Chapter 9

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South Africa

1 A Short History of Domestic Prosecutions of International Crimes Prior to Implementing Legislation

No domestic prosecutions of international crimes have taken place in South Africa. Prior to the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 ('the ICC Act'), South Africa had no municipal legislation on the subject of war crimes or crimes against humanity.[1] Although customary international law forms part of South African law, a South African court confronted with the prosecution of a person accused of an international crime would have been hard pressed to convict, since the principle of *nullem crimen sine lege* (no crime without a law) would probably have constituted a bar to any such prosecution.[2] The same principle would most likely have also put paid to prosecutions under the Geneva Conventions of 1949. South Africa has not incorporated the Geneva Conventions into municipal law nor, prior to the ICC Act, enacted legislation to punish grave breaches.[3]

2 Implementing Legislation

2.1 Title

The Implementation of the Rome Statute of the International Criminal Court Act No. 27, 2002.

2.2 When in force

The ICC Act came into force on 18 July 2002 after promulgation by the President in the Government Gazette.[4]

2.3 Government departments

The ICC Act takes seriously the 'complementary' obligation on South African courts to domestically investigate and prosecute the ICC offences of crimes against humanity, war crimes and genocide. 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

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1 See John Dugard, *International Law – A South African Perspective* (2000), p 142.

2 Ibid.

3 Ibid. This proposition is, however, currently being challenged before the South African Constitutional Court in *S v Basson*, a matter that will be finalised after the publication of the first edition of this Guide.

4 Government Gazette, Vol. 445, 18 July 2002, No. 23642. The full text of the Act is available at http://www.info.gov.za/acts/2002/a27-02/

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 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 ICC Act gives effect to the complementarity scheme by creating the structure necessary for national prosecutions under the ICC Statute (the structure is created in terms of Chapter 2 of the Act, entitled 'Jurisdiction of South African Courts and Institution of Prosecutions in South African Courts in Respect of Crimes').

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 requires that the consent of the National Director of Public Prosecutions must be obtained before any prosecution may be instituted against a person accused of having committed a crime (s 5(1)).[5] 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 a core crime (s 5(3)).

Given the importance of any such prosecution, it is clear that a specialised court needs to be designated. The Act provides that, after the National Director 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" (s 5(4)). 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. As such, if the National Director declines to prosecute a person under the Act, s/he must provide the Director-General for Justice and Constitutional Development with the full reasons for that decision (s 5(5)). The Director-General is then obliged to forward the decision, together with reasons, to the Registrar of the ICC in The Hague.[6]

2.4 Amendments to existing domestic legislation/laws in force

The ICC Act deals specifically with the non-applicability of statutes of limitations. Article 29 of the Rome Statute provides that the crimes within the jurisdiction of the Court shall not be subject to any statute of limitations. To comply with this directive, section 39 of the ICC Act points to an amendment to the Criminal Procedure Act,[7] effected by way of Schedule 2 to the ICC Act. In terms of that amendment, section 18 of the Criminal Procedure Act (which deals with the prescription of the right to institute prosecutions) now

5 The National Director of Public Prosecutions (NDPP) is appointed in terms of section 179 of the Constitution, Act 108 of 1996. There is a single national prosecuting authority in South Africa and the NDPP is the head of the prosecuting authority (s 179(1)).

6 Ibid.

7 Act 51 of 1977.

includes the right to institute a prosecution for crimes of genocide, war crimes and crimes against humanity as a right that does not lapse.[8]

A second amendment effected by the ICC Act is to the Military Discipline Supplementary Measures Act 16 of 1999. Schedule 2 of the ICC Act provides that any member of the South African Armed Forces who is subject to the Military Discipline Code, and who commits one of the core crimes, must now be dealt with in accordance with the provisions of the ICC Act (and not the Military Discipline Supplementary Measures Act as in the past).[9]

Aside from these express amendments, an implied amendment appears to have been effected in relation to Head of State and other official immunity by the ICC Act. The Diplomatic Immunities and Privileges Act 37 of 2001 provides in section 4(1) that "[a] head of state is immune from the criminal and civil jurisdiction of the courts of the Republic, and enjoys such privileges as - (a) heads of state enjoy in accordance with the rules of customary international law". Section 4(2) provides that "[a] special envoy or representative from another state, government or organisation is immune from the criminal and civil jurisdiction of the courts of the Republic, and enjoys such privileges as - (a) a special envoy or representative enjoys in accordance with the rules of customary international law".

