

THE CREATION OF THE ICC

Implications for Africa's despots, crackpots and hotspots

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The implications for African states of the recently created International Criminal Court should be carefully considered. There are far-reaching limitations placed on the ICC's jurisdictional scheme, both temporally as well as by the preconditions to the exercise of jurisdiction in the form of territoriality and nationality. The Court's powers may also be constrained out of deference to the grant of an internationally acceptable amnesty, and national courts may be constrained to recognise immunities from prosecution for high-ranking officials. These limitations need to be properly understood so that the ICC can be effectively utilised by African States to declare and act upon their commitment to the principle of individual criminal liability for those responsible for the most serious crimes.

Introduction

The International Criminal Court (ICC), dubbed by one leading commentator as 'arguably the most significant international organization to be created since the United Nations',¹ has ushered in a new era in the protection of human rights. The Rome Statute of the ICC puts in place individual criminal liability for those responsible for the most serious human rights violations, and creates a permanent institution to ensure the punishment of these individuals. The Court, no doubt, will serve as a painful reminder of the atrocities of the past century and the level to which humanity can stoop. International criminal law, if

nothing else, is testimony to the fact that we appear doomed to repeat history. As Judge Richard Goldstone, former Chief Prosecutor at the Hague Tribunals has wryly commented, the hope of "never again" so often becomes the reality of again and again'.² It is a sad reality that Africa is a continent which is home to many of the international human rights atrocities, both past and continuing, which haunt humanity in what appears to be repeating cycles. At the same time the International Criminal Court, with independent prosecutors putting tyrants and torturers in the dock before independent judges, reflects a post-war human rights aspiration come true, and one which certainly signals hope for the African region.

The Statute of the International Criminal Court was adopted on 17 July 1998 by an overwhelming majority of the states attending the Rome Conference, a conference specifically organised to secure agreement on a treaty for the establishment of a permanent international criminal tribunal. To date, the Statute has been signed by 139 States and 92 States have ratified it. It is notable that within just four years the treaty has achieved the 60 required ratifications, far sooner than was generally expected. The Statute entered into force on 1 July 2002, at which time the Court's jurisdiction over genocide, war crimes and crimes against humanity took effect. The 18 judges for the Court were chosen in February 2003 and sworn in on 11 March 2003 at the inaugural session of the Court in The Hague. The highly respected Argentine lawyer, Luis Moreno Ocampo, has also been chosen as the Court's Prosecutor

That Africa provides the Court with a number of 'situations' for consideration is no secret. The Court is expected to hear its first case soon. It will be an African affair most probably arising out of the recent and ongoing events in the Democratic Republic of the Congo. Already prior to this focus on the DRC, the International Bar Association requested in March 2003 that the first act of the ICC's Prosecutor should be directed at the alleged atrocities committed by Zimbabwe's President and the associated regime.³ The atrocities committed in Liberia under General Charles Taylor have moved that country into the ICC's spotlight.⁴ Of course there are other human rights violations that have taken place or are taking place in other African states that might ostensibly trigger the jurisdiction of the International Criminal Court.⁵ However, the DRC, Zimbabwe and Liberia are used as examples in this essay for the sake of convenience, and because they have in some or other way already been focused on in international literature as examples of countries which deserve the ICC's attention.

The ICC and Africa

In order to appreciate the implications of the International Criminal Court for the African

region it is necessary to understand how the Court will operate. Two topics are important in this regard: first, the possibility of prosecution by the ICC or States Parties of individuals involved in the commission of ICC crimes in Africa, and second, the effect under the ICC system of amnesties granted by African countries after transition, and of immunities attaching to individuals on account of their official status or rank.

Jurisdictional triggers

The International Criminal Court

It is important to appreciate that the Rome Statute strictly defines the jurisdiction of the Court. The Court can take up only the most serious crimes of concern to the international community as a whole (genocide, crimes against humanity, and war crimes, all of which are defined in the Statute), that have been committed on or after 1 July 2002. The obvious consequence is that the Court's power to investigate abuses in trouble spots such as Liberia, the DRC and Zimbabwe, is limited to events on or after that date.

The Statute also defines the mechanisms for triggering the Court's jurisdiction. The conditions that have to be met before the Court can exercise its competence are set out in Article 12 of the Statute.⁶ The Article provides that the Court may exercise jurisdiction if:

- the state where the alleged crime was committed is a party to the Statute (territoriality); or,
- the state of which the accused is a national is a party to the Statute (nationality).

