



South Africa's International Criminal Court Act

Countering genocide, war crimes and crimes against humanity

INTRODUCTION

It has been more than five years now that South Africa has been a party to the Rome Statute of the International Criminal Court (ICC). This is a reasonable period of time within which to reflect on South Africa's membership of the ICC regime, and to consider the domestic steps that South Africa has taken in its relationship with the ICC.

That South Africa is in a relationship with the ICC is a result of the particular 'complementarity' scheme set in place under the Rome Statute. While the ICC is the world's first permanent international criminal tribunal, it is not expected to be the primary means by which jurisdiction is asserted over international crimes. Indeed, the Court is designed to be a backstop; to act in what its Statute's preamble describes as a 'complementary' relationship with domestic states that are party to the Rome Statute.

The principle of 'complementarity' ensures that the ICC operates as a buttress in support of the criminal justice systems of States Parties at a national level, and as part of a broader system of international criminal justice. The principle proceeds from the belief that national courts should be the first to act. It is only if a State Party is 'unwilling or unable' to investigate and prosecute international crimes committed by its nationals or on its territory, that the ICC is then seized with jurisdiction.

Against the backdrop of complementarity, the importance of the ICC regime for South Africans becomes clearer. On 17 July 1998 South Africa signed and ratified the Rome Statute, thereby becoming the 23rd State Party. To domesticate the obligations in the Rome Statute, South Africa's parliament drafted The Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 (ICC Act), which became law on 16 August 2002.

The passing of the ICC Act was momentous: prior to the Act, South Africa had no domestic legislation on the subject of war crimes or crimes against humanity, and no domestic prosecutions of international crimes had taken place in South Africa. The ICC Act is the means by which to remedy that failure, and is in any event the domestic legislation that South Africa (as a State Party to the Rome Statute) was legally obliged to pass in order to comply with its duties under the Statute's complementarity scheme.

In this paper the state of South Africa's support for the ICC and its commitment to the complementarity scheme expressed in the Rome Statute are considered. As we shall see, there is much to commend South Africa's involvement in the ICC scheme, and in many respects South Africa has played a leading role in Africa in relation to the Court.

To date there are only two African States Parties to the Rome Statute that have taken steps to domesticate the Statute's obligations: South Africa and Senegal. This paper focuses on South Africa's efforts. South Africa was the first state in Africa to incorporate the ICC Statute into its domestic law, and the ICC Act is a very progressive example of implementing legislation – allowing for the potential prosecution of international crimes, wherever and by whomsoever they may be committed (see section 4(3)(c) of the ICC Act which extends jurisdiction to a person who, 'after the commission of the crime, is present in the territory of the Republic' and which thus provides South African courts with *universal* jurisdiction).

International criminal law is no longer something 'out there'. It has been brought home by the ICC Act, and has the potential (as we shall see later) to be increasingly used before South Africa's courts.

THE ICC ACT: SA'S DOMESTICATION OF ITS ROME STATUTE OBLIGATIONS

In order to give effect to its complementarity obligations under the Rome Statute, South Africa incorporated the Statute into its domestic law by means of the ICC Act in 2002. Under the ICC Act, a structure is created for national prosecution of crimes in the Rome Statute. In other words, the ICC Act allows for the prosecution of crimes against humanity, genocide and war crimes before a South African court.

The Act takes seriously the complementarity obligation on South African courts to domestically investigate and prosecute ICC offences. The preamble, for instance, speaks of South Africa's commitment to bring '... persons who commit such atrocities to justice ... in a court of law of the Republic in terms of its domestic law where possible'. And section 3 of the Act defines as one of its objects the enabling:

... as far as possible and in accordance with the principle of complementarity..., the national prosecuting authority of the Republic to prosecute and the High Courts of the Republic to adjudicate in cases brought against any person accused of having committed a crime in the Republic and beyond the borders of the Republic in certain circumstances.

The Preamble provides the context to the enactment of the ICC Act:

MINDFUL that –

- throughout the history of human-kind, millions of children, women and men have suffered as a result of atrocities which constitute the crimes of genocide, crimes against humanity, war crimes and the crime of aggression in terms of international law;
- the Republic of South Africa, with its own history of atrocities, has, since 1994, become an integral and accepted member of the community of nations;
- the Republic of South Africa is committed to –
 - bringing persons who commit such atrocities to justice, either in a court of law of the Republic in terms of its domestic laws where possible, pursuant to its international obligations to do so when the Republic became party to the Rome Statute of the International Criminal Court, or in the event of the national prosecuting authority of the Republic declining or being unable to do so, in line with the principle of complementarity as contemplated in the Statute, in the International Criminal Court, created by and functioning in terms of the said Statute; and
 - carrying out its other obligations in terms of the said Statute...

The preamble records that South Africa has an international obligation under the Rome Statute, to bring the perpetrators of crimes against humanity to justice, in a South African court under our domestic law where possible. The Act makes it clear that it favours the prosecution of international crimes, if needs be by domestic prosecution in South Africa. The Act seeks to achieve, inter alia, the following aims:

- The first object of the Act recorded in section 3(a) is to create a framework to ensure that the Rome Statute is effectively implemented in South Africa
- The second object of the Act recorded in section 3(b) is to ensure that anything done in terms of the ICC Act conforms with South Africa's obligations under the Rome Statute, including its obligation to prosecute the perpetrators of crimes against humanity referred to above
- Another object of the Act recorded in section 3(d), is to enable South Africa's National Prosecuting Authority (NPA) to prosecute and the high courts to adjudicate in cases against people accused of having committed crimes against humanity, both inside South Africa and beyond its borders

Although any prosecution under the ICC Act may only be brought with the consent of the National Director of Public Prosecutions (NDPP), he is obliged in terms of section 5(3), when he considers whether to institute such a prosecution, to:

give recognition to the obligation that the Republic, in the first instance and in line with the principle of complementarity as contemplated in article 1 of the Statute, has jurisdiction and the responsibility to prosecute persons accused of having committed a crime.

Like the Rome Statute, the ICC Act does not reach back into the past. The Act provides expressly that '[n]o prosecution may be instituted against a person accused of having committed a crime if the crime in question is alleged to have been committed before the commencement of the Statute', being 1 July 2002 (ICC Act 2002: section 5(2)).

