THE INTERNATIONAL CRIMINAL COURT AND AFRICA: AN END TO ATROCITIES?

1 Introduction

Intentional killings, destruction and extermination of entire groups; widespread or systematic attack directed against civilians pursuant to state policy or that of other organisations; disregard for human rights; war crimes and acts of aggression, have ravaged the world in general and the continent of Africa in particular. The atrocities in Rwanda prompted UN Secretary-General Kofi Annan to conclude that "man's capacity for evil knows no limits" (http://www.un.org/law/icc/general/overview.htm accessed 2003-05-01). On 2 September 1998, the International Criminal Tribunal for Rwanda (ICTR) in *The Prosecutor v Jean-Paul Akayesu* (Case No CTR-9-4-T) found the accused guilty of genocide. The tribunal concluded that genocide was indeed committed in Rwanda in 1994 against the Tutsi as a group, and that the genocide appears to have been meticulously organised. Ethnic and religious tension continues to plague other parts of Africa, such as the Hutu/Tutsi conflict in Burundi and Christian/Muslim friction in Nigeria (Pobee "Religious Human Rights in Africa" http://www.law.emory.edu/EILR/volumes/spring96/pobee.html accessed on 2003-08-22. Human Rights Watch (HRW) Reports by Country: Nigeria http://hrw.org/reports/world/nigeria-pubs.php accessed on 2003-08-22). Chad, Sudan, Uganda, Sierra Leone, Ivory Coast, the Democratic Republic of Congo (DRC) and the Central African Republic (CAR) have all been wracked with protracted civil wars (Dickerson "A Tour of Africa" July 2003 *Time* 37. These violations are documented in detail in the HRW report "Human Rights Abuses Against Civilians" http://www.hrw.org/reports02).

It is reported that the Congolese rebel leader Jeanne-Pierre Bemba is likely to be the first to be investigated for prosecution before the International Criminal Court (Black "International Criminal Court Comes to Life" http://www.globalpolicy.org/int/justice/icc/2003/0311judges.htm accessed on 2003-06-07).

The situations in Angola and Liberia (Eisenberg and Faris "Who Will Stop the Killing?" 4 Aug 2003 *Time* 37-39) testify to atrocities which in international law can be classified as war crimes and crimes against humanity. According to a *Business Day* report Zimbabwean NGOs have threatened ICC action against the Zanu-PF elite (Legalbrief News Brief 14 Aug 2003 www.bday.co.za accessed on 2003-08-25).

The commission of grave atrocities on the continent has, however, not been limited to conflict situations. The terror under the rule of Amin and Obote of Uganda, Bokassa of the CAR, Habre of Chad, Mengistu of Ethiopia, Nguema of Equatorial Guinea, and Mobutu of the DRC illustrate that gross human rights violations in Africa have not necessarily only occurred during times of war.

Also significant is the fact that the International Criminal Court (ICC) Statute includes apartheid (defined in a 7(2)(h) "as inhumane acts committed in the context of an institutionalised regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime") as a category of crimes against humanity. In no other continent has the effect of apartheid been felt like in Africa. Until a little over a decade ago apartheid was institutionalised in South Africa.

2 Crimes within the jurisdiction of the ICC

The creation of the International Criminal Court (ICC) represents a response by the international community to the unimaginable atrocities inflicted upon millions of children, women and men during the past century. The ICC aims to ensure that those who commit the most serious crimes of concern to the international community as a whole do not go unpunished (ICC Statute, preamble, par 2, 3, 4, 5 and a 1). Article 5 of the ICC Statute lists these crimes as including genocide, crimes against humanity, war crimes, and when defined, the crime of aggression. These crimes represent what are termed the "core crimes" under international law (other international crimes, for instance, terrorism and drug trafficking are not included in the court's jurisdiction). According to article 25(3), anyone who commits, orders, solicits, induces, facilitates or contributes to the commission of these crimes would be held guilty under the Statute.

This discussion will indicate that many of the atrocities committed on the African continent fit within the parameters of the definitions contained in articles 6, 7 and 8 of the Statute.