In terms of Article 14 of the Statute any State Party may refer to the Court a situation in which one or more crimes within its jurisdiction appear to have been committed, as long as preconditions to the Court's exercise of jurisdiction have been met, namely, that the alleged perpetrators of the crimes are nationals of a State Party or the crimes are committed on the territory of a State Party.⁷ Because countries like Zimbabwe and Liberia are not currently State Parties to the Rome Statute,⁸ the fact that Zimbabwean or Liberian nationals may have committed ICC crimes within Zimbabwe or Liberia means that it is not open to another

State Party to refer such 'situations' to the Court for investigation.⁹ The same is not true in respect of events in the Democratic Republic of the Congo. The DRC became a party to the Rome Statute by delivery of its instrument of ratification on 11 April 2002, and accordingly the ICC will have jurisdiction in respect of war crimes and crimes against humanity committed in the DRC after that date.

The Prosecutor is also authorised by Article 15 of the Rome Statute to initiate independent investigations on the basis of information received from any reliable source. The granting to the Prosecutor of a *proprio motu* power to initiate investigations was one of the most debated issues during the negotiations of the Rome Statute. In the end, the drafters of the Statute determined that in order for the Prosecutor to exercise this power, the alleged crimes must have been committed by nationals of a State Party or have taken place in the territory of a State Party; the preconditions set out in terms of Article 12.¹⁰ The implications of this jurisdictional limitation are clear for African states. Notwithstanding the fact that Liberian and Zimbabwean nationals have allegedly committed serious human rights violations in their respective countries, because those countries are not State Parties to the Statute, the Prosecutor has no power, of his own accord, to initiate an investigation of the crimes concerned.

A further point must be made in relation to the two trigger mechanisms just discussed. If, under their current government or through the efforts of a new government, African states like Zimbabwe or Liberia (that are not yet parties) chose in future to become party to the Rome Statute, the Statute provides that, for those States that become parties to the Statute after 1 July 2001, the ICC has jurisdiction only over crimes committed after the entry into force of the Statute with respect to that State.¹¹ The obvious consequence for international criminals in Zimbabwe or Liberia for the time being is that any serious crimes committed in those countries after 1 July 2001 are effectively removed from the ICC's scope of inquiry. In respect of the DRC, however, the ICC Statute came into effect on 11 April 2002, and, as suggested above, the ICC will therefore have

potential jurisdiction in respect of core crimes committed in the DRC after that date.

While individuals in states such as Zimbabwe and Liberia, that are not parties to the Statute, appear to have escaped the jurisdictional clutches of the ICC for now, the last jurisdictional trigger mechanism under the ICC Statute offers a solution. The last trigger concerns the power of the UN Security Council to refer to the Court 'situations' in which crimes within the jurisdiction of the Court appear to have been committed. This trigger is more problematic for these states' criminals, since it allows the Court jurisdiction over an offender, regardless of where the offence took place, by whom it was committed, and regardless of whether the state concerned has ratified the Statute or accepted the Court's jurisdiction.¹² The Security Council has not yet made any referral to the Court, but its power to do so in relation to the events in human rights' hotspots is clear, at least in respect of events that took place after 1 July 2001 and the entering into force of the Rome Statute. The Statute provides that the Council may only make such a referral by acting under Chapter VII of the United Nations Charter, which is to say it must regard the events in a particular country as a threat to the peace, a breach of the peace, or an act of aggression. There is a possibility that this could happen because the Security Council, in determining whether a 'threat to the peace', exists, will be guided by the gravity of the crimes committed; the impunity enjoyed by the crimes' perpetrators; and the effectiveness or otherwise of the national jurisdiction in the prosecution of such crimes.¹³ The International Bar Association's urging that the ICC's Prosecutor direct his energy at the alleged atrocities committed by Zimbabwe's President and his regime¹⁴ is a good example of how the international community is beginning to demand a response to events in Africa through the mechanism of international criminal law. A Security Council referral to the ICC is one way in which that response might be achieved.