SOME IMPORTANT FEATURES OF THE ICC ACT

Incorporation of ICC crimes

One of the advantages of the Rome Statute of the ICC is that it brings together in one place a codified statement of the elements which make up the crimes of genocide, war crimes, and crimes against humanity. The drafters of the ICC Act, no doubt aware of this benefit of codification,

incorporated the ICC Statute's definitions of the core crimes directly into South African law through a schedule appended to the Act. In this regard:

- Part 1 of Schedule 1 to the ICC Act follows the wording of article 6 of the ICC Statute in relation to genocide
- Part 2 of the Schedule mirrors article 7 of the Statute in respect of crimes against humanity
- Part 3 does the same for war crimes as set out in article 8 of the ICC Statute

It is clear that these crimes now form part of South African law through the Act. One of the objects of the Act is 'to provide for the crime of genocide, crimes against humanity and war crimes' (ICC Act 2002: section 3(c)) and section 4(1) of the Act provides that '[d]espite anything to the contrary in any other law in the Republic, any person who commits a crime [defined as genocide, crimes against humanity and war crimes], is guilty of an offence'.

The ICC Act extends jurisdiction to anyone who, after committing the crime, is present in SA

While the Act usefully incorporates the definitions of these crimes into South African domestic law, neither the ICC Act nor Schedule 1 refers specifically to article 9 of the Rome Statute on Elements of Crimes.¹ There is nothing, however, which prevents a South African court from having regard to the Elements of Crimes were it to be involved in the domestic prosecution of an ICC offence. However, in the interests of clarity and completeness it is suggested that South Africa follow the example of other States Parties² and incorporate by regulation the Elements of Crimes.³

Protections for the accused

The drafters of the ICC Act have also not seen fit to replicate the general principles of criminal law set out in articles 22–33 of the Rome Statute, which include that of *nullum crimen sine lege*, and grounds for excluding criminal responsibility, for instance on the basis of mental illness, self-defence, or intoxication.

That said, it seems that these general principles will find application in any domestic trial under the ICC Act. For one thing, an accused will be entitled to the ordinary defences and protections that are guaranteed under the South African Constitution. The ICC Act provides that a

South African court, charged with the prosecution of a person allegedly responsible for a core crime, shall apply 'the Constitution and the law' (ICC Act 2002: section 2). The protections set out in section 35 of the Bill of Rights for arrested, detained and accused persons will obviously need to be afforded to any person who is being tried under the ICC Act.

And while the drafters of the ICC Act have not chosen to expressly adopt Part 3 of the Rome Statute on general principles of liability and defences, section 2 of the ICC Act provides that applicable law for any South African court hearing any matter arising under the Act includes 'conventional international law, and in particular the [Rome] Statute' (ICC Act 2002: section 2(a)). Accordingly, the general principles of international criminal law applicable to the prosecution of genocide, war crimes and crimes against humanity (including the available defences contained in the Rome Statute such as superior orders, mistake of fact, etc) will be to the accused's avail before a South African court.

Grounds of jurisdiction

The ICC Act puts in place a variety of jurisdictional bases by which a South African court might be seized with the prosecution of a person alleged to be guilty of genocide, crimes against humanity and war crimes.

Section 4(1) of the ICC Act creates jurisdiction for a South African court over ICC crimes by providing that '[d]espite anything to the contrary in any other law of the Republic, any person who commits [an ICC] crime, is guilty of an offence and liable on conviction to a fine or imprisonment'.

Section 4(3) of the Act goes further and provides for extra-territorial jurisdiction. In terms of that section, the jurisdiction of a South African court will be secured when a person commits an ICC crime outside the territory of the Republic and:

- a) that person is a South African citizen; or
- b) that person is not a South African citizen but is ordinarily resident in the Republic; or
- c) that person, after the commission of the crime, is present in the territory of the Republic; or
- d) that person has committed the said crime against a South African citizen or against a person who is ordinarily resident in the Republic.

When a person commits a core crime outside the territory of the Republic in one of these four circumstances, then section 4(3) deems that crime to have been committed in the territory of the Republic.

The jurisdictional 'triggers' in the ICC Act are largely uncontroversial. Section 4(1) appears to assert the

traditional principle of territoriality, namely, that a state has competency in respect of all acts which occur in its territory. And section 4(3), which provides for extra-territoriality, begins in trigger (a) with the recognised nationality basis for jurisdiction. That is, international law has long accepted that states have the competency to exercise jurisdiction over their nationals for crimes committed anywhere in the world.

Trigger (b) extends, in similar fashion, jurisdiction over South African residents on the basis that they have a close and substantial connection with South Africa at the time of the offence. Trigger (d) is founded on the passive personality principle in international law. In terms of that principle a state has the competency to exercise jurisdiction over an individual who causes harm to one of its nationals abroad.

A particularly progressive feature of the ICC Act already is that it extends jurisdiction in trigger (c) to a person who, 'after the commission of the crime, is present in the territory of the Republic'. There is no mention here of the person's nationality or residency, and one must assume, given that trigger (a) and (b) already provide jurisdiction in respect of crimes committed abroad by South African nationals and residents, that trigger (c) is referring to individuals who commit a core crime and who do not have a close and substantial connection with South Africa at the time of offence.⁴

The jurisdiction in trigger (c) is thus grounded in the idea of universal jurisdiction – that is, jurisdiction which exists for all states in respect of certain crimes which attract universal jurisdiction by their egregious nature, and consequently over the perpetrators of such crimes on the basis that they are common enemies of mankind. This form of jurisdiction is to be welcomed because genocide, crimes against humanity, and war crimes are among the most serious crimes of concern to the international community as a whole, and as such, are often regarded as giving rise to 'universal jurisdiction' (Cassese 2002: 1862).

The ICC Act as an example of conditional universal jurisdiction

Domestic crimes, as is the tradition, are largely the responsibility and concern of domestic legal systems. However, certain crimes, through their egregiousness, take on a characteristic which 'internationalises' them.

The internationalisation of certain crimes provides the potential to all states of the world (in addition to the state on whose territory the crime was committed) to investigate and prosecute the offender under their domestic legal systems and before their domestic courts.⁵ This entitlement goes under the heading of what international lawyers understand as the principle of

'universal jurisdiction': the competency to act against the offender, regardless of where the crime was committed and regardless of the nationality of the criminal.

While there is ongoing debate about the scope and limits of the potential exercise of universal jurisdiction under international law, Professor Cassese – previously President of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia – provides an authoritative view in holding that universal jurisdiction cannot sensibly be an absolute right of jurisdictional competence (such that any and every state is empowered to investigate and prosecute the occurrence of an international crime). Rather, while all states are potentially empowered to act against international criminals, under the current state of international law 'universality may be asserted subject to the condition that the alleged offender be on the territory of the prosecuting state' (Cassese 2003: 592).