This grant of immunity (for Heads of State and special envoys or representatives) appears to have been supplanted, however, by section 4(2) of the ICC Act. The section provides as follows:

> "Despite any other law to the contrary, including customary and conventional international law, the fact that a person –
>
> (a) 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."

3 Co-operation with the ICC

3.1 Arrest and surrender

3.1.1 The procedure involved in the arrest process

The ICC Act is premised on an 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

8 The amendment to section 18 of the Criminal Procedure Act has been effected "by the addition…of the following paragraph:
"*(g)* the crime of genocide, crimes against humanity and war crimes, as contemplated in section 4 of the Implementation of the Rome Statute of the International Criminal Court Act, 2002".

9 See the amendment of the Military Discipline Supplementary Measures Act 16 of 1999 by Schedule 2 of the ICC Act. The amendment has been effected by the addition of the following subsection:
"(4) When a person who is subject to the Code is suspected of having committed a crime contemplated in section 4 or an offence contemplated in section 37 of the Implementation of the Rome Statute of the International Criminal Court Act, 2002, the matter must be dealt with in accordance with the Act."

it 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 the National Director of Prosecutions. In both scenarios the warrant 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.[10]

Under 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 Court has issued a warrant of arrest, 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.[11] 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.[12]

Section 9 details the second scenario (an arrest in terms of a warrant issued by the National Director of Prosecutions). In this situation the Director-General of Justice and Constitutional Development is mandated to receive a request from the ICC for the provisional arrest of a person who is suspected or accused of having committed a core crime, or has been convicted by the ICC. The Director-General is then obliged to immediately forward the request to the National Director of Public Prosecutions (NDPP), who must then bring an application for a warrant before a magistrate.[13] The application must be supported by an affidavit attesting to various factors, for example, that a warrant of arrest or a judgment against the person in question exists, and that the person concerned is in or on his or her way to the Republic.[14] A magistrate may then issue a warrant of arrest for that person and must notify the Director-General of that fact.

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".[15]

3.1.2 The procedure involved in the surrender process

Having laid their hands on the arrestee, the South African authorities then become engaged in what is known as the 'surrender' of an arrestee to the ICC – his or her 'delivery' to The Hague.

To make a delivery order, with a view to the surrender of an arrestee to the ICC, the magistrate has to be satisfied of three things only: (1) that the person before court is the individual named in the warrant;[16] (2) that the person has been arrested in accordance

10 See section 9(3) of the ICC Act.

11 See section 8(1) of the ICC Act.

12 See section 8(2) of the ICC Act.

13 See section 9(1) of the ICC Act.

14 See section 9(2) of the ICC Act.

15 See section 10(1) of the ICC Act.

16 See section 10(1)(a) of the ICC Act.

with the procedures laid down by domestic law;[17] and (3) that the arrestee's rights, as contemplated in Chapter 2 of the Constitution Act 108 1996, have been respected, if, and to the extent to which, they are or may be applicable.[18]

The nature of these three requirements makes it clear that surrender to the ICC is a different beast to extradition in international law. First, there is no mention of the double criminality rule that has become so central to extradition proceedings. And second, 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 s/he "must issue an order committing that person to prison pending his or her surrender to the Court".