Prosecution by states parties

International criminal law developments in national legal systems¹⁵ may also have consequences for people responsible for serious

crimes in African states. The Rome Statute operates on the basis of what is known as the 'complementarity principle' in terms of which national judicial systems of States Parties will have the 'first bite at the cherry' in respect of any investigation that affects their territory or their nationals. States Parties to the Court therefore retain their right and responsibility to investigate offences committed on their territory, or where their nationals stand accused of committing ICC crimes anywhere else in the world. The ICC will be able to step in only where a national judicial system is unwilling or unable genuinely to investigate.¹⁶ The principle of complementarity ensures that the ICC operates as a system of international criminal justice that buttresses the national justice systems of states parties.¹⁷

In order to give effect to its complementarity obligations under the Rome Statute, South Africa, as an example, has recently incorporated the Rome Statute into its domestic law by means of national legislation.¹⁸ Under the Act, a structure is created for national prosecution of crimes in the Rome Statute. In terms of the Act, the jurisdiction of a South African court will be triggered when a person commits an ICC crime within South Africa, and also when a person commits a core crime outside the territory of the Republic where that person, after the commission of the crime, is present in the territory of the Republic; or that person has committed the said crime against a South African citizen or against a person who is ordinarily resident in the Republic.¹⁹ When a person commits a core crime outside the territory of the Republic in these circumstances, the Act deems that crime to have been committed in the territory of the Republic.²⁰

With apparent reliance on this extension of extra-territorial jurisdiction under the ICC Act, the Act was invoked against President Mugabe by a South African citizen (who has significant property interests in Zimbabwe) in September 2002 while Mugabe was attending the World Summit on Sustainable Development in Johannesburg.²¹ However, President Mugabe had left South Africa by the time the call for his arrest was made, and no action was therefore taken against him.

It should be pointed out, however, that the prospects of successfully invoking the South African Act against President Mugabe, or an official from any other State that has not ratified the Rome Statute (Liberia, for instance) seem doubtful. It will be recalled that under the Rome Statute the jurisdictional preconditions for the Statute's operation are that "the alleged perpetrators of the crimes are nationals of a State Party or the crimes are committed on the territory of a State Party".²² While South Africa's ICC Act provides that a South African court may exercise jurisdiction over someone who extra-territorially commits a core crime against a South African citizen or against a person who is ordinarily resident in the Republic, or who after the commission of the crime is present in the territory of the Republic, the exercise of that jurisdiction is to be performed within the parameters of the objects of the ICC Act. Those objects include the creation of "a framework to ensure that the Statute is effectively implemented in the Republic" and the ensuring "that anything done in terms of this Act conforms with the obligations of the Republic in terms of the Statute".²³ Given that the Rome Statute—the Statute which the ICC Act is aimed at implementing—itself provides that jurisdiction under the ICC scheme is limited to offences committed on the territory of States Parties and in respect of offences committed by nationals of States Parties, it will be open to an official from a non-State Party (such as Zimbabwe or Liberia) who has committed the alleged offence outside of South African territory to argue that the South African court's jurisdiction is similarly constrained under the ICC Act.

Amnesties and immunities

Amnesty

For centuries, successor regimes have sought to secure peace through the pardoning of their enemies, and modern history is replete with examples where a regime has granted amnesty to officials of the previous regime who were guilty of torture and crimes against humanity, rather than prosecute them (such as Uruguay, Argentina and El Salvador). So too,

are there examples of outgoing regimes which use their last days of political power to ensure that their members are granted an official 'pardon' from prosecution before the new regime takes office (such as Chile).

With the advent of truth commissions it has become possible to channel the granting of amnesty through a commission. So far, however, only the South African Truth and Reconciliation Commission and the recent truth commission in East Timor have been accorded the power to grant amnesty.²⁴ Commissions generally investigate and then issue a report. They focus on the truth about human rights abuses of a particular historical period and the specific policies and practices that contributed to those violations. Individual cases are described only if indicative of a general pattern or to highlight important events. That said, there might be good reason for African states emerging from a history rife with serious human rights abuses to follow the South African example, particularly if a commission is seen as a more effective means of reaching the truth than prosecution. 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.²⁵ In any event, the political reality for many transitional governments is that giving a truth commission the power of amnesty rather than criminally prosecuting past offenders is the only realistic and peaceful way in which an existing regime will be persuaded to relinquish power. Certainly that appears to be the motivation behind the arrangements being made for an amnesty for Charles Taylor, the former President of Liberia, and an amnesty that has been facilitated by Nigeria's offer of asylum for the beleaguered general. And in Zimbabwe, for example, it is not inconceivable that in respect of that country's troubled past, the Mugabed ZANU-PF government will insist on striking an amnesty deal, allowing the many ZANU-PF officials, policemen and soldiers who have committed serious human rights abuses to avoid prosecution.