What the ICC Act does is to provide South Africa an opportunity – on the established basis of universal jurisdiction – to prosecute ICC crimes by its courts acting as an international surrogate for the ICC. It will be recalled that the ICC Act secures for a South African court jurisdiction over ICC crimes committed by a person outside South Africa where, in the wording of the section, 'that person, after the commission of the crime, is *present in the territory of the Republic*' (ICC Act 2002: section 4(3)(c) emphasis added).

The phrase 'present in the territory of the Republic' is intended to denote a limitation on what international lawyers describe as 'absolute universal jurisdiction' – that is, jurisdiction over offences committed abroad by foreigners, the exercise of which is not made subordinate to the presence of the suspect or accused on the territory. Accordingly, the ICC Act adopts a form of 'conditional universal jurisdiction' (which is instead contingent upon the presence of the suspect in the *forum* state), and which is consistent with the view expressed above by Cassese.

Conducting an investigation, issuing an indictment or requesting extradition when the accused is not present

The classic formulation of universal jurisdiction is well described by Abi-Saab (2003), a respected international lawyer, who explains the origins of the concept in relation to the international crime of piracy:

Piracy is a criminal act that takes place in a space where there is no overall territorial sovereign. A state captures the pirate on the high seas or in its national waters. It may have no other connecting factor with the acts of piracy or the pirate (not being the state of nationality of the pirate or of the flag of attacked ships or of the

victims) expect for being the place of capture, the *forum deprehensionis*. But the criminal acts are considered as injurious to the community at large, in view of the paramountcy of the perceived common interest in the security of maritime communications since the age of discoveries. In these circumstances, the state of capture is authorised, in spite of the absence of any of the traditional connecting factors, to prosecute the pirate, because it would not be acting in its own name *uti singulus* (which requires a special interest), but in the name of the community (Abi-Saab 2003: 599-600).

It is thus the act of capture, in the *forum deprehensionis*, that provides the state with the competence under international criminal law to prosecute the offender. The ICC Act in section 4(3)(c) reflects this position under international law when it provides that a South African court will have jurisdiction over a crime against humanity committed by a person outside South Africa where 'that person, after the commission of the crime, is present in the territory of the Republic'.

The question that remains is this: what about the steps anterior to prosecution, which occur in the investigation phase? International law does not require states to ensure that the accused is present in order to initiate universal jurisdiction proceedings. As Judges Higgins, Kooijmans and Buergenthal stated in their joint separate opinion in the International Court of Justice decision in *Democratic Republic of Congo v. Belgium* (2002):

[i]f the underlying purpose of designating certain acts as international crimes is to authorise a wide jurisdiction to be asserted over persons committing them, there is no rule of international law ... which makes illegal co-operative overt acts designed to secure their presence within a State wishing to exercise jurisdiction (par 58).

The due process right to be present during trial is distinct from the law defining the legitimate exercise of jurisdiction, which does not require presence when proceedings first commence.

In this regard the Princeton Principles of Universal Jurisdiction state that a judicial body may try accused persons on the basis of universal jurisdiction, 'provided the person is present before such judicial body' (Program in Law and Public Affairs Princeton University 2001: 32). That language 'does not prevent a state from initiating the criminal process, conducting an investigation, issuing an indictment or requesting extradition, when the accused is not present' (Program in Law and Public Affairs Princeton University 2001: 32).

There are two reasons of practice and logic which affirm that a suspect does not have to be physically

present in the *forum deprehensionis* for an investigation to be initiated and for an arrest warrant to be issued in anticipation of his or her physical arrival.

First, if the entire investigation is subject to having established the presence of the accused, then logically there is a great risk that no prosecution would ever be undertaken. As one commentator points out:

Whether or not expressed, the condition of presence must be presumed for the purposes of the "search", during the course of which it will be verified. Otherwise it is a vicious circle: in order to know whether X is in hiding on our territory, it is necessary to search for him; but in order to search for him, it is necessary to have already discovered (by enlightenment or intuition) that he is present (Lambois 1995 cited in FIDH 2006: 8).

Second, because it is based on the location of the suspect and not on other circumstances of the case, a strict presence requirement is a 'blunt instrument', imposing an imperfect limit on the exercise of universal jurisdiction and creating practical disadvantages by restricting the power to open an investigation to the point at which it can be proven that a suspect is within the territory of the state exercising universal jurisdiction. Human Rights Watch (2006) provides the following illustrative example of the negative effects of a strict presence requirement as precursor to investigation:

... in October 2005, Danish authorities received a complaint concerning a Chinese official who was scheduled to attend a conference in Copenhagen. The complaint was received in advance of the suspect's entry into Denmark, but the strict presence requirement in Danish legislation meant that Danish authorities could not legally open an investigation into the complaint before the suspect arrived. In effect, Danish investigators had only five days – the duration of the conference – to investigate the complaint and apply for an arrest warrant. When the Chinese official left Denmark after five days, the investigation had to be discontinued (Human Rights Watch 2006: 28).

For these reasons, it is open to and preferable for the NPA, under the ICC Act, to commence proceedings and issue warrants of arrest prior to the presence of the accused in South African territory.

The United Kingdom experience is of particular importance in this regard since it too has adopted a policy of 'anticipated presence' as the prerequisite to initiating an investigation against individuals suspected of international crimes. For instance, Major General (retired) Doron Almog refused to disembark from his flight at Heathrow airport after he had learned that he

was facing arrest by British police after a decision on 10 September 2005 by Chief London Magistrate Timothy Workman to issue a warrant for his arrest on suspicion of committing a grave breach of the Fourth Geneva Convention 1949 which is a criminal offence in the UK under the Geneva Conventions Act 1957. (The alleged offence was committed as part of Israel's occupation of the Occupied Palestinian Territory).

This unprecedented arrest warrant against a senior Israeli soldier was issued after years of failed efforts to obtain justice through the Israeli judicial system. Because of the failure of the Israeli judiciary to combat impunity, a non-governmental organisation acting for victims in Gaza, built a file of evidence with the help of Hickman & Rose Solicitors to pursue a case against him (and others) in the UK in accordance with the legal principle of universal jurisdiction over war crimes.