3 Why an international criminal court?

Half a century after the adoption of the Universal Declaration of Human Rights (IM GA RES 217A(111) 10 Dec 1948), the adoption of the Genocide Convention (UN GA RES 260A(111) 9 Dec 1948 (entered into force 12 Jan 1951)), and the adoption of the Geneva Conventions, the Statute of the ICC was finally adopted in 1998. (See aa 8(2)(a)(i)-(viii). The four Geneva Conventions were adopted on 12 Aug 1949 and entered into force on 21 Oct 1950.). The idea of a permanent international criminal court had been on the international agenda for much of the last century and the adoption of the ICC Statute constituted a milestone in the arena of international criminal law

(Dugard "Criminal Responsibility of States" in Bassiouni (ed) *International Criminal Law* 2ed (1999) 151; Slomanson *Fundamental Perspectives on International Law* 3ed (2000) 399; and Gargiulo "The Controversial Relationship Between the International Crime Court and the Security Council" in Lattanzi and Schabas (eds) *Essays on the Rome Statute of the International Criminal Court* Vol 1 (1999) 67). The ICC is an independent and permanent international judicial body governed by the Rome Statute. It is charged with prosecuting violators of grave international crimes.

African states played an important role in the establishment of the ICC (African states were part of the mandated group that pioneered the Statute and played an important role at the Rome Conference; see also Dugard 9). Twenty-one African states featured among the first 72 states that signed the ICC Statute in 1998. These are Angola, Burkina Faso, Cameroon, Congo, Ivory Coast, Eritrea, Gabon, Gambia, Ghana, Lesotho, Liberia, Madagascar, Mali, Mauritius, Namibia, Niger, Senegal, Sierra Leone, South Africa, Zambia and Zimbabwe. At present (7 July 2003), Africa counts 39 signatories. Djibouti, Equatorial Guinea, Ethiopia, Libya, Mauretania, Sahrawi Arab Democratic Republic (SADR), Somalia, Swaziland, Togo and Tunisia have not signed the Statute.

Senegal, the first state to ratify the ICC Statute, is from the African continent (subsequently, only 20 African countries have ratified the Rome Statute). South Africa ratified the Statute on 10 November 2000. The Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 was signed into South African law on 18 July 2002.

The establishment of the ICC can be seen as strengthening international criminal justice, but the question is whether it could really serve as a mechanism against disregard for the violation of international criminal law in Africa.

The objectives behind the establishment of the ICC are outlined below.

3 1 Prosecution of violators of international criminal law

The ICC seeks to affirm the principle of the rule of law internationally, by guaranteeing the prosecution of individuals responsible for violating international criminal law. It is generally accepted that the prosecution of criminals is based on the need to protect society (International Committee of the Red Cross *Punishing Violations of International Humanitarian Law of the National Level* (2001)); likewise the prosecution of violators of international law can be seen as protecting the international community. Past human rights abuses ought to be prosecuted to deter future abuses (Ratner and Abrams *Accountability for Human Rights Atrocities in International*

Law (1997) 184). World respect for law will suffer if it is seen that civilian and military authorities can commit certain kinds of criminal conduct with impunity (Stover "In the Shadow of Nuremberg: Pursuing War Criminals in the Former Yugoslavia and Rwanda" http://www.rog/MGS/V2N3Stover. html accessed on 2003-09-29). As such, a permanent international criminal institution with powers to investigate and prosecute violators of international law could contribute to the fight against impunity.

3 2 To supplement national mechanisms

The growth of international criminal law has been retarded by a reliance on national authorities to prosecute international wrongdoers (Wise "Aut Dedere aut Judicare: The Duty to Prosecute or Extradite" in Bassiouni (ed) *International Criminal Law Vol II* 2ed (1999) 16). In the past governments have often been unwilling to undertake prosecutions, or have been unable to because of a weak domestic legal system or because human rights violators have fled to other countries (this has been the case with Habre (Chad), Mengistu (Ethiopia) and Idi Amin (Uganda)). In other situations there is sufficient willingness to prosecute, but the administration of justice does not provide sufficient guarantees for fair trial (Rwanda is a good example). The Rome Statute provides effective mechanisms for initiating prosecutions where domestic legal systems are either "unwilling" or "unable" to do so (ICC Statute a 17(1)(a) and (b)) and can provide an effective guarantee for fair trial principles recognised in international human rights law.