Whatever the form of amnesty (whether granted by a truth commission or by the out-

going or ingoing government as a political act of reprieve), the question to be confronted is: how are such trumps to prosecution going to be dealt with by the International Criminal Court? Imagine, for example, that the ICC were to initiate an investigation into the 'situation' in Zimbabwe or Liberia following a Security Council referral (see above),²⁶ or that one of these states in future becomes a party to the Rome Statute, and accepts the Court's jurisdiction over specific crimes for the period that it was not a party to the Statute.²⁷ If during its transition Zimbabwe or Liberia had created a truth commission, and that truth commission had granted amnesties to individuals who were guilty of committing serious human rights abuses (such as crimes against humanity), then the question might arise whether such national amnesties would constitute a bar to prosecution before the International Criminal Court. So too, what is the ICC to do when faced with an official pardon granted to an alleged international criminal by an African state in the manner and form of the pardons accorded to the generals in Chile, and which is currently being negotiated in respect of General Charles Taylor?

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 be raised as a defence.²⁸ 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. And where a criminal prosecution is instituted by a State under its domestic legislation (such as South Africa's Implementation of the Rome Statute of the International Criminal Court Act of 2002), amnesty does not have an extraterritorial effect and the prosecuting state is not required to recognise the amnesty granted to human rights offenders by another state.²⁹

While amnesties do not in principle bar the ICC or a State Party from exercising criminal jurisdiction over an individual who has been granted amnesty, the political reality is that in some instances it might be expedient or a requirement of justice not to push ahead with

the prosecution of such a person. Article 53(2)(c) of the Rome Statute therefore provides the Prosecutor with the discretion to refuse prosecution at the instance of a state or the Security Council where, after investigation, he concludes that "a prosecution is not in the interests of justice, taking into account all circumstances". Of course, the type of amnesty at issue will play an important role in the Prosecutor's decision. No clear rules can be enunciated to distinguish between permissible and impermissible amnesties under international law, but one of the leading experts in this field suggests that 'international recognition might be accorded where amnesty has been granted as part of a truth and reconciliation inquiry and each person granted amnesty has been obliged to make full disclosure of his or her criminal acts as a precondition of amnesty and the acts were politically motivated'.³⁰ As such, the blanket amnesty in Chile passed by the Pinochet regime would not meet the required standard (in the Pinochet case³¹ before the House of Lords it was not even argued by Pinochet's lawyers that his amnesty in Chile could constitute a bar to his extradition from Britain to Spain)³², 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.³³ It is also important to note that the nature of certain offences precludes the grant of amnesty to their perpetrators.³⁴ It is still open to states to grant amnesty for international crimes without violating a rule of international law, but international lawyers are largely in agreement that states are not permitted to grant amnesty for the crimes of genocide, torture, and 'grave breaches' under the Geneva Convention.³⁵ The preamble of the Statute of the International Criminal Court, while binding only in respect of parties to it, confirms this trend when it declares that 'it is the duty of every State to exercise criminal jurisdiction over those responsible for international crimes'. It is noteworthy that this trend has been reflected in the mandate of East Timor's recently created truth commission.³⁶ While the mandate is clearly supportive of individualised amnesty in exchange for truth, the commission may grant

'no immunity' to persons who have committed a 'serious criminal offence', which includes the international crimes of genocide, crimes against humanity, war crimes, torture as well as the domestic crimes of murder and sexual offences, as defined by the Indonesian Criminal Code.³⁷

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

Immunity

One of the more interesting and difficult questions faced by international lawyers in recent times has been the question of immunities from jurisdiction. The most heated debate has been around the extent to which serving heads of state and other senior government officials can justifiably claim immunity, on account of their official status, from proceedings brought against them for committing serious crimes.

The Rome Statute attempts to bring clarity to the position and, in Article 27, provides that 'official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute'.³⁸ An individual charged before the International Criminal Court is therefore stripped of immunity, the official status of that person no longer being allowed to lead to impunity in respect of crimes with which she or he has been charged.

The position before national courts, however, is not as clear. This lack of clarity is particularly problematic in light of the fact that national courts of States Parties to the Rome Statute are, it will be recalled, expected to act in a 'complementary' arrangement with the

International Criminal Court, prosecuting individuals for ICC crimes and deferring to the ICC only where the national state is unwilling or unable to perform its prosecutorial role. The problem for a domestic court is this: where a head of state, for instance, of a foreign country is put on trial in a domestic court for his or her alleged commission of an ICC offence, the domestic court's state is disrespecting the sovereignty of the foreign state; a sovereignty which is embodied in the very person of the head of state being tried before the court, and which is protected under customary international law through the grant of immunity from prosecution.