The Priority Crimes Litigation Unit is specifically tasked with dealing with crimes in the ICC Act

The Court decision legally obliged the Anti-Terrorist and War Crimes Unit of the Metropolitan Police to arrest Doron Almog, which they tried to do.⁶ The arrest warrant was made subject to stringent bail conditions.

The decision to apply to the court for an arrest warrant was taken against the background of a series of meetings with the Anti-Terrorist and War Crimes Unit of the Metropolitan Police. Hickman & Rose, on behalf of the NGO and the clients in these cases, provided the police with a considerable volume of evidence in relation to this suspect. The police were unable to take a decision about the arrest or prosecution of the suspect before his planned visit to Birmingham on 11 September. Consequently, acting on behalf of the victims, Hickman & Rose and the NGO pursued the suspect through the judicial system, in the hope that he could be arrested before fleeing the UK. It was on the strength of their efforts that the arrest warrant was issued by the Chief London Magistrate.

A legal threshold of 'anticipated presence' as the precondition for opening an investigation would be a means by which South Africa would avoid the logical and practical difficulties identified above.⁷ And, more vitally, an 'anticipated presence' precondition would facilitate the use of the ICC Act in the manner that parliament intended, and would ensure compliance by South Africa with its obligations under the Rome Statute.

For states like South Africa that are party to the Rome Statute, the concept of universal jurisdiction is given

added specificity within the context of the complementarity obligation assumed under the provisions of the Statute. The ICC Act is the means by which South Africa gives effect to its international obligations as a party to the Rome Statute.

In that respect, the preamble of the Rome Statute (1998) stipulates that '... it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes'. An 'anticipated presence' threshold as a prelude to investigation would facilitate the exercise by South Africa of its criminal jurisdiction over those responsible for international crimes, whereas – for the logical and practical reasons set out above – a strict threshold requirement would hamper such action.

In terms of section 233 of the Constitution, when interpreting the ICC Act, a court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law. Given that under international law there is no requirement that states ensure that the suspect is present in order to initiate universal jurisdiction proceedings, a reasonable interpretation of the ICC Act is one which adopts an 'anticipated presence' requirement as a precursor to the initiation of an investigation. An unreasonable interpretation would be one that puts in place hurdles to the exercise of universal jurisdiction which are not required under international law.

The adoption of the 'anticipated presence' requirement would accordingly facilitate South Africa's compliance with its obligations under the Rome Statute to act against international criminals. It would also give effect to the intention of parliament as reflected in the ICC Act – that is, to ensure that domestic prosecutions of international criminals take place in South Africa.

INVESTIGATION AND PROSECUTION UNDER THE ICC ACT

The Priority Crimes Litigation Unit

In order that South Africa's obligations under the ICC Act may be fulfilled, a Priority Crimes Litigation Unit (PCLU) has been established within the NPA, and which is headed by a special director of public prosecutions appointed in terms of section 13(1)(c) of the National Prosecuting Authority Act. Section 13(1)(c) provides that the president:

... may appoint one or more Directors of Public Prosecutions (hereinafter referred to as Special Directors) to exercise certain powers, carry out certain duties and perform certain functions conferred or imposed on or assigned to him or her by the President by proclamation in the Gazette.

The special director's appointment was confirmed in terms of *Government Gazette* No 24876 of 23 May 2003.⁸ The special director was given two powers:

- To 'head the Priority Crimes Litigation Unit'
- To 'manage and direct the investigation and prosecution of crimes contemplated in the Implementation of the Rome Statute of the International Criminal Court Act 2002 (Act No. 27 of 2002) ...'

The Unit is thus specifically tasked with dealing with the ICC crimes set out in the ICC Act, and the special director that heads the PCLU is empowered to 'manage and direct the investigation' of such crimes. In practice this means that requests by individuals or civil society groups for investigation and prosecution under the ICC Act should be directed to the PCLU.

On the assumption that the PCLU takes up the investigation and issues a warrant of arrest (*in camera* or otherwise) and the suspect or suspects are arrested, the matter will then move to the prosecution stage. As mentioned earlier, the ICC Act stipulates that '[n]o prosecution may be instituted against a person accused of having committed a [core] crime without the consent of the National Director [of Public Prosecutions]'. On the assumption that such consent is provided, the matter will proceed to court and the PCLU will adopt responsibility for the prosecution of the matter.

Factors to be considered in the exercise of prosecutorial discretion under the ICC Act

Under the ICC Act the PCLU and NDPP exercise prosecutorial discretion in relation to ICC crimes. Aside from the question of evidence that has been presented to the PCLU and NDPP, there are three important factors which play (or ought to play) a role in the process by which the PCLU and the NDPP decide on whether to institute an investigation or prosecution under the ICC Act and which significantly curtail the discretion of the PCLU and NDPP to refuse to initiate an investigation and/or prosecution.

First, the decision to investigate/prosecute must take account of the aims of the ICC Act. The primary aim of the Act is to secure prosecution of individuals alleged to be guilty of crimes against humanity, war crimes and genocide. The Preamble to the ICC Act records that the obligation imposed on South African authorities under the Act is to:

[bring] persons who commit such atrocities to justice, either in a court of law of the Republic in terms of its

domestic laws where possible, pursuant to its international obligations to do so when the Republic became party to the Rome Statute of the International Criminal Court.

Section 3(d) (Objects of the Act) stipulates that one of the Act's objects is:

to enable, as far as possible and in accordance with the principle of complementarity ... the national prosecuting authority of the Republic to prosecute and the High Courts of the Republic to adjudicate in cases brought against any person accused of having committed a crime in the Republic and beyond the borders of the Republic in certain circumstances.

Second, a decision by the national director must take account of the fact that:

[i]f the National Director, for any reason, declines to prosecute a person under this section, he or she must provide the Central Authority [the Director-General: Justice and Constitutional Development] with the full reasons for his or her decision and the Central Authority must forward that decision, together with the reasons, to the Registrar of the Court.

Third, the decision must comply with the NPA Prosecution Policy (as amended on 1 December 2005). The Preamble to the policy states that 'Prosecutors are the gatekeepers of the criminal law. They represent the public interest in the criminal justice process'. The policy then provides as follows in salient part:

The Prosecuting Authority has the power and responsibility to institute and conduct criminal proceedings on behalf of the State and to carry out any necessary functions incidental thereto.

The Prosecution Policy must be tabled in Parliament and is binding on the Prosecution Authority. The National Prosecuting Authority Act also requires⁹ that the United Nations Guidelines on the Role of Prosecutors should be observed.¹⁰

The UN Guidelines on the Role of Prosecutors (1990) provide as follows in paragraph 15:

Prosecutors shall give due attention to the prosecution of crimes committed by public officials, particularly ... grave violations of human rights and other crimes recognised by international law and, where authorised by law or consistent with local practice, the investigation of such offences.