3 3 To ensure individual accountability

Except for *ad hoc* tribunals such as the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), international criminal law did not, prior to the establishment of the ICC, provide for an international tribunal where individuals had *locus standi*. The International Court of Justice (ICJ), for instance, handles cases involving states and not individuals. There are no means of ensuring individual accountability before the ICJ. Without an international tribunal such as the ICC, individuals to blame for gross human rights violations, unless prosecuted domestically, would continue to go unpunished. The ICC has the power to investigate, prosecute and convict individuals responsible for international crimes. It is thus a forum for the redress of crimes committed by individuals whether as part of, or in relation to, the government in power, or part of groups rebelling or aiming to change the government or the status quo (AFHRD "*Primer on the International Criminal Court*" http://www.forumasia.org/projects/icc.html accessed 2003-07-10). The ICC can also award compensation to victims for the harm suffered from violations (ICC Statute a 75).

3 4 To provide a permanent tribunal

Unlike the ICTR and ICTY, the ICC is a permanent body based in The Hague (ICC Statute a 3(1)). *Ad hoc* tribunals do not in themselves provide a system of international criminal law (however, both tribunals have irrefutably developed substantial criminal jurisprudence that may assist the ICC in its operation) and have always been established in response to specific situations. This aspect raises the issue of "selective or arbitrary justice": Why a tribunal for Rwanda and none for Liberia, Sudan or the DRC? The United Nations has, however, appointed a special court for Sierra Leone (Mbakwe "The Untold Story" Aug/Sept 2003 *New Africa* 21).

4 The crime of genocide

The term genocide is derived from the Greek word *genos* meaning race, nation or tribe, and the Latin *cide* meaning killing (for more on the background and application of the Genocide Convention see Jorgensen "State Responsibility and the 1948 Genocide Convention" in Goodwin-Gill and Talmon (eds) *Reality of International Law: Essays in Honour of Ian Brownlie* (1999) 273-291). Genocide is commonly understood as the intentional killing, destruction or extermination of entire groups or members of a group and the crime was generally acknowledged as far back as 1951 as reflecting customary international law (Hebel and Robinson "Crimes within the Jurisdiction of the Court" in Roy Lee (ed) *The International Criminal Court: The Making of the Rome Statute* (1999) 89). An example of genocide closer to home was the systematic series of wars the German colonial forces fought against the indigenous people of Namibia. By the end of 1908 80% of Herero men, women and children had been wiped out (Erichsen "Namibia's Island of Death" Aug/Sept 2003 *New Africa* 46). Decades of ethnic conflict between the Hutus and Tutsis escalated in 1994 into a full-scale and deliberate extermination of the Tutsis by the Hutus in Rwanda. These events were defined as genocide (*The Prosecutor v Jean-Paul Akayesu supra*). In terms of the Genocide Convention, genocide can be committed either in times of peace or war (Genocide Convention, preamble, par 1 and a 1. The ICC Statute defines the crime of genocide in an identical manner to a 2 of the Genocide Convention. See also the Statute of the ICTY a 4 and ICTR a 2). The ICC Statute defines genocide with respect to the commission of certain acts with intent to destroy, in whole or in part, a national, ethnic, racial or religious group (see aa 6(a)-(e)).

Consequently, the punishment of this crime by the ICC could act as a sufficient deterrent to potential violators.

5 Crimes against humanity

The international prohibition of crimes against humanity was codified in the Charter of the Nuremberg Tribunal in 1945 and recognised as part of

international law (Charter of the Nuremberg Tribunal a 6(c)). This was the first instance in positive international criminal law in which the specific term "crimes against humanity" was identified and defined (Dugard 151). However, these crimes have received a much clearer definition in the international treaty under the Rome Statute and are distinguished from ordinary crimes in three ways: first, the crimes must have been "committed as part of a widespread or systematic attack"; second, they must be "knowingly directed against a civilian population"; third, they must have been committed pursuant to a "State or organisational policy". Thus they can be committed by state agents or by persons acting at their instigation or with their acquiescence, such as vigilantes or para-military units (AFHRD http://www.forumasia.org/projects/icc.html accessed 2003-07-10). Crimes against humanity can also be committed pursuant to policies of organisations, such as rebel groups, which have no connection with the government (AFHRD http://www.forumasia.org/projects/icc.html accessed 2003-07-10).