South Africa, for one, has tried to cut its way past this controversy by proclaiming boldly in its ICC Act that notwithstanding 'any other law to the contrary, including customary and conventional international law, the fact that a person...is or was a head of state or government, a member of a government or parliament, an elected representative or a government official...is neither – (i) a defence to a crime; nor (ii) a ground for any possible reduction of sentence once a person has been convicted of a crime'.³⁹ In terms of the Act, South African courts, acting under the complementarity scheme, are accorded the same power to 'trump' the immunities that usually attach to officials of government as the International Criminal Court is by virtue of Article 27 of the Rome Statute. This is a significant aspect of the ICC Act and one which is to be welcomed insofar as it signals South Africa's intention of acting hand-in-hand with the International Criminal Court to bring government officials, whatever their standing, to justice.

However, whether the boldness of the Act matches the state of international law is another question, the openness of which will undoubtedly be seized upon by any high-level foreign government official who finds him or herself the subject of prosecution before a South African court for alleged commission of an ICC offence. Even in the groundbreaking Pinochet cases, the House of Lords accepted that serving international functionaries (such as current heads of state) retain absolute immunities *rationae personae* (immunity on

account of their official status), irrespective of the nature of the crime alleged, unless waived by the sending state. The House of Lords denied immunity to Pinochet in his capacity as a former head of state. However, it was made clear that if he had still been an acting head of state, this immunity in international law would have continued to subsist. For instance, Lord Nicholls in the first Pinochet case held that '...there can be no doubt that if Senator Pinochet had still been the head of the Chilean state, he would have been entitled to immunity'.⁴⁰ 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'.⁴¹ In its recent decision of *Democratic Republic of Congo v Belgium*⁴² the International Court of Justice appears to have reaffirmed this point. With regard to the provisions precluding immunity found in the constitutive instruments of a myriad of international criminal tribunals (the most recent being the Rome Statute of the ICC), the Court expressly held that this exception to customary international law was not applicable to national courts.⁴³ This case law suggests that the diplomatic or head of state immunity of an accused prevents national courts, regardless of what their domestic legislation might insist, from dealing with allegations of international crimes unless that immunity has been waived.⁴⁴

That is not to say, of course, that the individual must be set free. Under the complementarity scheme it will be expected of a State Party to the Rome Statute that finds itself unable to exercise jurisdiction (because, for instance, such prosecution would be an affront to the dignity of a foreign state) to send the accused to the International Criminal Court for prosecution. While similar political considerations might make it difficult for the requested state to comply with even this obligation under the Rome Statute (particularly where the accused is a high-ranking official of a friendly foreign state), it will at least have rid itself of the problem of dealing with the difficult immunity questions which its national courts would have had to face in attempting to prosecute the criminal concerned.

Conclusion

The demonstration of international criminal justice exemplified by the ICC is of undoubted importance for the states of Africa. There are already severe limitations placed on the ICC's jurisdictional scheme, both temporally (in that the Court is given competence only from 1 July 2002) as well by the preconditions to the exercise of jurisdiction in the form of territoriality and nationality (the Court's jurisdiction being limited to offences that occur on a State Party's territory or which are committed by a State Party's national). So too, the Court's powers may ultimately be constrained out of deference to the grant of an internationally acceptable amnesty or pardon, and while the Court may in terms of its own Statute ignore the official status of a criminal who might otherwise have been afforded immunity under customary international law for the crimes he or she has committed, that immunity arguably remains in place where the prosecution is attempted before a national court under the complementarity scheme of the Rome Statute.

These limitations (many of them, if not palatable, are at least explicable in a world of sovereign states) should not detract from the achievement that the International Criminal Court heralds for Africa. The International Criminal Court takes seriously the words of Justice Robert Jackson, Chief Prosecutor at Nuremberg, who famously said that letting major war criminals live undisturbed to write their 'memoirs' in peace 'would mock the dead and make cynics of the living'.⁴⁵ Through a commitment to the International Criminal Court, African states may proclaim that certain conduct is unacceptable to the African region. War crimes are committed every day and whole races have been defined by their experience of genocide or crimes against humanity. Yet international laws designed to punish these acts have, for a variety of political reasons, only been put into practice at Nuremberg and Tokyo after the Second World War, and in the 1990's by the creation of The Hague Tribunals. This very limited outpouring of indignation has for too long sent out an insidious message at the international level that, to a large degree, war

crimes and crimes against humanity are followed by impunity. The International Criminal Court is the mechanism to cure this defect in the international legal system by providing a public demonstration of justice. The act of punishing particular individuals—whether the leaders, or generals, or foot soldiers of Africa—becomes an instrument through which individual accountability for massive human rights violations is increasingly internalised as part of the fabric of the African continent, and indeed the international society. At the same time, it is a method by which African citizens put a stop to the culture of impunity that has taken hold at the international level, and which has made a mockery of justice within Africa for far too long.