Of obvious importance in this regard is that the South African government has chosen to create a Priority Crimes Litigation Unit in order that the crimes under the ICC Act are prioritised and prosecuted by a specialist and dedicated body of prosecutors and investigators. The prosecution policy furthermore provides that prosecutions should ordinarily follow unless ‘public interest demands otherwise’ (NPA 2005: paragraph 4(c)).

In terms of the policy, when considering whether or not it will be in the public interest to prosecute, prosecutors should consider all relevant factors, including:

The nature and seriousness of the offence:

- The seriousness of the offence, taking into account the effect of the crime on the victim, the manner in which it was committed, the motivation for the act and the relationship between the accused and the victim.
- The nature of the offence, its prevalence and recurrence, and its effect on public order and morale.
- The economic impact of the offence on the community, its threat to people or damage to public property, and its effect on the peace of mind and sense of security of the public ... (NPA 2005: paragraph 4(c)).

The fact that ICC crimes are by definition the most serious of all crimes, and given their effect on peace and security, it seems that an investigation or prosecution of ICC crimes under the ICC Act should ordinarily follow and that there must be compelling reasons of public interest to forestall or prevent such action by the prosecuting arm of government.

In deciding on what is in the public interest an overriding consideration ought to be the gravity of crimes such as genocide, crimes against humanity and war crimes, their universal condemnation and the international community’s commitment to repressing them. In this respect it is useful to recall what the Constitutional Court said in *S v Basson* 2005 (12) BCLR 1192 (CC):

[184] As was pointed out at Nuremberg, crimes against international law are committed by people, not by abstract entities, so that only by punishing individuals who commit such crimes can the provisions of international law be enforced. Given the nature of the charges, the SCA should have given appropriate weight and attention to these considerations, even in the absence of any argument on these issues by the state. *Given the extreme gravity of the charges and the powerful national and international need to have these issues properly adjudicated, particularly in the light of the international consensus on the normative desirability of*

prosecuting war criminals, only the most compelling reasons would have justified the SCA in exercising its discretion to refuse to rule on the charges. [emphasis added]

Similarly, South Africa’s interest in not becoming a ‘safe haven’ for perpetrators of such crimes should form part of the overall ‘public interest’ in prosecuting such crimes.

Prosecution and the NDPP’s consent

The ICC Act gives effect to the complementarity scheme by creating the structure necessary for national prosecutions under the ICC Statute. The procedure for the institution of prosecutions in South African courts is set out in section 5 of the Act. This procedure involves different governmental departments and officials.

First, the ICC Act (section 5(1)) stipulates that ‘[n]o prosecution may be instituted against a person accused of having committed a [core] crime without the consent of the National Director [of Public Prosecutions]’. The national director must, when reaching a decision about a prosecution, recognise South Africa’s obligation in the first instance, under the principle of complementarity in the Rome Statute, to exercise jurisdiction over and to prosecute persons accused of having committed an ICC crime (ICC Act 2002: section 5(3)). The ICC Act requires the NDPP’s consent before a ‘*prosecution may be instituted* against a person accused of having committed a crime’ (emphasis added).

However, no such consent is required under the Act before a person is charged or arrested for such an offence, or an investigation opened.¹¹ Had such consent been required the drafters of the ICC Act could just as well have stipulated that no ‘proceedings’ may be instituted without the NDPP’s consent. They chose not to, and instead have limited the requirement of consent to the ‘[i]nstitution of prosecutions in South African courts’. The preliminary decision of the NPA to investigate and/or issue a warrant of arrest would not be subject to the consent of the NDPP, although the eventual decision to initiate a prosecution of the arrested individual under the ICC Act would require his consent.

Given the importance of a prosecution involving allegations against an accused of having perpetrated genocide, crimes against humanity or war crimes, the ICC Act provides that a specialised court would need to be designated. The Act provides that after the NDPP has consented to a prosecution, an appropriate high court must be designated for that purpose. Such designation must be provided in writing by the ‘Cabinet member responsible for the administration of justice ... in consultation with the Chief Justice of South Africa and after consultation with the National Director’ (ICC Act 2002: section 5(4)).

The ICC Act does not provide any specific trial procedure or punishment regime for domestic courts. All that the Act provides is for the designation of ‘an appropriate High Court in which to conduct a prosecution against any person accused of having committed [an ICC] crime’ (ICC Act 2002: section 5(5)). Presumably the usual trial procedure for a criminal trial in the high court will be followed and the high court will be empowered to issue any of the sentences which it would ordinarily be entitled to impose in terms of its domestic criminal sentencing jurisdiction. Such punishments would include life imprisonment, imprisonment, a fine, and correctional supervision.¹²

The expectation under the Act, flowing from South Africa’s obligations under the complementarity scheme, is that a prosecution will take place within the Republic. Accordingly, and as pointed out earlier, if the national director declines to prosecute a person under the Act, the director-general for justice and constitutional development must be provided with the full reasons for that decision (ICC Act 2002: section 5(5)). The director-general is then obliged to forward the decision, together with reasons, to the Registrar of the International Criminal Court in The Hague (ICC Act 2002: section 5(5)).

CO-OPERATION WITH THE ICC

Beyond empowering South African officials to domestically engage in the prosecution of ICC crimes as an example of complementarity, the ICC Act sets in place a comprehensive cooperative scheme for South Africa vis-à-vis the ICC.

Arrest and surrender

The ICC Act is premised on the understanding that the ICC will, in most circumstances, have to rely on the intercession of national jurisdictions to gain custody of suspects. As a result the ICC Act envisages two types of arrest: one in terms of an existing warrant issued by the ICC, and another in terms of a warrant issued by South Africa’s NDPP. In both scenarios the warrant (whether endorsed or issued) must be in the form and executed in a manner as near as possible to that which exists in respect of warrants of arrest under existing South African law (ICC Act 2002: section 9(3)).

Dealing with the first scenario (an arrest in terms of an existing warrant issued by the ICC), in terms of section 8 of the ICC Act, when South Africa receives a request from the ICC for the arrest and surrender of a person for whom the ICC has issued a warrant, it must refer the request to the director-general of justice and constitutional development with the necessary

documentation to satisfy a local court that there are sufficient grounds for the surrender of the person to The Hague (ICC Act 2002: section 8(1)). The director-general must then forward the request (along with the necessary documentation) to a magistrate who must endorse the ICC’s warrant of arrest for execution in any part of the Republic (ICC Act 2002: section 8(2)).