Of course, the magistrate also has to have some sense 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 satisfied that the person concerned may be surrendered to the Court: (a) for prosecution for the alleged crime; (b) for the imposition of a sentence by the Court for the crime in respect of which the person has been convicted, or (c) to serve a sentence already imposed by the Court (one must assume that the listing of these conditions is in the disjunctive).

There is unfortunately little indication in the Act as to 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 the person's trial for the offence s/he is alleged to have committed.[19] 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). 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 as well.

One should also bear in mind that to obtain a warrant of arrest and surrender 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 a core offence. As such, it is submitted here that because an onerous evidential burden has already been overcome by the Prosecutor to obtain the warrant, and because of the

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17 See section 10(1)(b) of the ICC Act.

18 See section 10(1)(c) of the ICC Act.

19 The UK's ICC Act, for example, rather more helpfully 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 ICC Act 2001); see also the commentary on the Act by Robert Cryer, 'Implementation of the International Criminal Court Statute in England and Wales', 51 *International and Comparative Law Quarterly (ICLQ)* 733 (2002) at 736) and Chapter 10 to this Guide.

distinct nature of the ICC,[20] these additional requirements be regarded as satisfied on the strength of the "material supporting the request"[21] for surrender provided by the Court.

3.1.3 Constitutional/human rights concerns

As explained above, in order to make a delivery order with a view to the surrender of an arrestee to the ICC, a magistrate has to be satisfied that three requirements are met, one of which is that the arrestee's rights, as contemplated in Chapter 2 of the South African Constitution Act 108 of 1996,[22] have been respected, if, and to the extent to which, they are or may be applicable.[23] It does not appear that constitutional or human rights concerns will ordinarily be triggered by South Africa's co-operation with the ICC. An arrestee who is detained pursuant to a warrant would automatically become entitled to the protections contained in section 35 of the South African Constitution, *viz.*, the rights reserved for arrested, detained and accused persons (including, for instance, the rights to remain silent, to be brought before a court as soon as is reasonably possible and to a legal practitioner). Such protections would inure to the arrestee under South African domestic law, and South African officials would be obliged to respect the arrestee's constitutional rights, quite apart from the procedure involved in the surrender process.

In relation to sentencing, the ICC sentencing regime does not pose an obstruction to surrender. For example, life imprisonment is a competent sentence in South African municipal law and the imposition of the same sentence by the ICC will not create difficulties for a South African court seized with the surrender process.

3.2 Other forms of assistance to the court

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

Part 2 of the ICC Act sets out a variety of circumstances in which the "relevant competent authorities in the Republic" must "co-operate with, and render assistance to, the Court" in relation to investigations and prosecutions. There are many areas of co-operation (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.[24] The areas of co-operation must be

20 Article 91 of the Rome Statute provides that the request for the arrest and surrender of a person for whom a warrant of arrest has been issued by the Pre-Trial Chamber shall contain or be supported by, *inter alia*, such "documents, statements or information as may be necessary to meet the requirements for the surrender process in the requested State, except that those requirements should not be more burdensome than those applicable to requests for extradition pursuant to treaties or arrangements between the requested State and other States *and should, if possible, be less burdensome, taking into account the distinct nature of the Court*." (Emphasis added.)

21 See Article 89 of the Rome Statute.

22 Chapter 2 of the Constitution contains the Bill of Rights.

23 See section 10(1)(c) of the ICC Act.

24 The full list of areas of co-operation is set out in section 14 (a)-(l), and these are modelled on Article 93 of the Rome Statute.

undertaken in terms of the relevant law applicable to investigations in South Africa, as well as the applicable rules in the ICC Statute,[25] and with the ultimate aim of assisting the ICC.