Article 7 of the Rome Statute lists eleven acts which amount to crimes against humanity if they satisfy the three characteristics above (ICC Statute a 7(1)). These acts include: murder; extermination; enslavement; deportation or forcible transfer of population; imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; torture; rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity; persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender, or other grounds that are universally recognised as impermissible under international law, in connection with any crime within the jurisdiction of the court; enforced disappearance of persons; the crime of apartheid; and other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health. (See aa 7 (1)(a)-(k). For definitions of the various components of crimes against humanity, see aa 7(2)(a)-(h).)

6 War crimes

Article 8 of the ICC Statute empowers the ICC to investigate and prosecute individuals for war crimes. The ICC has jurisdiction over war crimes when committed as part of a plan or policy, or as part of a large-scale commission of such crimes (ICC Statute a 8(1)).

In the first instance the ICC has the jurisdiction to try persons for acts that amount to grave breaches of the four Geneva Conventions of 12 August 1949, wilfully committed against protected persons such as wounded soldiers, shipwrecked sailors, prisoners of war or civilians in occupied territories. (See aa 8(2)(a)(i)-(viii). The four Geneva Conventions were adopted on 12 Aug 1949, and entered into force on 21 Oct 1950. They deal with the Amelioration of the Condition of the Wounded and Sick in Armed

Forces in the Field (Convention I); Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Convention II); The Treatment of Prisoners of War (Convention III); and The Protection of Civilian Persons in Time of War (Convention IV).)

The ICC also has jurisdiction over other serious violations of the laws and customs applicable in international armed conflicts, within the established framework of international law. These refer to violations recognised under the Hague Convention limiting the methods of warfare (adopted on 18 Oct 1907, entered into force on 26 Jan 1910). Although a violation of the Hague Convention is today regarded as a war crime (see Statutes of the ICTY, ICTR and ICC), no provision of that Convention refers to the word "war crime". The Convention calls on states to respect the law and customs of war on land, and article 3 (Convention IV) provides for the payment of compensation by a contracting party for acts in violation of its provisions. However, article 6(b) of the Charter of the International Military Tribunal for Nuremberg (IMT) had incorporated violations of laws and customs of war as war crimes. Protocol I of the Geneva Conventions (1977) (adopted on 8 June 1977, entered into force on 7 Dec 1978 deals with the Protection of victims of international armed conflicts, and international customary law. The ICC Statute lists 26 different crimes under this section (see aa 8(2)(b)(i)-(xxvi)).

Thirdly, the ICC's jurisdiction over war crimes extends to armed conflicts not of an international character and refers to serious violations of article 3 common to the four Geneva Conventions of 1949, which bars specific acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those *hors de combat* by sickness, wounds, detention or any other cause (see aa 8(2)(c)(i)-(iv)). Common article 3 provides in relevant parts that the protected persons shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria, and the following acts remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) Taking of hostages; (c) Outrages upon personal dignity, in particular humiliating and degrading treatment; and (d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilised peoples.

The fourth category of war crimes over which the ICC has jurisdiction relates to other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, which is based largely on the Second

Additional Protocol to the four Geneva Conventions (ICC Statute a 8(2)(e); Protocol II was adopted with Protocol I, but it deals with the Protection of victims of non-international armed conflicts). Acts falling within this category are very much the same as those of category three above. However, although acts within the third and fourth categories apply to non-international armed conflict, they do not cover situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature (a 8(2)(d)).

War crimes and crimes against humanity have been examined together here, because the nature of violations in Africa and the different components of these crimes show that they have often been committed simultaneously. Although there is some overlap between war crimes and crimes against humanity, the two concepts remain different (see generally Jia "The Differing Concepts of War Crimes and Crimes Against Humanity in International Criminal Law" in Goodwin-Gill and Talmon 243-271).

