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ICC and Africa

Substantive jurisdiction

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Introduction

The Statute of the International Criminal Court provides three crimes over which the Court has jurisdiction: genocide (art.6), crimes against humanity (art.7) and war crimes (art.8). In addition to that, article 5, paragraph 2 of the Statute stipulates that the court may also exercise jurisdiction over the crime of aggression once a provision defining the crime has been adopted. Since this has not been done yet, I will not speculate on how aggression might be formulated.

In this contribution I will therefore focus on the three crimes mentioned and concentrate on future issues that could lead to (legal) disputes or issues that would necessitate further clarification.¹ The second angle from which I would like to approach the substantive jurisdiction under the ICC Statute is the extent to which developments are specifically African. Having regard to peculiarities of Africa is justified for the following reasons. Firstly, it is likely that the first cases before the ICC are going to be African cases. There are quite some conflicts going on that could qualify for application of the ICC Statute. Secondly, the international political situation stimulates a closer look towards Africa in the sense that world powers (or better to say: the world power) are/ is not dominantly involved in the conflicts in Africa. It is therefore likely that the accused will be African (and not for instance US or EU nationals). Thirdly, there is a good ratification rate among African states. Fourthly, it is likely that African states lack the infrastructure for prosecution and will easily fulfil the requirement of being unable to prosecute (art. 17, par. 1 sub a ICC Statute).

As a consequence, the progress and development of international criminal law and the effectiveness of the ICC will be determined in Africa, not in Europe or Asia and certainly not in the Americas.

Construction of Criminal Responsibility

Although the Statute offers definitions of the crimes in articles 6, 7 and 8, this is insufficient to determine criminal responsibility. On the basis of article 9 ICC Statute the so-called Elements of Crimes have been formulated. This set of rules “shall assist the Court in the interpretation and application of articles 6, 7 and 8.” One could regard these Elements of Crimes as an attempt to supply the ICC Statute with a general part. What is a general part? In the general part, a criminal justice system defines who is subject to criminal law (e.g. natural persons (excluding children below a certain age) and (in some natural criminal justice systems) legal entities, contrary to animals as was the case before the middle ages); whether the conduct is criminal in the sense that it falls within

¹ This contribution will not deal in detail with every aspect of the crimes mentioned.

the definition of a specific crime; whether the suspect qualifies as a direct perpetrator (and thus has committed the crime itself) or as an indirect perpetrator. By allowing for the criminalisation of indirect perpetrators a criminal justice system will define forms of participation to the crime, such as accessories, instigators, aiders and abettors etc.; the general part also deals with circumstances in which no punishment may take place due to internal (e.g. insanity) or external (e.g. emergency) circumstances of the offence. This may lead to the conclusion that either in the specific circumstances of the case the behaviour was not illegal, *or* that the illegal behaviour cannot be reproached to the perpetrator. This aspect deals with the concepts of *defences* and *excuses*; Finally, a general part determines jurisdictional matters. What justifies the applicability of specific national legislation? The fact that the conduct took place on its territory? The fact that the perpetrator or the victim is one of its nationals? Or is there room for extra-territorial or even universal application of national criminal law?

The general part of criminal law can be regarded as the foundation on which each criminal justice system is built. Most jurisdictions have therefore codified the general part in the first section of their Penal Code.² This general part is subsequently followed by a much more voluminous part with specific incriminations, the so called special part. In the special part we find the definitions and penalties of all crimes: for murder, for theft etc. The general part derives its notion “general” from the fact that is applicable to all specific crimes. To a certain extent one can describe the general part and the specific incrimination as the two coordinates that determine criminal responsibility.

The Elements of Crimes further clarify the meaning of the provisions on substantive criminal law. Because of the fact that the definitions of the crimes are similar to definitions used earlier in for instance the ICTY Statute and the ICTR Statute, it raises the question whether the case law of these and other tribunals, such as the Special Court for Sierra Leone and the East Timor Special Panels can be used as a source of reference and interpretation for the ICC. In this context it is interesting to see that articles 6, 7 and 8 all use the same wording: “for the purposes of this Statute”.³ Why has this been done? This makes it clear that other definitions of the crimes remain applicable in the context for which those definitions were drafted. A consequence of any difference is of course that added value of the case law of the other international and internationalised tribunals mentioned is limited to the extent that the definitions of the crimes do not differ.

Genocide

Genocide is regarded as the crime of crimes by both ad hoc tribunals.⁴ It is the most superior crime. It requires a special intent of the perpetrator. He wants to kill victims because they belong to a certain (national/ ethnic/ racial/ religious) group. Victims are selected by the perpetrator not as individuals but because of their membership to a specific group. The crime of genocide was drafted after the second world war. The atrocities committed by nazi-Germany on the European jews modelled the 1948 Genocide Convention.⁵

² In this sense it is striking that none of the statutes of international criminal tribunals has done that.

³ Art. 6, par. 1, art.7, par. 1 and art.8, par. 2 ICC Statute.