Certain acts of co-operation are subject to comprehensive regulation in the ICC Act, while others are not. Particularly in those cases where the ICC Act provides no guidance, the relevant South African law and the provisions of the ICC Statute will need to be consulted. 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 ICC Statute and domestic law for assistance. In this context there is little difference between South African law and the treaty's provisions, both of which take their cue from international human rights law. Equally, the Constitution in section 35 and the ICC Statute in Article 55 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 co-operation that are subject to detailed regulation under the ICC Act include the examination of witnesses,[26] the transfer of a prisoner to the ICC for the purposes of giving evidence or to assist in an investigation,[27] the service of process and documents[28] and acts of entry, search and seizure.[29]

Particularly interesting are the provisions relating to forfeiture or confiscation orders. The Director General of Justice and Constitutional Development may receive a request from the ICC for assistance in enforcing 'restraint orders' as well as 'confiscation orders' in the Republic.

A 'restraint order' is defined in the ICC Act as an "order by the ICC in respect of a crime or an offence within the jurisdiction of the Court, aimed at restraining any person from dealing with any property". This term is not found in the ICC Statute, but presumably refers to the provisional measure of assistance that the South African authorities are to provide to the Court under section 14(k) of the ICC Act. Section 14(k) is expressly modelled on Article 93 of the Rome Statute, as 93(1)(k) provides for the "identification, tracing and freezing or seizure of proceeds, property … [etc] for the purposes of eventual forfeiture".

25 Section 14 reads that the "relevant competent authorities in the Republic must, *subject to the domestic law of the Republic and the Statute*, co-operate with, and render assistance to, the Court…" (emphasis added). 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 section 30 of the ICC Act, the relevant provisions of the Act will need to be read in conjunction with sections 10, 12(1)(a)-(d), 12(2)(b), 14, 21, 35(5) and 36(1) of the Constitution.

26 See sections 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 that a witness might commit and the procedure by which the attendance of a witness might be secured in proceedings before the ICC.

27 See section 20 of the ICC Act.

28 See section 21 of the ICC Act.

29 See section 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 (sections 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.

As such, a restraint order would seem to cover the scenario under the ICC Statute where the Court orders provisional measures with the aim of securing eventual forfeiture.

A 'confiscation order' – defined in the ICC Act as an "order issued by the Court aimed at recovering the proceeds of any crime or an offence within the jurisdiction of the Court or the value of such proceeds" – appears, by contrast, to relate to a final measure of punishment. In terms of Article 77 of the ICC Statute, one of the penalties that the ICC may impose, in addition to imprisonment, is the "forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties". Article 109(1) of the ICC Statute in turn imposes obligations upon States Parties to enforce such forfeiture orders.

Under the ICC Act, when the Director-General of Justice and Constitutional Development receives a request from the ICC for assistance in enforcing one of these 'orders' in the Republic, he is expected to lodge the order with the Registrar of the High Court in whose jurisdiction the property is situated or present a certified copy of that order.[30]

Once a restraint order has been 'registered' by the relevant Registrar, the ICC Act provides that the order has the effect of a restraint order made by that High Court under the Prevention of Organised Crime Act.[31] Where a confiscation order has been 'registered', the order has the effect of a civil judgment of the court at which it has been registered.[32]

3.2.2 Obligations outside the mutual assistance context

In terms of the ICC Act the President of South Africa 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.[33] 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 (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 No. 37, 2001 (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 that (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".

30 See section 22(1) for 'restraint orders' and section 27(1) for 'confiscation orders'. However, the request from the ICC for assistance in executing a confiscation order must first be submitted to the Minister of Justice for approval before the request may be lodged with the clerk or the Registrar, as the case may be, of a court in the Republic having jurisdiction (see section 27(1) for details). In both cases, the Director-General of Justice must be satisfied of certain requirements, such as that the order is not subject to review or appeal.

31 Act 121 of 1998. See section 23 of the ICC Act.

32 See section 28(1) of the ICC Act.

33 Section 6.

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 (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 notice in the Government Gazette, on such conditions as s/he deems necessary (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 (section 7(5)).

