Director [of Public Prosecutions (NDPP)]'.[114] Crucially, if the NDPP declines to prosecute a person under the Act, the director-general for the Department of Justice and Constitutional Development must be provided with the full reasons for that decision,[115] because he or she is then obliged to forward the decision, together with reasons, to the registrar of the ICC in The Hague.[116] However, as Du Plessis notes:

If the NDPP declines to prosecute, the director-general for the Department of Justice and Constitutional Development must forward the decision, together with reasons, to the ICC registrar

> [N]o such consent is required under the [Rome Statute] Act before a person is charged or arrested for such an offence, or an investigation opened. Had such consent been required the drafters of the ICC Act could just as well have stipulated that no "*proceedings*" may be instituted without the NDPP's consent. They chose not to, and instead have limited the requirement of consent to the "[*i*]*nstitution of prosecutions in South African courts*". The preliminary decision of the NPA to investigate and/or issue a warrant of arrest would not be subject to the consent of the NDPP, although the eventual decision to initiate a prosecution of the arrested individual under the ICC Act would require his consent.[117]

If the NDPP provides such consent, then the case will proceed to trial, with the PCLU assuming responsibility for its prosecution. Given the importance of a prosecution involving allegations against a person accused of having perpetrated genocide, crimes against humanity, or war crimes, the Rome Statute Act provides that an appropriate, specialised, high court must be designated for that purpose.[118] The Act, however, does not provide for any specific trial procedure or punishment regime for domestic courts, so it can be assumed that the regular trial procedure for a criminal trial will be followed and that the court will be empowered to pass any of the sentences regularly imposed.[119]

Further reading

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Bassiouni, MC and Wise, EM. *Aut dedere aut judicare: the duty to extradite or prosecute in international law.* M Nijhoff, 1995.

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NOTES

1 As noted previously in Module 2, the domestic prosecution of international crimes implicates both prescriptive and enforcement jurisdiction.
2 M Shaw, *International Law*, Cambridge: Cambridge University Press, 2008, 645.
3 O'Keefe, Universal Jurisdiction: Clarifying the basic concept, *Journal of International Criminal Justice* 2 (2004), 735-760, 736-737. (author's emphasis)
4 O'Keefe, Universal Jurisdiction, 741.
5 Ibid. This is will be explored further below.
6 As Shaw notes: 'It follows from the nature of the sovereignty of states that while a state is supreme internally, … it must not intervene in the domestic affairs of another nation'. Shaw, *International Law*, 647. See further article 2(7), UN Charter.
7 See, however, discussion below regarding 'pure' and 'conditional' universal jurisdiction.
8 Shaw, *International Law*, 654. 'Territory' in this sense includes aircraft and ships registered in such states.
9 Shaw, *International Law*, 653.
10 See, however, infra.
11 Cryer et al note: 'A state has jurisdiction over a crime when the crime originates abroad or is completed elsewhere, so long as at least one of the elements of the offence occurs in its territory. If it is the former, it is said to be objective territorial jurisdiction, if it is the latter, then it is subjective territoriality.' R Cryer, H Friman, D Robinson, and E Wilmhurst, *Introduction to international criminal law and procedure*, Cambridge: Cambridge University Press, 2007, 46.
12 See Module 1 discussion on international human rights law in domestic legal proceedings.
13 In this regard Shaw notes: 'There is no obligation to exercise jurisdiction on all, or any particular one, of these grounds. This would be a matter for the domestic system to decide.' Shaw, *International Law*, 652.
14 'The Case of the SS Lotus', *France v. Turkey*, Judgment (7 September 1927) PCIJ, 1927 PCIJ (ser.A) No 9, paras 45-46. (hereinafter 'Lotus Case').
15 M Milanovic, From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties, *Human Rights Law Review* 8 (2008), 411-448, 421. To the extent that states – through treaties or custom – permit other states to exercise enforcement jurisdiction on their territory, there is no rule under international law that prohibits such an arrangement. Such agreements, both formal and informal, are not uncommon. In addition, in international armed conflicts states may under certain circumstances exercise criminal (enforcement) jurisdiction outside their territory, but this clearly is exceptional. See O'Keefe, Universal Jurisdiction, footnote 18.
16 *Lotus Case*, para 46.
17 Shaw, *International Law*, 656.
18 Ibid.
19 Cryer et al, *An introduction to international criminal law and procedure*, 39.
20 O'Keefe argues that it '[d]oes not matter whether the so-called "*Lotus* presumption"… is correct or accepted in principle, since, in practice, its application need not run counter to the observable situation whereby state assertions of prescriptive criminal jurisdiction are tolerated only if they fall under specific acceptable heads: all that is required is that, instead of characterising the accepted heads of prescriptive jurisdiction as permissive rules set against a backdrop of a general prohibition, we think of them as pockets of residual presumptive permission in the interstices of specific prohibitions". O'Keefe, Universal Jurisdiction, 738. This will be discussed in more detail below. See especially 'The doctrinal basis of universal jurisdiction'.
21 Shaw, *International Law*, 663.
22 Article 12(2)(b), Rome Statute.
23 Sections 4(3)(i) and (ii), South Africa's Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 (hereinafter the 'Rome Statute Act').