The preliminary decision of the NPA to investigate and/or issue a warrant of arrest would not be subject to the consent of the NDPP

Section 9 details the second scenario (an arrest in terms of a warrant issued by the NDPP). In this situation the director-general of justice and constitutional development is mandated to receive a request from the ICC for the provisional arrest of a person who is suspected or accused of having committed a core crime, or has been convicted by the ICC. The director-general is then obliged under the ICC Act to immediately forward the request to the NDPP, who must then apply for the warrant before a magistrate (ICC Act 2002: section 9(1)).

After being arrested pursuant to a warrant (whether that warrant was issued by the ICC or by the NDPP), the arrestee is to be brought ‘before a magistrate in whose area of jurisdiction he or she has been arrested or detained’, ‘within 48 hours after that person’s arrest or on the date specified in the warrant for his or her further detention’ (ICC Act 2002: section 10(1)).

Having arrested the individual, the South African authorities then become engaged in what is known as the ‘surrender’ of an individual to the ICC – his or her ‘delivery’ to The Hague. To make a committal order, with a view to the surrender of an arrestee to the ICC, the magistrate has to be satisfied of three things only:

- That the person before court is the individual named in the warrant (ICC Act 2002: section 10(1)(a))
- That the person has been arrested in accordance with the procedures set down by domestic law (ICC Act 2002: section 10(1)(b))
- That the arrestee’s rights, as contemplated in the Bill of Rights, have been respected, if, and to the extent to which, they are or may be applicable (ICC Act 2002: section 10(1)(c))

The nature of these three requirements makes it clear that surrender to the ICC is different to extradition in

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

Of course, the magistrate also has to be satisfied that the ICC has a genuine interest in the surrender of the arrestee, and to this end section 10(5) stipulates that in addition to the three requirements being met, the magistrate must be content that the person concerned may be surrendered to the Court:

- For prosecution for the alleged crime
- For the imposition of a sentence by the Court for the crime in respect of which the person has been convicted
- To serve a sentence already imposed by the Court¹³

There is little indication in the Act what level of proof must be proffered by the prosecution in respect of these additional requirements, such as, whether the court must inquire whether there is evidence to justify his trial for the offence he is alleged to have committed.¹⁴ Presumably any of these three factual conditions will have been proved by the terms of the ICC’s request, either for the endorsement of its own warrant of arrest within South Africa (in terms of section 8 of the ICC Act), or for South Africa to issue a provisional warrant of arrest pursuant to the Court’s request (in terms of section 9 of the ICC Act) such that these additional requirements may be regarded as being satisfied on the strength of the ‘material supporting the request’ for surrender provided by the ICC.¹⁵

Forms of assistance offered to the Court in fulfillment of Article 93 of the Rome Statute

Article 93 of the Rome Statute requires States Parties to assist the ICC by cooperating in relation to an investigation and prosecution that are under underway before the ICC. Part 2 of the ICC Act sets out a variety of circumstances in which the ‘relevant competent authorities in the Republic’ must ‘cooperate with, and render assistance to, the Court in relation to investigations and prosecutions.’

There are many areas of cooperation (detailed in section 14 of the Act), such as the questioning of suspects,

the identification and whereabouts of persons or items, the taking of evidence (including expert opinions), inspections *in loco* (including the exhumation and examination of grave sites) and execution of searches and seizures, to name but a few.¹⁶ The areas of co-operation must be undertaken in terms of the relevant law applicable to investigations in South Africa, as well as the applicable rules in the Rome Statute,¹⁷ and with the ultimate aim of assisting the ICC.

The president may, at the request of the ICC, declare any place in South Africa to be the seat of the Court

Certain acts of cooperation are subject to comprehensive regulation in the ICC Act, and others are not. For example in the context of questioning suspects, the ICC Act stipulates in section 14(c) no more than that the competent South African authorities must assist with ‘the questioning of any person being investigated or prosecuted.’ South African authorities will therefore have to turn to the Rome Statute and South African law for assistance. In this respect the Bill of Rights in section 35 and the Rome Statute in article 55 equally guarantee certain rights to a person under investigation, such as the right against self-incrimination, the right to remain silent, and the right to legal assistance.

Those means of cooperation that are subject to detailed regulation under the ICC Act include the examination of witnesses,¹⁸ the transfer of a prisoner to the ICC for the purposes of giving evidence or to assist in an investigation,¹⁹ the service of process and documents,²⁰ acts of entry, search and seizure,²¹ and the making of forfeiture or confiscation orders.²²

Discretionary measures of assistance

In terms of the ICC Act the president may, at the request of the ICC and by proclamation in the *Government Gazette*, declare any place in the Republic to be the seat of the ICC (ICC Act 2002: section 6). Should such a declaration be made, then the ICC Act sets out a variety of privileges and immunities for the Court.

First, the Court is accorded such rights and privileges of a South African court of law in the Republic as may be necessary to enable it to perform its functions (ICC Act 2002: section 7(1)). Furthermore, the Judges, the Prosecutor, the Deputy Prosecutors and the Registrar of the Court, while performing their functions in the

Republic, enjoy the same immunities and privileges that are accorded to a representative of another state or government in terms of section 4(2) of the South African Diplomatic Immunities and Privileges Act 37 of 2001 (ICC Act 2002: section 7(2)). Those immunities include immunity from the criminal and civil jurisdiction of the courts of the Republic, and the privileges enjoyed are those which (a) a special envoy or representative enjoys in accordance with the rules of customary international law; or (b) are provided for in any agreement entered into with a state, government or organisation whereby immunities and privileges are conferred upon such special envoy or representative.

The Deputy Registrar, the staff of the Office of the Prosecutor and the staff of the Registry of the Court enjoy the privileges and facilities necessary for the performance of their functions in the Republic as may be published by proclamation in the *Government Gazette* as provided for in section 7(2) of the Diplomatic Immunities and Privileges Act of 2001 (ICC Act 2002: section 7(3)).

The minister of foreign affairs may, after consultation with the minister of justice, confer immunities and privileges on any other member of the staff of the Court or any person performing functions for purposes of the ICC Act. Such immunities and privileges are conferred by the minister of foreign affairs publishing a notice in the *Government Gazette*, on such conditions as he or she deems necessary (ICC Act 2002: section 7(4)). Any person who is accorded immunities or privileges in terms of the ICC Act must have his or her name entered into a register as contemplated in section 9(1) of the Diplomatic Immunities and Privileges Act 2001 (ICC Act 2002: section 7(5)).