Notes

1. W Schabas, *An Introduction to the International Criminal Court*, (2001) p 20.
2. 'Were They Just Obeying Orders?', *The Guardian*, May 7, 1996, at 10, quoted in Simon Chesterman 'Never Again ... and Again: Law, Order, and the Gender of War Crimes in Bosnia and Beyond', (1997) 22 *Yale J. of Int. Law*, pp 299–316.
3. See M Ellis, *International Bar Association*, 7 March 2003 (IBA Press Release).
4. See G Dwyer, "Why we need an International Criminal Court", *l'express dimanche*, 12 October 2003, available at http://www.lexpress.mu/display_news_dimanche.php?news_id=2482 (accessed on 15/10/03); and see Amnesty International Press Release, "Nigeria: No impunity for Charles Taylor", 12 August 2003, available at <http://web.amnesty.org/library/print/ENGAFR440242003> (accessed 15/10/03).
5. There are clearly other "hotspots", such as Burundi, Mozambique and Algeria which might in future fall under the scrutiny of the International Criminal Court.
6. See Article 12(2)(a) of the Rome Statute: '[T]he Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court [on an ad hoc basis]:
 - The State on the territory of which the conduct in question occurred ...
 - The State of which the person accused of the crime is a national.'
7. See Press Release of the Prosecutor of the International Criminal Court, No.: pids.008.2003-EN, 15 July 2003, available at <http://www.icc.int>. See also P Kirsch (QC) & D Robinson, "Trigger mechanisms", in A Cassesse, *et al*, *The Rome Statute of the International Criminal Court: A Commentary*, 1,

- (2002), Oxford University Press, Oxford, pp 623–625.
8. Both Zimbabwe and Liberia signed the ICC Statute on 17 July 1998, but neither State has yet ratified the Statute (for information see <http://www.iccnw.org/countryinfo/worldsignsandratifications.html>).
 9. Additionally, any country, State Party or non-State Party may in terms of Article 12(3) of the Rome Statute make an *ad hoc* acceptance of the exercise of jurisdiction by the Court over its nationals or crimes committed on its territory. See H-P Kaul, 'Preconditions to the exercise of jurisdiction', in A Cassesse, *et al*, *ibid.*, p.611. This has not yet occurred, and it certainly does not appear that Zimbabwe or Liberia, as non-State Parties, will make such an *ad hoc* acceptance under current circumstances.
 10. See Press Release of the Prosecutor of the International Criminal Court, No: pids.008.2003-EN, 15 July 2003, available at <http://www.icc.int>. See also P Kirsch (QC) Y D Robinson, *op cit*, pp 661–663.
 11. Article 11(2) of the Rome Statute.
 12. See P Kirsch (QC) & D Robinson, *ibid.* p 634.
 13. The Preamble of the Rome Statute proclaims that the crimes within the Court's jurisdiction 'threaten the peace, security and well-being of the world' (para. 13). Furthermore, the practice of the Security Council reflects a willingness to regard these crimes as a threat to the peace. See for example the application of Chapter VII by the Security Council in case of grave international crimes that remain unpunished in expressing its support for the establishment of the International Criminal Tribunals for Yugoslavia and Rwanda. For instance, in Security Council Resolution 808, 1993, after having expressed 'its grave alarm at continuing reports of widespread violations of international humanitarian law occurring within the territory of the former Yugoslavia', the Security Council declares 'that this situation constitutes a threat to international peace and security' and its determination 'to put an end to such crimes and to take effective measures to bring to justice the perpetrators who are responsible for them'. See in general on this point, Kirsch P (QC) & D Robinson, *op cit*, pp 630–631.
 14. See M Ellis, *International Bar Association*, 7 March 2003 (IBA Press Release). The IBA addressed its call to all state parties to the International Criminal Court (ICC), on the assumption that each of those states has the authority to request that prosecution be initiated. While that is true, the IBA has failed to appreciate that the Court can only take up that request where the alleged perpetrators of the crimes are nationals of a State Party or the crimes are committed on the territory of a State Party – jurisdictional factors which prevent the court from being able to consider the events in Zimbabwe (or any other State) which is not a party to the Statute (see endnote 8 above above and related text). Nonetheless, the IBA's call is evidence of the growing international concern about the human rights violations occurring in Zimbabwe, a concern which the Security Council has the power to act upon and to refer the matter to the ICC for investigation.
 15. For an overview of such developments see Charney J, 'International criminal law and the role of domestic courts', *American Journal of International Law*, 120, 2001, p 95. Belgium's courts are perhaps the best example of national judges exercising universal jurisdiction to prosecute international criminals.
 16. See Article 117 of the Rome Statute.
 17. So William Schabas writes that the term 'complementarity' may be somewhat of a misnomer, 'because what is established is a relationship between international justice and national justice that is far from "complementary". Rather, the two systems function in opposition and to some extent hostility with respect to each other. The concept is very much the contrary of the scheme established for the *ad hoc* tribunals [for Yugoslavia and Rwanda], whereby the international court can assume jurisdiction as a right, without having to demonstrate the failure or inadequacy of the domestic system' (Schabas *op cit*, p 67).
Schabas is referring here to the fact that the International Criminal Tribunals for the Former Yugoslavia and Rwanda, both of which are set up by the UN Security Council exercising its enforcement power under Chapter VII of the UN Charter to maintain international peace and security, exercise primacy jurisdiction over the national courts in those two countries.
 18. The Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002.
 19. The first scenario is grounded in the idea of universal jurisdiction; that is, that a State may exercise jurisdiction over a person who enters its territory who has committed crimes elsewhere, but which, because of their egregious nature, are of concern to the international community as a whole. The second scenario flows from the passive personality principle in international law. In terms of that principle a State has the competency to exercise jurisdiction over an individual who causes harm to one of its nationals abroad. See further Du Plessis M, 'Bringing the International Criminal Court home: The implementation of the Rome Statute of the International Criminal Court Act 2002', *South African Journal of Criminal Justice*, (2003) vol. 16, No. 1, 1, at pp. 2-4.
 20. Section 4(3) of the Implementation of the Rome Statute of the International Criminal Court Act 2002.
 21. Quintal A, 'Farmer's case against Mugabe under spotlight', *Independent Online*, 4 September 2002, available at <http://www.iol.co.za/index.php> (accessed on 15/10/03).
 22. See Press Release of the Prosecutor of the International Criminal Court, No.: pids.008.2003-EN,