7 The crime of aggression

Article 5(1)(d) of the ICC Statute gives the ICC jurisdiction to try the crime of aggression. However, its jurisdiction over this crime is postponed until a suitable definition is adopted (a 5(2)). The lack of a definition for the crime reflects the difficulties in describing precise individual responsibilities for the crime (Gargiulo 91). Another part of the debate on the definition of the crime of aggression focussed on the role of the Security Council in this regard (Gargiulo 91-92; and Zimmermann "Crimes within the Jurisdiction of the Court" in Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court. Observers' Notes, Article by Article* (1999) 104-105). As per article 39 of the UN Charter, the Security Council shall determine the existence of an act of aggression. Accordingly therefore, the subject is linked to the role of the Security Council in the maintenance of international peace and security. Difficulties in finding an acceptable balance between the responsibility of the Security Council on the one hand, and the judicial independence of the court on the other hand, therefore led to deferment of the aspect of definition.

8 Factors that can hamper the effectiveness of the ICC in Africa

8 1 Exercise of jurisdiction over non-states parties

Only twenty out of the 98 instruments of ratifications of the Rome Statute have been deposited by African states. Treaties are binding only on state parties and non-State parties which undertake an obligation under it (Beyani "The Legal Premises for the International Protection of Human Rights" in Goodwin-Gill and Talson 30). This principle is in line with the Vienna Convention on the Law of Treaties (adopted on 23 May 1969, entered into

force on 27 Jan 1980, reprinted in Carter and Trimble *International Law: Selected Documents* (1991) 51-75). Article 34 provides that "a treaty does not create either obligations or rights for a third state without its consent". The exercise of jurisdiction by the ICC is premised on the fact that the state in which the act occurred, or the state of nationality of the violator, is a party to the Statute (ICC Statute a 12). This situation is further worsened by the transitional provision of article 124 which provides the opportunity for a state to opt out of the court's competence for war crimes when the crime is committed by its nationals or on its territory, for a period of seven years starting from the entry into force of the Statute. Such an opting-out may be withdrawn at any time. Since article 124 will be a subject of the Review Conference to consider any amendments to the ICC Statute article 123, it would be a positive move for delegates to fight for a renunciation of the opt out clause. The ICC will be of little consequence in Africa if all African states do not ratify the Statute. This is because states which are not parties to the Statute can in some instances hinder or even prevent the court from exercising its functions and powers (Palmisano "The ICC and Third States" in Lattanzi and Schabas (eds) *Essays on the Rome Statute of the International Criminal Court* Vol 1 (1999) 391-392).

To a certain extent the ICC provides for mechanisms to overcome this problem. The Rome Statute has devised other means of exercising jurisdiction over acts committed in states not party to the Statute, or by nationals of such states. The Statute creates the opportunity for states to accept the jurisdiction of the ICC with respect to specific acts even when they are not parties to the Statute. Article 12(3) is to the effect that states which are not parties to the ICC Statute may, by declaration lodged with the Registrar of the court, accept the jurisdiction of the court with respect to the crime in question. The rationale behind this article is to increase the chances of the court exercising its jurisdiction by offering to states which do not ratify the Statute, but which are connected to the crime in question (the territorial state or the state of nationality of the accused), the possibility of accepting the court's jurisdiction on an *ad hoc* basis. Through this means, the court can extend its jurisdiction to cases not connected to state parties, as well as giving non-state parties the possibility of making, use of an international judicial mechanism to improve the prosecution of international crimes (see Palmisano 393). Through this device it is possible to say that the ICC will be in a position to exercise its jurisdiction over African states not party to the Statute, insofar as they are willing to requisition the court's *ad hoc* jurisdiction.