24 Article 4(3)(ii), Rome Statute Act.
25 See further T McCormack, Their atrocities and our misdemeanours: the reticence of states to try their "own nationals" for international crimes, in M Lattimer and P Sands (eds), *Justice for crimes against humanity*, Portland: Hart Publishing, 2003, 107-142.
26 See article 17, Rome Statute.
27 Shaw, *International Law*, 665-666.
28 *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium),* Joint Dissenting Opinion of Judges Higgins, Kooijmans and Buergenthal, ICJ Rep [2002], paras 76-77. (hereinafter '*Arrest Warrant* case').
29 It states that: 'Every Member State shall take necessary measures to establish jurisdiction over the crimes of genocide, war crimes, and crimes against humanity in the following cases: (a) When these crimes are or were committed on its territory; (b) When the presumed perpetrator of the crime is a national of the said State or is ordinarily resident on its territory; (c) When the victim is a national of the said State.' (author's emphasis) International Conference on the Great Lakes Region, *Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes against Humanity and all forms of Discrimination* (2006).
30 See Cryer et al, *An introduction to international criminal law and procedure*, 51.
31 Principle 1(1), 'The Princeton Principles on Universal Jurisdiction' (2001).
32 L Reydams, *Universal jurisdiction: international and municipal legal perspectives*, Oxford: Oxford University Press, 2003, 5. See further O'Keefe, Universal Jurisdiction, 745.
33 See G Simpson, *Law, war and crime: war crimes trials and the reinvention of international law*, Cambridge: Polity, Chapter 7.
34 The question as to whether or not states are obliged to do so will be discussed below. See C Bassiouni, *International criminal law conventions and their penal provisions*, Ardsely, NY: Transnational Publishers, 2000, 50.
35 O'Keefe, Universal Jurisdiction, 746.
36 *Arrest Warrant* case, 3.
37 *Arrest Warrant* case, Joint Dissenting Opinion, paras 20-44.
38 O'Keefe, Universal Jurisdiction, 736.
39 A Cassese, Is the Bell Tolling for Universality – A Plea for a Sensible Notion of Universal Jurisdiction, *Journal of International Criminal Justice* 1 (2003), 589-895, 894.
40 Ibid. 747.
41 *Arrest Warrant* case, para 52.
42 See: Decision on the Abuse of the Principle of Universal Jurisdiction, 1-3 July 1–3 2009, Sirte, Libya, Doc. Assembly/AU/11 (XIII); Decision on the Implementation of the Assembly Decision on the Abuse of the Principle of Universal Jurisdiction, 1-3 February 2009, Addis Ababa, Ethiopia, Doc. Assembly/AU/3 (XII); Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction, 30 June to 1 July 2008, Sharm El-Sheikh, Egypt, Doc. Assembly/AU/ 14 (XI).
43 See L Reydams, The rise and fall of universal jurisdiction, in W Schabas and N Bernaz (eds), *Handbook of international criminal law,* London: Routledge, 2010.
44 See Botswana's Geneva Conventions Act 1970; and Malawi's Geneva Conventions Act 1967, both of which grant court's jurisdiction over grave breaches of the Geneva Conventions 1949 wherever they take place.
45 See infra.
46 ICJ, *Arrest Warrant*, Joint Separate Opinion, para 51.
47 Ibid.
48 Ibid.
49 Ibid, para 46.
50 *Lotus Case*, 18-19.
51 Higgins et al, para 50.
52 O'Keefe, Universal Jurisdiction, 736.
53 O'Keefe, Universal Jurisdiction, 735.
54 O'Keefe, Universal Jurisdiction, 740.
55 See Module 2. This is why the ICJ majority's decision in *Arrest Warrant* case to discuss the issue of immunity (as a bar to enforcement jurisdiction), without first establishing that Belgium's exercise of prescriptive jurisdiction on the ground of universal jurisdiction was legal, was heavily criticised.
56 Cryer et al, An introduction to international criminal law and procedure, 52.
57 O'Keefe, Universal Jurisdiction, 740.
58 Cryer et al, *An introduction to international criminal law and procedure*, 56; O'Keefe, Universal Jurisdiction, 741. The situation is different with regard to individuals who enjoy personal immunity. As is discussed infra, this would be an impermissible exercise of enforcement jurisdiction.
59 O'Keefe, Universal Jurisdiction, 741.
60 O'Keefe, Universal Jurisdiction, 750.
61 O'Keefe, Universal Jurisdiction, 738.