- 15 July 2003, available at <http://www.icc.int>. See also Kirsch P (QC) & D Robinson, 'Trigger mechanisms', in A Cassese, *et al*, *The Rome Statute of the International Criminal Court: A Commentary*, 1, 2002, pp.623–625.
23. Section 3 (a) and (b) of the ICC Act 2002.
 24. On the South African TRC's amnesty process, see A McDonald, 'A right to truth, justice and a remedy for African victims of serious violations of international humanitarian law', *Law, Democracy and Development*, 2, 1999, p 139, especially pp. 164–170; P Hayner, *Unspeakable Truths*, (2002), Routledge, New York, pp 98 *et seq*. On the amnesty process in East Timor, see C Stahn, 'Accommodating individual criminal responsibility and national reconciliation: The UN Truth Commission for East Timor', *American Journal of International Law*, 95, 2001, p.952, especially pp.962–965.
 25. See the judgment of South Africa's former Chief Justice, Ismail Mohamed, who in *Azapo v President of the Republic of South Africa* 1996 (4) SA 671, at 681–685, stated: 'Most of the acts of brutality and torture which have taken place have occurred during an era in which neither the law which permitted the incarceration or persons or the investigation of crimes, nor the methods and the culture which informed such investigations were easily open to public investigation, verification and correction. Much of what transpired in this shameful period is shrouded in secrecy and not easily capable of objective demonstration and proof. ... That truth, which the victims of repression seek so desperately to know is, in the circumstances, much more likely to be forthcoming if those responsible for such monstrous misdeeds are encouraged to disclose the whole truth with the incentive that they will not receive the punishment which they undoubtedly deserve if they do. Without that incentive there is nothing to encourage such persons to make the disclosure and to reveal the truth ...'. The judge's observations are applicable to any African state insofar as that country's history is also not easily capable of objective demonstration and proof, and/or has been denied by the government through various senior officials.
 26. Once again, it must be reiterated that any such investigations would be limited to the events in Zimbabwe and Liberia after 1 July 2001 when the Rome Statute became operative.
 27. As explained above, the Rome Statute provides that in the case of States that become parties to the Statute after its entry into force on 1 July 2001, the Court only has jurisdiction over crimes committed *after* the entry into force of the Statute with respect to that State. However, it is possible for a State to make an *ad hoc* declaration recognising the Court's jurisdiction over specific crimes, and to allow the Court to exercise jurisdiction over those crimes for the period *before* that State became a party to the Statute (see Article 11(2) read with Article 12(3) of the Rome Statute of the International Criminal Court). In this way it would be possible for a future Zimbabwean government to become a member of the Court and to allow the Court to exercise jurisdiction over the events that occurred from 1 July 2001, the date on which the Court's jurisdiction over genocide, crimes against humanity and war crimes came into effect.
 28. J Dugard, 'Conflicts of Jurisdiction with Truth Commissions', pp.700–701 in A Cassese, *et al*, *The Rome Statute of the International Criminal Court: A Commentary*, 1, 2002, Oxford University Press, Oxford.
 29. J Dugard, *ibid*, p. 699.
 30. J Dugard, *ibid*, p.700.
 31. *R v Bow Street Metropolitan Stipendiary Magistrate, ex Parte Pinochet Ugarte* (No. 3) (1999) 2 All ER 97 (HL).
 32. See J Dugard, *Conflicts of Jurisdiction with Truth Commissions, op cit*, p 699.
 33. *Ibid*. See too Rama Mani, *Beyond Retribution: Seeking Justice in the Shadows of War*, (2002) Blackwell Publishers Ltd, UK, pp 112–113.
 34. There is a vast body of literature on the debate as to whether there is an international legal obligation (whether founded in customary or conventional law) obliging states to punish past crimes. See for example Orentlicher D, 'Settling accounts: The duty to prosecute human rights violations of a prior regime', *Yale Law Journal*, 2537, 1991, p 100; Roht-Arriaza N, 'State responsibility to investigate and prosecute grave human rights violations in international law', *California Law Review*, 78, 2, 1990, p.449. See also Dugard J, 'Possible conflicts of jurisdiction with truth commissions', in A Cassese, *et al*, *The Rome Statute of the International Criminal Court – A Commentary*, 1, 2002, Oxford University Press, Oxford p.697, and the authorities cited in footnote 26. P Hayner, *Unspeakable Truths, op. cit.*, p.90 makes the important point, however, that 'even where international law clearly requires prosecution of those accused of rights crimes, serious prosecutorial action against perpetrators is still uncommon and many blanket amnesties remain in force', confirming the fact that much of the debate about the legality of amnesties such as those granted by TRCs is still—at least for now—somewhat academic.
 35. J Dugard, *ibid.*, p.699.
 36. In 1999 pro-Indonesian militia, supported by Indonesian security forces, used violence, threats and intimidation in an attempt to coerce the East Timorese population to support continued integration in Indonesia in the UN-organised 1999 referendum on independence of the island. In apparent revenge for the overwhelming vote in favour of independence, an estimated one thousand supporters of independence were killed and hundreds of thousands fled their homes or were forcibly expelled to Indonesia. After these events the United Nations took control of East Timor