3.2.3 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".[34] 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.[35]

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".[36] 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.[37]

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.[38] If the Republic is placed on this list and is designated as the State in which an offender is to serve a prison sentence, then such person must be committed to prison in South Africa.[39] The provisions of the Correctional Services Act 1998[40] and South African domestic law then apply to that

34 See Article 103(3)(a) of the Rome Statute as well as Rule 201 of the Rules of Procedure and Evidence.

35 See further W Schabas *An Introduction to the International Criminal Court* (2001), 144 et seq. If no State offers its prison services, the host State of the ICC – the Netherlands – will take up the job (see Article 103(4) of the Rome Statute).

36 See Article 103(3) of the Rome Statute.

37 See Article 106(2) of the Rome Statute.

38 See section 31 of the ICC Act.

39 See section 32 of the ICC Act.

40 Act 111 of 1998.

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 ICC Statute.[41]

It is commendable that the ICC Act requires the government to indicate its availability to assist in enforcing the ICC sentences. It is not a given, however, that South Africa will be placed on the list of States available for enforcement duty. As William Schabas has written, the Rome Statute makes it clear that there can be "no question of sending a prisoner to a State with prison conditions that do not meet international standards".[42] This is a particular problem for South Africa, given the poor state of its prisons. The Judicial Inspectorate of Prisons 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.[43] Earlier reports by groups such as Human Rights Watch show that "South African prisons are places of extreme violence, where assaults on prisoners by guards or fellow inmates are common and often fatal".[44] The possibility of being asked to act as a conduit for the enforcement of an ICC prison sentence ought therefore to be regarded as further motivation, if any were needed, for South Africa to urgently respond to the sub-standard condition of its prisons.

The ICC Statute also enables the ICC to impose a fine, but only "[i]n addition to imprisonment".[45] On top of this, the ICC is empowered to address the issue of reparations to victims, and may "make an order directly against any convicted person" specifying reparation.[46] 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,[47] and these must be 'registered' with a court in the Republic having jurisdiction.[48] Once this has been done, 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.[49]

41 See section 32(4)(b) of the ICC Act. 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".

42 W Schabas, note 35 above, p 145.

43 See Amnesty International, 'Country Report, South Africa – 2002' (available at http://web.amnesty.org/web/ar2002.nsf/afr/south+africa!Open).

44 See Human Rights Watch Report, *Prison Conditions in South Africa,* Africa Watch Prison Project (1994), p ix.

45 See Article 77(2)(a) of the Rome Statute.

46 See Article 75(2) of the Rome Statute.

47 See sections 25 and 26 of the ICC Act.

48 See sections 25(2) and (3) of the ICC Act.

49 See section 26 of the ICC Act.

4 Incorporating the Crimes

4.1 Measure and extent of incorporation

The advantage of the ICC Statute is that it brings together, in one place, a codified statement of the elements that make up the crimes of genocide, war crimes and crimes against humanity. The drafters of the ICC Act, 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 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, and 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",[50] 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".

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 the Elements of Crimes. For the purposes of interpreting and applying the definitions of crimes found in Articles 6, 7 and 8 of the Rome Statute, reference must also be made to this 50-page document adopted in June 2000 by the Preparatory Commission for the ICC.[51] There is nothing, however, that prevents a South African court from having regard to the Elements of Crimes were it to be involved in the domestic prosecution of one of the Rome Statute offences. However, in the interests of clarity and completeness it has been suggested that South Africa follow other States Parties[52] and incorporate by regulation the Elements of Crimes.[53]

5 Jurisdiction of Domestic Courts and Principles of Liability

5.1 Grounds of jurisdiction

Section 4(1) of the ICC Act creates jurisdiction for a South African court over the core crimes by providing that "[d]espite anything to the contrary in any other law of the Republic, any person who commits a [core] crime, is guilty of an offence and liable on conviction to a fine or imprisonment…". Presumably section 4(1) creates jurisdiction over such core crimes on the basis that they are committed within South African territory.