62 M du Plessis, South Africa's Implementation of the ICC Statute: An African Example, *Journal of International Criminal Justice* 5(1) (2007), 460-479, 470. (author emphasis)

63 N Larsueus, The Relationship between Safeguarding Internal Security and Complying with International Obligations of Protection. The Unresolved Issue of Excluded Asylum Seekers, *Nordic Journal of International Law* 73(1) (2004), 69-97, 79.

64 The International Law Commission defined this principle in the following terms: 'The obligation to prosecute or extradite is imposed on the custodial State in whose territory an alleged offender is present. The custodial State has an obligation to take action to ensure that such an individual is prosecuted either by the national authorities of that State or by another State which indicates that it is willing to prosecute the case by requesting extradition. The custodial State is in a unique position to ensure the implementation of the present Code by virtue of the presence of the alleged offender in its territory.' Official Records of the General Assembly, Fifty-first Session, Supplement No. 10 (A/51/10), chap. II, *Commentary to the Draft Code of Crimes against the Peace and Security of Mankind* (1996), Article 9, para 3.

65 MC Bassiouni and EM Wise, *Aut dedere aut judicare: the duty to extradite or prosecute in international law*, The Hague: Martinus Nijhoff, 3.

66 See article 15 International Conference on the Great Lakes Region's *Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes Against Humanity and all forms of Discrimination* (2006).

67 *Arrest Warrant* case, para 59.

68 Higgins et al note: 'The underlying idea of universal jurisdiction properly so-called (as in the case of piracy and possibly in the Geneva Conventions of 1949), as well as the *aut dedere aut prosequi* variation, is a common endeavour in the face of atrocities.' *Arrest Warrant* case, Joint Dissenting Opinion, para 51.

69 Article 49, Geneva Convention I; article 50, Geneva Convention II; Article 129, Geneva Convention III; and article 146, Geneva Convention IV.

70 *Arrest Warrant* case, Joint Dissenting Opinion, para 29.

71 O Ben-Naftali and M Sharon, What the ICJ did not say about the Duty to Punish Genocide: The Missing Pieces in a Puzzle, *Journal of International Criminal Justice* 5 (2007), 859-874.

72 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro),* ICJ Rep 2007, para 442. However, the ICJ added that: '[W]hile [article VI] certainly does not prohibit States, with respect to genocide, from conferring jurisdiction on their criminal courts based on criteria other than where the crime was committed which are compatible with international law, in particular the nationality of the accused, it does not oblige them to do so'.

73 Article VII, Genocide Convention states that: '[T]he Contracting parties pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force'. This was not addressed in the *Genocide Case*, because Bosnia focussed on Serbia's failure to 'transfer individuals accused of genocide ... to the International Criminal Tribunal for the former Yugoslavia and to fully co-operate with this Tribunal.'

74 Article VI, Genocide Convention contains an alternative obligation (on all states parties) to transfer an accused to an international penal tribunal, if they have accepted the jurisdiction of that court. See infra.

75 See, for example, Ben-Naftali and Sharon, What the ICJ did not say about the Duty to Punish Genocide.

76 Akande notes: 'Judicial opinion and state practice on this point are unanimous and no case can be found in which it was held that a state official possessing immunity *ratione personae* is subject to the criminal jurisdiction of a foreign state when it is alleged that he or she has committed an international crime.' Akande, *supra* note 5, at 411.

77 Cryer et al, *An introduction to international criminal law and procedure*, 425.

78 *Arrest Warrant* case, para 75.

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

80 See, for example: *Ghaddafi case*, No 1414 (Cass crim 2001) (France), 125 ILR 456; *Castro case*, No 1999/2723, Order (Audiencia nacional 4 March 1999) (Spain); *H.SA. et al. v. S.A.,* Cass. 2e civ., (12 February 2003), No. P.02.1139.F (Belgium.), translated in 42 ILM 596 (2003); *R v. Bow Street Stipendiary Magistrate, ex parte Pinochet* (No. 3), [1999] 2 All E.R. 97, 126-27, 149, 179, 189 (H.L.) (per Lord Justices Goff, Hope, Millett, and Phillips); *Plaintiffs A, B, C, D, E, F v. Jiang Zemin*, 282 F.Supp.2d 875 (N.D. Ill. 2003); *Tachiona v. Mugabe*, 169 F.Supp.2d 259 (S.D.N.Y. 2001); *Arrest Warrant Against General Shaul Mofaz* (Bow Street Magistrates Court, 12 February 2004) 53 *Int'l & Comp*. L. Q. 769, 771.

81 This does not mean that the country concerned will be able to rely on that provision to avoid responsibility for the breach of its obligations under international law to respect such immunity.