⁴ ICTR, Sentence, *Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-T, 21 May 1999, T. Ch.II, Klip/ Sluiter, *Annotated Leading Cases of International Criminal Tribunals*, Vol. II, p.695.

⁵ Convention for the Prevention and Suppression of the Crime of Genocide, 9 December 1948, UNTS 78, 277 and 317 UTS 319. See also William A. Schabas, *Genocide in International Law*, Cambridge University Press 2000.

In my opinion two possible future issues deserve further attention. The first is the question of whether an individual can individually commit genocide or whether concerted action is required. The second is what the requirements are for the special intent.

Isolated acts and acts of an individual

The main question is whether an individual can commit genocide by commission of isolated acts. This seems to be ruled out by the Elements of Crimes: “the conduct took place in the context of a manifest pattern of similar conduct.” This makes clear that there can be no isolated act that qualifies as genocide, even if the perpetrator in question had the requisite special intent to kill a certain group of people. I doubt whether this interpretation in the Elements of Crimes will be flexible enough to cope with future technical developments. Unfortunately the possession of atomic, biological and chemical weapons is no longer exclusively under the control of states.

What I deduce from the Elements of Crimes is that it is not necessary to kill huge numbers of victims, as long as it fits into a pattern of conduct. What is necessary, though, is that the conduct must form a serious attempt. The Elements of Crimes determine that the conduct could itself effect the destruction of the group. In this context it is also relevant to see that the acts listed in the Statute are not enumerative. The Statute stipulates that “any of the following acts” shall be considered as genocide. There is a certain pressure to expand the protection of this crime by accepting other acts as falling within the definition. The ICTR demonstrated that by bringing rape under the definition of genocide.⁶

The second issue that may come up is whether *dolus eventualis* may also qualify as special intent required under genocide. With *dolus eventualis* it is meant that although the initiative to commit genocide may not have come from the perpetrator he deliberately and voluntarily engaged himself in conduct of which he knew that it would contribute to genocide. Examples of this from the second world war are the participation of certain German enterprises in the construction of gas chambers and the production of gas.

Current practices of the use of radio-active material, as well as the exploitation of oil and gas fields may deprive entire groups of their natural home lands, may seriously inflict the conditions of life and destruct the population in whole or in part. Another example is the cutting of the rain forest which may have similar effects. The examples given also demonstrate that it is time to think over the question whether legal entities may also be criminally liable.

Crimes Against Humanity

Article 7 of the ICC Statute describes which acts fall under the heading of crimes against humanity. Like with genocide, also this list is not enumerative since sub k stipulates that “other inhumane acts” may be regarded as a crime against humanity. Further explanation of the elements of this crime is given in two instances. In paragraph 2 of article 7 itself as well as in the Elements of Crimes.

⁶ ICTR, Judgement, *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, 2 September 1998, Klip/ Sluiter, Annotated Leading Cases of International Criminal Tribunals, Vol. II, p.531-536.

The discretion of bringing other acts under the definition of crimes against humanity is not unlimited. Article 22, paragraph 2 ICC Statute sets the standard here: “The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.”

With regard to the crime of apartheid it is remarkable that the ICC Statute did not copy the definition from the Anti-Apartheid Convention. The reason could be that the state based system of apartheid as practised in South Africa no longer exists. The consequence of that reference is that a new interpretation will have to be given. In this context the question comes up whether the treatment of Papuas in Irian Jaya by Indonesia falls under the crime of apartheid. Similar situations are for the Tibetians in China, white farmers in Zimbabwe and the aboriginals in Australia.

According to the Elements of Crime with regard to extermination, it includes the deprivation of access to food and medicine. What about not supplying food or anti Aids-medicine to countries and population in need?

Further questions can be raised with regard to “attack directed against any civilian population”. Also here the question must be raised whether this rules out an individual act. Paragraph 2 requires multiple commission of acts and seems to rule out a single strike. Do terrorist acts, such as the destruction of the World Trade Center in New York qualify as an attack in this sense? In light of the further explanation of attack, given in paragraph 2 of the article my answer is positive. It further defines that an attack may be “pursuant to or in furtherance of a state or organizational policy to commit such an attack”. There can be hardly any discussion about the definition of a state. The “organizational policy” distinguishes itself from the state. Does this relate to formal organisations, such as the African Union or the North Atlantic Treaty Organisation? Or can this provision also be applied with regard to informal organisations, such as Al Qaeda or separatist movements.

War crimes

War crimes can be considered as the broadest category of all international crimes. The definition distinguishes between various categories:

- grave breaches of the four Geneva Conventions (protected persons)
- other serious violations in international conflict
- Common Article 3 violations in armed not of an international character
- Other serious violations in armed conflict not of an international character

The provision on war crimes does not apply to internal disturbances and tensions.