50 See section 3(c) of the ICC Act.

51 See the Finalised Draft Text of the Elements of Crimes (PCNICC/2000/INF/3/Add.2). See also the discussion in W Schabas, note 35 above, p 29.

52 The Secretary of State in England has, for example, 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, available at http://www.hmso.gov.uk/si/si2001/20012505.htm

53 In terms of section 38 of the ICC Act, the Minister of Justice may make regulations regarding the Act. In terms of section 1(xx) of the Act, such regulations would be included as part of the Act.

Section 4(3) of the Act goes further and provides for extra-territorial jurisdiction in express language. In terms of that section the jurisdiction of a South African court will be triggered when a person commits a core 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 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), as we have seen, appears to assert the traditional principle of territoriality, namely, that a State has competency in respect of all acts that occur in its territory. And section 4(3), which deals with 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 (c) of the ICC Act extends jurisdiction 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.[54] The conclusion that flows from this is that trigger (c) is grounded in the idea of universal jurisdiction; that is, jurisdiction existing for all States in respect of certain crimes that 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, as 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'.[55] 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.

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54 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" (see section 68(1) of the International Criminal Court Act 2001).

55 See for example A Cassesse, P Gaeta, J Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary,* Vol. II (2002), p 1862.

5.2 Temporal jurisdiction

Jurisdiction exists for South African courts over the core crimes in the ICC Statute from the date on which the ICC Act was enacted into law: 18 July 2002. The ICC 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" (section 5(2)).

5.3 Principles of liability

The ICC Act states that a South African court has jurisdiction over "any person who commits a [core] crime". There is no indication whether that person must have attained the age of 18 at the time of the offence, or whether the jurisdiction extends to crimes by corporations. Since the objects of the ICC Act are "to create a framework to ensure that the [Rome] Statute is effectively implemented in the Republic", and "to ensure that anything done in terms of [the Act] conforms with the obligations of the Republic in terms of the Statute", it is not inconceivable that the ICC Act will take its cue from the ICC Statute regarding which subjects are covered by the Statute's criminal prohibitions.

6 Rights of the Accused

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".[56] The South African Constitution in section 35 sets out a panoply of rights for arrested, detained and accused persons. These protections will be afforded to any person who is being tried under the ICC Act.

7 Available Defences

Part 3 of the ICC Statute sets out a comprehensive framework of general principles of liability and defences. While the drafters of the ICC Act have not chosen to expressly adopt Part 3, section 2 of the Act says that applicable law for any South African court hearing any matter arising under the Act includes "conventional international law, and in particular the Statute".[57] As such, 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) can appropriately be relied on by a South African court.

8 Immunity, International Crimes and Domestic Courts

One of the most interesting and difficult questions in international law 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 the basis of their official status, from proceedings brought against them for allegedly committing international crimes.

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56 Section 2, ICC Act.

57 See section 2(a) of the ICC Act.

The Rome Statute attempts to bring clarity to the position and provides in Article 27 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".[58] An individual charged before the ICC 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 s/he has been charged.

The ICC Act, in similar vein, proclaims boldly, 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".[59] 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 Court is by virtue of Article 27 of the ICC Statute. This is a significant aspect of the ICC Act and one that is to be welcomed, signalling as it does South Africa's intention of acting hand in hand with the ICC to bring government officials, whatever their standing, to justice.[60]

However, whether the boldness of the Act matches the state of international law is another question, and this will undoubtedly be seized upon by any high-standing foreign government official who finds him or herself the subject of prosecution before a South African court for alleged commission of an ICC offence. The international and domestic 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.