82 Section 4(2)(a), Rome Statute Act.
83 Du Plessis notes: 'In terms of the Act, South African courts, acting under the complementarity scheme, are thus accorded the same power to "trump" the immunities which usually attach to officials of government as the International Criminal Court is by virtue of article 27 of the Rome Statute.' Du Plessis, The implementation of the Rome Statute.
84 J Dugard and G Abrahams, Public international law, Annual Survey of South African Law 2002, 140, 165-66.
85 Article 27(2), Rome Statute states: '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.'
86 Section 233, South African Constitution provides that: 'When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law'.
87 This section relies considerably on the article by BR Dinokopila (with his kind permission), The prosecution and punishment of international crimes in Botswana', *Journal of International Criminal Justice* 7 (2009), 1077-1085. See further L Stone, Country study I: Botswana, in M du Plessis and J Ford (eds), *Unable or Unwilling? Case Studies on Domestic Implementation of the ICC Statute in Selected African Countries*, Pretoria: Institute of Security Studies, 2008.
88 Botswana is a dualist state (see Module 1), which means that any international treaties must be incorporated into its domestic law in order for their provisions to be applied domestically.
89 Nor has it signed the Agreement on Privileges and Immunities. It has, however, signed a Bilateral Immunity ('article 98') Agreement with the United States. Ibid.
90 Botswana is a signatory to the four Geneva Conventions 1949 and its two Additional Protocols 1977 (ratified on 29 March 1968 and 23 May 1979 respectively).
91 L Stone, Country study I: Botswana, 20.
92 Section 10(8) Constitution of Botswana 1996 provides that no person shall be held to be guilty of a criminal offence that did not at the time it took place constitute an offence. See *Bimbo v. The State*, [1976] BLR 78 (HC).
93 Article 3(1), Geneva Conventions Act 1970.
94 Article 50, Geneva Convention I; article 51, Geneva Convention II; article 130, Geneva Convention III; and article 147, Geneva Convention IV.
95 Article 3(1), Geneva Conventions Act (1970).
96 Article 3(1), Geneva Conventions Act (1970). See further articles 6 and 7, Geneva Conventions Act 1970.
97 Section 3(3), Geneva Conventions Act 1970 states that: 'A magistrate's court shall have no jurisdiction to try an offence under this section, and criminal proceedings for such an offence shall not be instituted except by or on behalf of the Director of Public Prosecutions'.
98 DN Nsereko, Prosecutorial discretion before national courts and international tribunals', *Journal of International Criminal Justice* 3 (2005), 124-144, 128.
99 Under section 3(5), Geneva Conventions Act 1970, a 'court' cannot be a magistrate's court or a court martial.
100 Section 5(1)(a)(i), Geneva Conventions Act 1970.
101 Section 4(1)(a), Geneva Conventions Act 1970. Further, section 4(2)(a) provides that this shall include: the full name and description of the accused, including the date of his birth and his profession or trade, if any and, if the accused is a protected prisoner of war, his rank and army, regimental, personal or serial number; his place of detention, internment or residence; the offence with which he is charged; and the court before which the trial is to take place and the time and place appointed for the trial.
102 Section 3(4), Geneva Convention Act (1970).
103 Section 4(1), Geneva Conventions Act 1967. Similarly, see article 4(2).
104 Section 4(a)(i), Geneva Conventions Act 1967.
105 Section 4, Geneva Convention Act 1967.
106 Section 17, Constitution of Malawi 1994.
107 Article 4(3), Geneva Convention Act 1967.
108 Section 4(4), Geneva Convention Act 1967.
109 2005 (12) BCLR 1192 (CC) (emphasis added).
110 Importantly, while the Rome Statute Act incorporates the definitions of these crimes into South African domestic law, neither it nor Schedule 1 refers specifically to the ICC Elements of Crimes. There is nothing, however, which prevents a South African court from having regard to these were it to be involved in the domestic prosecution of an ICC offence.
111 Articles 4(3)(b) and (d), Rome Statute Act respectively.
112 Article 4(3)(c), Rome Statute Act. Du Plessis notes in this regard that: '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.' Du Plessis, South Africa's Implementation.

113 Appointed in terms of section 13(1)(c), National Prosecuting Authority Act 1998.

114 Section 5(1), Rome Statute Act.

115 Section 5(5), Rome Statute Act.

116 Ibid.

117 Du Plessis notes further: 'An analagous situation prevails in other Commonwealth countries that have implemented the Rome Statute of the International Criminal Court into their domestic law. In New Zealand, for instance, a person may be charged and arrested without the consent of the Attorney-General to a prosecution, but the consent of the Attorney-General is required for a prosecution.'

118 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'. Section 5(4), Rome Statute Act.

119 Such punishments would include life imprisonment, imprisonment, a fine, and correctional supervision. The death penalty is not an option, given the Constitutional Court's decision in *S v Makwanyane* 1995 (3) SA 391 (CC).

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