It is interesting to see that the Elements of Crime require knowledge with the perpetrator of factual circumstances that established the existence of an armed conflict. The Elements of Crime further adapted to the development in the case law of the ad hoc tribunals that it is not required that the perpetrator was able to qualify whether he participated in an internal or international conflict.

Overlap of specific crimes

There is a general tendency to expand the remit of the definition of all crimes. The ICTR and ICTY have not been extremely restrictive in their interpretation of definitions of crimes and their definition of individual and command responsibility. Although this may lead to a more extensive protection of the rights of individuals it raises new problems of demarkation between the various international crimes. Two examples of overlaps may illustrate this, many others could have been given. There is an overlap of genocide and extermination as a crime against humanity. There is an overlap of genocide, crimes against humanity and war crimes with regard to rape.⁷

What is or could be the problem if the ICC were not able to resist this development? It will lead to cumulative charging and cumulative convictions. It requires the regulation of *concursum idealis* because a conviction will be based on the same material facts.

Such a practice leaves certain ambiguity as to rights protected by the prohibition of a certain crime. There is a fair risk that we will end up with a hotch-potch of international crimes without any clear distinction.

International tribunals should be more restrictive in their interpretation and be able to specify what the values protected by each specific crime are. Only then is it possible to make clear why certain acts are universally seen as international crime. It should be abundantly clear what makes an individual murder or rape a crime against humanity and how it distinguishes crimes against humanity from genocide.

Penalties

A few remarks on article 77 ICC Statute that deals with the penalties. It provides for two types of sanctions: imprisonment for a specified number of years, which may not exceed a maximum of 30 years; and life imprisonment. Although this is already much more than any previous statute of an international criminal tribunal provided, it is questionable whether this fulfils the requirements of *nullum poena sine lege*. Two problems appear at the horizon here. The first is that there is no sentencing policy. From the sentences imposed by the ICTY it is impossible to deduct a policy with sufficiently predictability. This is different with the ICTR, but at that tribunal most accused are convicted of genocide for which the ICTR imposes life imprisonment. One may even question whether the grave nature of the crimes for which the ICC is competent allow for anything else but a very harsh sentence.

The second problem is that the court/ judges at the moment of sentencing do not know what happens to the sentence once it is imposed. They do not have any information as to the state that will execute the sentence. The penitentiary position of a convicted person will be entirely different in Mali or in Norway even if the duration of the sentence may be exactly the same.

Concluding remarks

Former international criminal tribunals were given a substantive jurisdiction competence specifically drafted for the relevant conflict. With the establishment of the ICC this is different. It will be interesting to see what the consequences of that are for the ICC's effectiveness and success.

⁷ See ICTR, Judgement and Sentence, *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T, T.Ch.I, 6 December 1999, Klip/ Sluiter, *Annotated Leading Cases of International Criminal Tribunals*, Vol. II, p.709. See my commentary on these type of cases on p.787.

Article 26 ICC Statute excludes jurisdiction over persons under 18 years. Although that is certainly in line with various the competences of most international tribunals, it is questionable whether this corresponds to specific African situations. In many African conflicts, child soldiers play an important role. This raises the question as to their accountability. The Statute of the Special Court for Sierra Leone specifically provided jurisdiction over minors.

A final remark is on the ICC as a source of inspiration and guidance for national courts. Following the principle of complementarity, the ICC should only act if states are unwilling or unable to prosecute crimes.⁸ The Statute does send the message that the first task is for the states and certainly not for the ICC. The structure of the ICC Statute emphasises the criminal liability of leaders (military and civil) by the requirement of knowledge of a plan or policy. This focuses on the prosecution of the leadership in each conflict. A consequence that can already be found in the prosecution practice of both the ICTR and the ICTY. For the Special Court for Sierra Leone it is even stipulated in the Statute itself.

One of the consequences is that international criminal tribunals do not deal with representative cases but with similar cases. In cases related to the leadership of international crimes entirely different issues with regard to criminal responsibility come up than in cases with small fish. Hardly any of the superiors did kill, rape or set fire to houses themselves. Their criminal responsibility is construed with the establishment of a line of responsibility with the person who actually killed, raped or burnt the house. It is much more likely that questions with regard to defences and excuses will be raised in cases against individual soldiers than in cases against ministers and generals. In a more retoric way the question is whether one could imagine Milosevic to plead that he acted under duress. In combination with the political tendency to leave political sensitive cases (i.e. cases against the political or military elite) to the ICC, the ICC will have exclusively high profile cases. As a consequence of this development the ICC case law will not give any guidance regarding the peculiarities of cases regarding minor perpetrators. National courts will subsequently have to decide such issues completely on their own. This will result in many different practices and certainly not further the equal treatment of perpetrators. This will be to detriment of the development of international criminal law. This could be counterbalanced if the ICC were willing to monitor the policy of the prosecution in bringing cases before it.

⁸ See André Klip, Complementarity and Concurrent Jurisdiction, 19 *Nouvelles Etudes Pénales* 2004, p.173-197.