For instance, we have seen that 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* (i.e., personal immunity on account of their status), irrespective of the nature of the crime alleged, unless waived by the sending State. While their Lordships denied immunity to Pinochet in his capacity as a former Head of State, they made it 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".[61] Lord Millett in

58 Rome Statute of the ICC, 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".

59 See section 4(2)(a) of the ICC Act.

60 The provision, aside from being bold, is also prudent. As Cassesse et al, note 55 above, point out (p 1857):

"To avoid these difficulties [regarding immunities for officials], a prudent approach would be to provide that any issue of immunities will not bar arrest or surrender to the ICC. In essence, this approach leaves the issue to be decided by the ICC and not by national courts. In this manner, an implementing State can ensure that it will not find itself stuck with a legislative provision – or a judicial interpretation – on international immunities that hinders compliance with an ICC request."

61 *R v Bow St Magistrate, ex parte Pinochet Ugarte*, [1998] 4 All ER (Pinochet 1) at 938.

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".[62]

We have seen too that in its decision in *Democratic Republic of Congo v Belgium*[63] the International Court of Justice (ICJ) has 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 Statute of the ICC), the ICJ expressly held that this exception to customary international law was not applicable to national courts.[64] This case law therefore suggests that the diplomatic or Head of State immunity of an accused prevents national courts from dealing with allegations of international crimes unless that immunity has been waived, or the senior official has left office.

In the context of the ICC Statute, a helpful cue for a South African court dealing with section 4(2)(a) of the ICC Act and faced with a claim of Head of State immunity is provided by the recent decision of the Belgian Court de Cassation in the *Sharon and others* case.[65] The Belgian legislation in question before the Court, like its South African counterpart, provides in Article 5(3) that whatever the official capacity of persons accused of crimes enumerated in that law, they are not precluded from prosecution. One of the arguments advanced in support of the applicability of Article 5(3) in relation to Mr Arial Sharon, the serving Israeli Head of State, was that the Article was in conformity with Article 27 of the Rome Statute. The Court de Cassation rejected this argument, finding that Article 27 of the Rome Statute does not affect or prevent the application of the customary rules of absolute immunity.[66]

According to the Belgian Court, because the customary international law rule of absolute personal immunity for a Head of State was applicable (and binding), Article 5(3) of the Belgian law had to be taken to refer to *another* customary international law rule that prevents persons accused of international crimes from invoking their official capacity as a reason for not being held criminally responsible.[67] Similarly, a South African court, faced with a claim for immunity from a serving Head of State, and in light of the prevailing international and foreign case law that serve to indicate binding customary international law, may well be inclined to uphold the personal immunity of a Head of State notwithstanding the provisions of Section 4(2)(a) of the ICC Act. Such an inclination would be significantly bolstered by no less than the Constitution itself, inasmuch as its section 232 provides that courts interpreting legislation must always prefer any reasonable

62 *R v Bow St Magistrate, ex parte Pinochet (No.3)* [1999] 2 WLR 824 at 905 H.

63 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*.

64 Para. 58.

65 See decision of 26 June 2002, available at http://www.sabra-shatila.be/documents/arrest020226.pdf.pp.22.

66 See Cassese, 'The Belgian Court of Cassation v. the International Court of Justice: the *Sharon and others* Case', 1 *Journal of International Criminal Justice*, 437 (2003) at 439.

67 Cassese, ibid p 443. The other customary international rules in question would be those relating to immunity *ratione material*, but these were not applicable in the case at issue. The possibility thus remains that functional immunities might legitimately have been removed from Article 5(3) of the Belgian law, and similarly, under the South African ICC Act.

interpretation that is consistent with international law over an interpretation that is inconsistent with international law.

That is not to say, of course, that the individual must be set free. Under the complementarity scheme it will be expected of South Africa as a State Party to the Rome Statute, should it find 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 ICC for prosecution.