The limitation of territoriality and nationality as preconditions for the exercise of the court's jurisdiction only applies to cases instituted either by a state party or by the prosecutor (a 12(2)). In essence, the court can still effectively exercise its jurisdiction over non-state parties, for acts constituting crimes within its jurisdiction, if the Security Council acting

under Chapter VII of the UN Charter refers a case to it (a 13(b)). Note that article 12(2) does not include cases referred to the court by the Security Council within the realm of the limitation. The practice in article 13(b) is premised on the power of the Security Council to establish criminal jurisdiction under Chapter VII of the UN Charter (see the ICTY and ICTR). Article 13(b) therefore becomes relevant as it avoids the proliferation of *ad hoc* tribunals which are not only expensive to run, but also inhibit the establishment of a consistent international criminal case law (see Gargiulo 73-78). By these means the Security Council gives the ICC competence over UN member states independently of their acceptance of the Statute. Since all African states are members of the UN (with the exception of SADR, which has since been recognised by the OAU, but not by the UN), it seems that African states are unlikely to evade justice by merely refraining from ratifying the ICC Statute.

8 2 National criminal prosecution

ICC jurisdiction does not override, but merely complements national criminal jurisdiction of state parties (ICC Statute, preamble, par 4, 6, 10 and aa 1, 17 and 18). It should be pointed out that some of the difficulties involved in the process of the adoption of the ICC Statute were mainly attributed to the concern that the jurisdiction of the court could infringe upon sovereignty of states. This position is different from the superior status granted to the *ad hoc* tribunals. According to articles 9(1) and 8(1) of the Statutes of the ICTY and ICTR respectively, the tribunals have concurrent jurisdiction to prosecute persons for serious violations of international criminal law committed in the territories of Yugoslavia and Rwanda. Articles 9(2) and 8(2), respectively, elevate the statutes of the ICTY and ICTR by according them primacy over national courts of all states and specify that at any stage of the procedure, these tribunals may formally request national courts to defer to their competence. This position is further confirmed in the Rules of Procedure and Evidence of both tribunals (see Rules 7-13 of the Rules of Procedure and Evidence of the ICTY 12 July 2001; and Rules 8-13 of the Rules of Procedure and Evidence of the ICTR 26 June 2000). The inclusion of the principle of complementarity is to ensure that the ICC does not substitute itself for national courts, and demonstrates that states unavoidably continue to bear the primary obligation to ensure respect for human rights and humanitarian law, and to prevent and punish violators (Dugard *International Law: A South African Perspective* (2000)). Thus the jurisdiction of the ICC will only come to the fore and take the place of national jurisdictions in the second phase, not at the beginning, when states fail to manage correctly their sovereignty by allowing serious crimes to go unpunished (Benvenuti "Complementarity of the International Criminal Court to National Jurisdictions" in Lattanzi and Schabas (eds) *Essays on the Rome Statute of the International Criminal Court Vol 1* (1999) 21-50).

The ICC has launched its first pre-trial investigation against the Congolese rebel leader Jeanne-Pierre Bemba. The Bemba case falls into the category of those where a "state party" to the ICC Statute, *viz*. Democratic Republic of Congo, is either "unwilling or unable" to prosecute a suspected war criminal (http://www.globalpolicy.org/intjustice/icc/2003/0311judges.htm accessed 2003-07-06). In spite of the presence of the ICC, there is the need for effective national criminal jurisdiction (De Waynecouer-Steele "The Contribution of the Statute of the International Criminal Court to the Enforcement of International Law in the Light of the Experiences of the ICTY" 2002 27 *South African Yearbook of International Law* 55-63). This is because states are not released from their responsibilities and obligations; rather they retain their fundamental and sovereign prerogative and the duty to prosecute alleged criminals. Not all international crimes are covered by the court's jurisdiction. This means that domestic legal mechanisms remain the main channels for suppressing other crimes of international concern not covered by the ICC Statute. Besides, the ICC Statute provides for high thresholds when establishing the court's jurisdiction over crimes. For instance, the court shall only have jurisdiction over war crimes "when committed as part of a plan or policy or as part of a large-scale commission of such crimes" (a 8(1)), meaning that the court may not try war crimes that do not meet these criteria. In the same vein, the court will only exercise its jurisdiction over crimes against humanity "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack" (a 7(1)). Therefore crimes against humanity that do not satisfy these conditions remain excluded from the court's jurisdiction. The consequence of all these provisions is that exclusive competence for the suppression of international crimes in general remains at all times within state's jurisdictions.