- and through its United Nations Transitional Administration in East Timor established the Commission for Reception, Truth and Reconciliation in East Timor. See C Stahn, *op cit*, pp 952–953.
37. See C Stahn, *op. cit.*, pp 957–958.
 38. Rome Statute of the International Criminal Court, 1998, Article 27(1). Nor shall such capacity 'in and of itself, constitute a ground for reduction of sentence'. Article 27(2) reinforces this immunity by providing that '[i]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.'
 39. See s 4(2)(a) of the ICC Act.
 40. *R v Bow St Magistrate, ex parte Pinochet Ugarte*, [1998] 4 All ER (Pinochet 1) at 938.
 41. *R v Bow St Magistrate, Ex p. Pinochet (No.3)* [1999] 2 WLR 824 at 905 H.
 42. Judgment of 14 February 2002, *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, available at the ICJ homepage, <http://www.icj-cij.org>.
 43. Para. 58.
 44. The recent application to the International Court of Justice by Liberia against Sierra Leone to set aside the indictment and international arrest warrant of 7 March 2003 issued by the Special Court for Sierra Leone against Charles Taylor, President of the Republic of Liberia, indicates that diplomatic or state immunity might prevent even ad hoc Special tribunals, constituted by the United Nations, from disrespecting state sovereignty in pressing ahead with prosecution. At the time of going to press the outcome of the case is still awaited. For further information see International Court of Justice Press Release, Liberia applies to the International Court of Justice in a dispute with Sierra Leone concerning an international arrest warrant issued by the Special Court for Sierra Leone against the Liberian President, 2003/26 (5 August 2003), available at http://www.pict-pcti.org/news_archive/03/03Aug/ICJ_080503.htm.
 45. Robert H. Jackson, *The Nuremberg Case, as Presented by Robert H. Jackson*, 1947, p 8.