Enforcement of sentences

The Rome Statute stresses that 'States Parties should share the responsibility for enforcing sentences of imprisonment, in accordance with principles of equitable distribution'.²³ The ICC will have no prison, and states are therefore expected to volunteer their services, indicating their willingness to allow convicted prisoners to serve the sentence within their domestic penal institutions.²⁴

After sentencing an offender, the ICC will, in terms of article 103(1)(a) of the Rome Statute, designate the state where the term is to be served. In so doing the Court must take into account the views of the sentenced prisoner, his or her nationality, and 'widely accepted international treaty standards governing the treatment of prisoners' (Rome Statute 1998: article 103(3)). In addition, conditions of detention must be neither more nor less favourable than those available to prisoners

convicted of similar offences in the state where the sentence is to be enforced (Rome Statute 1998: article 106(2)).²⁵

In order to give effect to this enforcement scheme, the ICC Act provides that the minister of correctional services must consult with the cabinet and seek the approval of parliament with the aim of informing the ICC whether South Africa can be placed on the list of states willing to accept sentenced persons (ICC Act 2002: section 31). If the Republic is placed on the list of states and is designated as a state in which an offender is to serve a prison sentence, then such person must be committed to prison in South Africa (ICC Act 2002: section 32). The provisions of the Correctional Services Act 111 of 1998 and South African domestic law then apply to that individual. However, the sentence of imprisonment may only be modified at the request of the ICC, after an appeal by the prisoner to, or review by, the Court in terms of the Rome Statute.²⁶

The Rome Statute makes it clear that there can 'obviously be no question of sending a prisoner to a state with prison conditions that do not meet international standards'.²⁷

SA courts, like the ICC, have the power to 'trump' the immunities usually attached to government officials

The Rome Statute in article 77(2)(a) also enables the ICC to impose a fine, but only '[i]n addition to imprisonment' (Schabas 2007: 321). In addition, the ICC is empowered to address the issue of reparations to victims, and may 'make an order directly against any convicted person' specifying reparation (Rome Statute 1998: article 75(2)). Such an order will no doubt often take the form of monetary compensation.

The ICC Act makes provision for the execution of such fines and compensation orders within the Republic (ICC Act 2002: sections 25 and 26). Such orders must be 'registered' with a court in the Republic having jurisdiction (ICC Act 2002: sections 25(2) and (3)). Once the order has been registered, that sentence or order 'has the effect of a civil judgment of the court at which it has been registered', and the director general of justice and constitutional development must pay over to the ICC any amount realised in the execution of the sentence or the order, minus any expenses incurred by the Republic in the execution thereof (ICC Act 2002: section 26).

IMMUNITIES

Article 27 of the Rome Statute provides that the ‘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.’ While the position of international law immunities before national courts is less obvious,²⁸ South Africa’s ICC Act adopts the Rome Statute’s hard line by providing in section 4(2)(a) of the 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.

In terms of the Act, South African courts, acting under the complementarity scheme, are thus accorded the same power to ‘trump’ the immunities which usually attach to officials of government as the ICC is by virtue of article 27 of the Rome Statute.

As Dugard and Abraham have pointed out, section 4(2)(a) of the ICC Act represents a choice by the legislature to wisely not follow the ‘unfortunate’ *Arrest Warrant* decision, ‘of which it must have been aware’ (Dugard and Abraham 2002). Support for an argument that section 4(2)(a) of the ICC Act does indeed scrap immunity, notwithstanding the contrary position under customary international law, comes from the Constitution itself. Section 232 provides that ‘[c]ustomary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament’.

CONCLUSION

South Africa’s ratification of the Rome Statute, followed by the enactment of the ICC Act, demonstrates that the country is responding to the world public’s demand for a stand on genocide, crimes against humanity, and war crimes. That response is important. South Africa’s role as an African leader in its support of the ICC is vital to the Court’s work and legitimacy on the continent, and its ICC Act might hopefully serve as a useful example for other African States Parties in their efforts to domestically give effect to their obligations under the Rome Statute.

NOTES

1 Reference must also be made to the Elements of Crimes, a 50-page document adopted in June 2000 by the Preparatory

Commission for the International Criminal Court. See the Finalised Draft Text of the Elements of Crimes (PCNICC/2000/INF/3/Add.2).

- 2 For example, the Secretary of State in England has by regulation made the Elements of Crimes applicable to proceedings in a service court within the United Kingdom. See *The International Criminal Court Act 2001 (Elements of Crimes) Regulations 2001*.
- 3 In terms of s 38 of the ICC Act, the Minister of Justice may make regulations regarding the ICC Act. In terms of s 1 of the Act such regulations would be included as part of the Act.
- 4 The UK’s implementing legislation, for example, provides more clearly that, aside from the traditional bases of jurisdiction (territoriality and nationality), the UK courts will have jurisdiction over a person who ‘commits acts outside the United Kingdom at a time when he is not a United Kingdom national, a United Kingdom resident or a person subject to UK service jurisdiction and who subsequently becomes resident in the United Kingdom’ (International Criminal Court Act 2001:s 68(1)).
- 5 The State concerned must of course have taken steps under its domestic law to empower its officials and Courts to act upon this potential.
- 6 They were unsuccessful: he caught the next flight back to Israel and evaded capture.
- 7 This threshold is incorporated in a new provision of the German Code of Criminal Procedure, para. 153f (cited in Werle 2005), which makes obligatory an investigation into a suspected perpetrator of international crimes where the suspect is present in Germany or the suspect’s presence is anticipated (see also Human Rights Watch 2006). So too, the United Kingdom Police may open an investigation regardless of the whereabouts of the accused. However, for an arrest warrant to be issued and for the suspect to be charged, the accused must either be present or his or her presence anticipated (Human Rights Watch 2006).
- 8 Proclamation No 43 of 2003.
- 9 See National Prosecuting Authority Act s 22(4)(f).
- 10 *Ibid.* The UN Guidelines (adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990) stipulates that: ‘The Guidelines set forth below, which have been formulated to assist Member States in their tasks of securing and promoting the effectiveness, impartiality and fairness of prosecutors in criminal proceedings, should be respected and taken into account by Governments within the framework of their national legislation and practice, and should be brought to the attention of prosecutors, as well as other persons, such as judges, lawyers, members of the executive and the legislature and the public in general. The present Guidelines have been formulated principally with public prosecutors in mind, but they apply equally, as appropriate, to prosecutors appointed on an ad hoc basis’.
- 11 An analogous situation prevails in other Commonwealth countries that have implemented the Rome Statute of the International Criminal Court into their domestic law. In New Zealand, for instance, a person may be charged and arrested without the consent of the Attorney-General to a prosecution, but the consent of the Attorney-General is required for a

prosecution. Section 13 (Attorney-General's consent to prosecutions required) states:

- (1) Proceedings for an offence against section 9 or section 10 or section 11 may not be instituted in any New Zealand court without the consent of the Attorney-General.
 - (2) Despite subsection (1), a person charged with an offence against section 9 or section 10 or section 11 may be arrested, or a warrant for his or her arrest may be issued and executed, and the person may be remanded in custody or on bail, even though the consent of the Attorney-General to the institution of a prosecution for the offence has not been obtained, but no further proceedings can be taken until that consent has been obtained.
- 12 The death penalty is not an option, given the Constitutional Court's decision in *S v Makwanyane* 1995 (3) SA 391 (CC).
 - 13 One must assume that the listing of these conditions is in the disjunctive.
 - 14 By contrast the United Kingdom's ICC Act, for example, makes it clear that a court, when making an order for surrender, 'is not concerned to enquire' whether the warrant was duly issued by the ICC or, where the person to be surrendered is 'alleged to have committed an ICC crime, whether there is evidence to justify his trial for the offence he is alleged to have committed' (see s 5(5) of the International Criminal Court Act 2001; see too Cryer's (2002) commentary on the Act). A further problem is that s 10(5) of the ICC Act speaks of the magistrate's power to issue an order of committal to prison, but does not refer to 'an order to be surrendered'. No other section of the Act refers to an order to be surrendered to the ICC. This may give rise to problems, since technically the ICC Act does not contain a provision for any competent authority, whether a court or the executive branch of government, to issue an order of surrender. See further Katz (2003). The problem has been rectified by a recent amendment to the ICC Act by including an order for surrender in section 10(5) of the ICC Act.
 - 15 Article 89 of the Rome Statute, which deals with surrender of persons to the Court, provides that the 'Court may transmit a request for the arrest and surrender of a person, together with the material supporting the request' to a State Party, so this material would be before the magistrate. Prior to this, to obtain a warrant of arrest from the ICC the Prosecutor would have had to convince a Pre-Trial Chamber of the Court (consisting of three judges) that there were 'reasonable grounds to believe' the suspect had committed an ICC offence.
 - 16 The full list of areas of co-operation is set out in s 14 (a)-(l). The list is modeled on article 93 of the Rome Statute.
 - 17 Section 14 reads that the 'relevant competent authorities in the Republic must, *subject to the domestic law of the Republic and the Statute*, cooperate with, and render assistance to, the Court' [my emphasis]. The Constitution, where applicable, will no doubt provide the background standards against which the relevant 'co-operation' is undertaken. So, for example, when it comes to searches and seizures in terms of s 14 (h), read with s 30 of the ICC Act, the relevant provisions of the Act will need to be read in conjunction with ss 10, 12(1)(a)-(d), 12(2)(b), 14, 21, 35(5) and 36(1) of the Constitution.
 - 18 See ss 15, 16, 17, 18 and 19 of the ICC Act. The sections outline the procedure for the examination of witnesses before a magistrate, the rights and privileges of the witness, the offences

which a witness might commit, and the procedure by which the attendance of a witness might be secured in proceedings before the International Criminal Court.

- 19 See s 20 of the ICC Act.
- 20 See s 21 of the ICC Act.
- 21 See s 30 of the ICC Act. This section is in many respects similar to those provisions of the Criminal Procedure Act 51 of 1977 in relation to search and seizure (s 19 to 36), but with modifications to reflect the fact that the request for co-operation has been made by the ICC for the purposes of its investigation, and not to assist South Africa in criminal investigations unrelated to the ICC.
- 22 Sections 14(k), 22(1) and 27(1). For fuller discussion see du Plessis (2003).
- 23 See article 103(3)(a) of the Rome Statute as well as Rule 201 of the Rules of Procedure and Evidence.
- 24 See further Schabas (2007). If no State offers its prison services, the host State of the ICC – the Netherlands – will perform the task (see article 103(4) of the Rome Statute).
- 25 Article 106(2).
- 26 Section 32(4)(b). This provision is a reflection of the prescription in article 110(2) of the Rome Statute whereby the ICC 'alone shall have the right to decide any reduction of sentence'.
- 27 This is a particular problem for South Africa, given the poor state of its prisons. The Judicial Inspectorate of Prisons, for example, reported at the end of 2000 that prisons were severely overcrowded, with some at 200 per cent occupancy rate, and that a third of the prison population who were awaiting trial were detained under inhumane conditions and in breach of national law and international standards. See further Steinberg (2005).
- 28 For fuller discussion see Du Plessis and Coutsoudis (2005).

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ABOUT THIS PAPER

On 17 July 1998 South Africa signed and ratified the Rome Statute of the International Criminal Court, thereby becoming the 23rd State Party. To domesticate the obligations in the Rome Statute, South Africa's parliament drafted The Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002, which became law on 16 August 2002. The passing of the ICC Act was momentous: prior to the Act, South Africa had no domestic legislation on the subject of war crimes or crimes against humanity, and no domestic prosecutions of international crimes had taken place in this country. The ICC Act is the means by which to remedy that failure, and is in any event the domestic legislation that South Africa (as a State Party to the Rome Statute) was legally obliged to pass in order to comply with its duties under the Statute's complementarity scheme.

This paper reflects on South Africa's membership of the ICC regime, and considers the domestic steps the country has taken in its relationship with the ICC. There is much to commend South Africa's involvement in the ICC scheme, and the ICC Act might be considered an example for other African states as they draft their own implementation legislation.

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FUNDER

This paper was published with the support of the Open Society Foundation of South Africa (OSF-SA), and the Governments of Sweden and Norway.



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Published by the Institute for Security Studies,
P O Box 1787, Brooklyn Square 0075
Tshwane (Pretoria), South Africa
Tel: (27-12) 346 9500 Fax: (27-12) 460 0998
iss@issafrica.org

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Production Image Design (27 11) 469 3029
Printing Remata iNathi