Commentators are concerned about whether African states are ready and able to take up this responsibility. The low level of ratification is a cause for concern. In order for the ICC to be able to operate as a complement to national jurisdiction, domestic courts must be ready to invoke the principle of universal jurisdiction effectively in order to prosecute international criminals. Goodwin-Gill, in his seminal essay "Crimes in International Law: Obligations Erga Omnes and the Duty to Prosecute", indicates that states in general have been reluctant to invoke this principle in criminal proceedings (Goodwin-Gill and Talmon 199-224). This aspect is crucial for African States because:

(a) International law requires domestic legislation to give effect to its enforcement. Few national legal systems, particularly in Africa, provide for the exercise of universal jurisdiction, or have national legislation criminalizing international crimes (Dugard "Universal Jurisdiction for Crimes Against Humanity" April/June 2000 *African Legal Aid* 7-9; and Benvenuti 29).

(b) The emphasis on domestic legislation as a precondition for the activation of national courts, shows that this remains a major obstacle to the exercise of universal jurisdiction. (South Africa, for instance, could not prosecute Mengistu while he was here on a medical visit, because there was no legislation in place at that time to prosecute torture, crimes against humanity or genocide under domestic law.)

(c) Impediments to the exercise of universal jurisdiction include the high cost of undertaking such trials by poor countries where evidence is outside their borders, and the difficulties in securing witness testimony (Goodwin-Gill and Talmon 214).

(d) Political expediency plays a large role, as political actors may not want to be seen to "interfere" in the affairs of other states.

(e) African states may actually be afraid of criticism because ordinary citizens are unwilling to see their resources applied to cases that they feel have little to do with them.

(f) In the past African states have shown a flagrant unwillingness to prosecute international criminals. (This point is illustrated by the lack of will by the Zimbabwean government to extradite or prosecute ex-dictator Mengistu of Ethiopia who has been living in that country since his overthrow. See also the frustrating decision of the Cour de Cassation (Senegal's highest court) on March 2001, that Chad's exiled dictator Habré could not stand trial on torture charges because his alleged crimes were not committed in Senegal. In effect the court ruled that Senegal had no jurisdiction to pursue crimes not committed in Senegal, despite the fact that Senegal is a state party to the Torture Convention.)

(g) Where states have been unwilling to prosecute they have also failed to extradite violators to requesting states. Reasons include lack of an extradition treaty between the hosting and the requesting state. Presently, Nigeria refuses to extradite Liberia's former president Charles Taylor, to the USA (http://www.vanguardingngr.com/articles/ 2002/headline/ f114082003.html accessed 2003-08-18). The situation of Ethiopia is a further example, as is lack of political will to extradite (Senegal over Habré, Zimbabwe over Mengistu, and South Africa over Mengistu are illustrative), and the well-founded fear of the lack of fair trial guarantees, and the possibilities of the imposition of the death penalty (Ethiopia and Rwanda are good examples).

Cooperation among governments in investigation and extradition is of paramount importance to combating international crimes (Blakesley "Extra Territorial Jurisdiction" in Bassiouni (ed) *International Criminal Law Vol II* 2ed (1999) 37), and states that fail in this duty should consider themselves as encouraging violations of international criminal law. The principle of complementarity enshrined in the Rome Statute puts states on the alert that should they be unwilling to prosecute, there is an international institution ready to do so.

8 3 Non-retroactivity of the ICC jurisdiction

The Statute of the ICC bars it from exercising retrospective jurisdiction over crimes within its jurisdiction. Both the Nuremberg and Tokyo IMT and the ICTY and ICTR were all established to try offences committed prior to their establishment. This notwithstanding, it is still possible to justify the creation of the ICTY and ICTR under articles 15(1) and (2) of the International Covenant on Civil and Political Rights (ICCPR), which is to the effect that acts which constitute crimes under international law or the general principles of law recognised by the community of nations can be punished even if national legislations do not provide for them. Article 24(1) provides that no person shall be criminally responsible under the Statute for conduct committed prior to its entry into force. The jurisdiction of the ICC is therefore limited to offences committed after the ICC came into force (it came into force on 1 July 2002 following the 60th ratification of the Rome Statute). This signifies that the ICC will not try Africa's past and current enemies of humankind. This is a serious limitation on the court's jurisdiction. Perpetrators of international crimes committed before the Statute entered into force by the national courts may, as has been indicated, however, be prosecuted nationally.

The definition of crimes under the Statute does not affect the characterisation of any conduct as criminal under international law independently of this Statute (the provision is made against the background of a 22(1), which is to the effect that no one shall be prosecuted under the ICC Statute unless the conduct in question constituted, at the time of commission, a crime within the jurisdiction of the court). It therefore leaves open the possibility of prosecuting international crimes under various principles of international law, the most effective of these being the duty to exercise universal jurisdiction over international crimes. States have a duty under international human rights instruments to either prosecute gross human rights violators, or hand them over to requesting states for prosecution (Wise 15-29). If this route were to be followed there is the possibility of a guarantee that Africa's past and current gross human rights violators cannot and should not escape the demands of justice.

8 4 Amnesty

The development of amnesty over the years reveals that it now represents a political device employed by states in difficult situations as a price for transition to democracy. Most often it has been adopted because the new regime lacks the power to embark on prosecution (Dugard "Dealing with Crimes of a Past Regime. Is Amnesty Still an Option?" 1999 12 *Leiden Journal of International Law* 1005). Amnesty has been used in several African states and represents a major obstacle to prosecution for gross violations of human rights. Although this has worked out favourably for

perpetrators in the past, its continued use needs to be challenged (see generally O'Shea *Amnesty for Crime in International Law and Practice* (2002)).

8 5 Article 98 agreements

In August 2002 the American Service Members Protection Act (ASPA) was signed into law by President George W Bush. This Act restricts US government cooperation with the ICC and places significant restraints on recipients of US military aid who are party to the Rome Statute.

In pursuit of the immunity of its citizens, the US government has embarked on a programme to conclude so-called "Article 98 agreements" with as many states as possible, including states who are not party to the Rome Statute. These bilateral agreements are designed to impose an obligation not to surrender to the ICC USA nationals accused of genocide, crimes against humanity or war crimes of either party. These agreements undermine the basic premise of the Rome Statute that everyone should be liable for these crimes as they contain no requirement that the parties investigate and, if there is sufficient evidence, proceed with prosecution of the individual(s).

On 30 June 2003 Botswana joined the ranks of Mauritania and The Gambia, in pledging not to extradite American citizens for prosecution by ICC tribunals (Mukumbira "Up USA, down ICC" Aug/Sept 2003 *New Africa* 26). This is despite the fact that both Botswana and The Gambia have ratified the Rome Statute. These countries maintain that signing such an agreement does not violate the ICC statute as article 98 allows for derogation for countries that might want to sign immunity agreements with other countries. South Africa has refused to sign such an agreement, and has reportedly lost approximately $7 million in US military assistance (Mukumbira Aug/Sept 2003 *New Africa* 26).

If African states in sufficient number ratify the Rome Statute, the ICC may well effect an end to impunity in Africa.

9 Conclusion

The ICC can help to end the impunity often enjoyed by those responsible for the most serious international human rights crimes. It can provide incentives and guidance for countries that want to prosecute such criminals in their own courts, and it can offer permanent back-up in cases where countries are unwilling or unable to try these criminals themselves, because of violence, intimidation, or a lack of resources or political will.

The ICC can ensure that those who commit the most serious human rights violations can be punished even if national courts are unable or unwilling to do so. The possibility of an ICC proceeding may encourage national

prosecutions in states that would otherwise avoid bringing war criminals to trial.

Human Rights Watch (http://www.hrw.org/campaign/icc/qna.htm accessed 2003-08-28) maintain that the success of the International Criminal Court is directly linked to complete and prompt state cooperation. State parties will need to render assistance to the ICC in the many as enumerated in the provisions of the Rome Statutes (aa 6-63). Unfortunately ICC implementing legislation in Africa lags far behind. South Africa is the only country to have enacted implementation legislation. In the Democratic Republic of Congo a draft bill has been circulated. Benin, Ghana, Namibia, Niger, Senegal and Sierra Leone have all commenced the drafting process. In other African countries there has been "minimal or no progress" (http://www.hrw.org/ campaign/icc/qna.htm accessed 2003-08-28).

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