In this regard it must be stressed that 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. As such, if the National Director declines to prosecute a person under the Act, he or she must provide the Director-General for Justice and Constitutional Development with the full reasons for that decision (section 5(5)). The Director-General is then obliged to forward the decision, together with reasons, to the Registrar of the ICC in The Hague.[68]

It goes without saying under the complementarity scheme of the Statute that any decision by the South African authorities not to prosecute entitles the ICC to do so in South Africa's place. Section 5(6) of the ICC Act says to this effect that a decision by the National Director "not to prosecute a person under this section does not preclude the prosecution of that person in the [International Criminal] Court". And Article 98(1) of the ICC Statute entails that States parties to the Statute have a duty of co-operation with the Court, requiring such States to arrest and surrender to the Court persons charged with an ICC crime.

Such obligation, however, would only be incumbent upon a State where an official charged before its Court is an official of a State that is also a party to the ICC Statute. That is because both States, as parties to the ICC Statute, have accepted that the constitutive instrument of the ICC has scrapped immunities for Heads of State and other government officials through Article 27. The position may well be different where the accused person is an official of a State *not party* to the Statute. Article 98(1) of the Rome Statute provides that:

> "The [International Criminal] Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity."

If under international law personal immunity attaches to incumbent senior cabinet officials, then not only would any prosecution of such an official by South Africa be inconsistent with its (South Africa's) obligations under customary international law, but the ICC would also be prevented from instituting proceedings against such a person or

68 Ibid.

requesting the surrender of that person.[69] The only exception to this situation would be a waiver of the immunity by the third State.[70]

9 Trial Procedure and Punishment in Domestic Courts

The ICC Act does not provide any specific trial procedure or punishment regime for domestic courts. All that the ICC Act provides is for the designation of "an appropriate High Court in which to conduct a prosecution against any person accused of having committed a [core] crime" (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 that 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.

10 Article 98 Agreements

10.1 Government response to American attempts to conclude Article 98 agreements

South Africa was pressurised by the United States but refused to sign an Article 98 agreement. The US asserted a deadline of 31 June 2003 for the conclusion of such an agreement between the two States, backed up by the threat that South Africa's failure to sign would result in the suspension of US military aid to that country. Having refused to succumb to US pressure, South Africa then found itself among 35 States blacklisted by the United States on 1 July 2003.[71]

In response to this blacklisting and the resultant suspension of military aid by the US, South Africa's Foreign Ministry spokesperson, Mr. Ronnie Mamoepa, said that the Government would study "the implications of that decision".[72] Having done so, the South African Cabinet announced on 24 July 2003 that it "will maintain its decision not to sign an agreement with Washington giving United States nationals immunity from prosecution by the ICC".[73] According to the US embassy in Pretoria, South Africa's decision would cost it some 7.2 million dollars in military aid;[74] the South African Cabinet explained that the South African department of defence "will address the funding shortfalls through the normal budgeting and adjustment processes".[75]

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69 P Gaeta, 'Official Capacity and Immunities', in Cassese *et al* (eds), *The Rome Statue of the International Criminal Court: A Commentary,* Vol. 1 (2002), p 992.

70 Gaeta, ibid, pp 993-994, argues that Article 98 should be interpreted to mean that a request for the waiver of immunity will only be required if the State (whose national enjoys immunity) is not a party to the Rome Statute.

71 *Cape Times*, 'US Suspends all military aid to South Africa', 02 July 2003.

72 *Mail and Guardian*, 'US slaps military funding embargo on SA', 02 July 2003.

73 "South Africa will not sign agreement with US on international court", statement by the Cabinet of the Government of the Republic of South Africa, Pretoria, 24 July 2003.

74 Agence France Press, 24 July 2003.

75 Ibid.

The Cabinet's reasons for maintaining its position were said to be premised on South Africa's "commitment to the humanitarian objectives of the ICC and the country's international obligations".[76]

Just prior to Cabinet's announcement, on 20 July 2003 at a meeting for the formation of a South Africa-Kenya bi-National Commission in Nairobi, Kenya, officials of the South African and Kenyan Governments expressed their concern at the diplomatic intimidation displayed by the US in relation to Article 98 agreements.[77] As a measure of challenge, Abdul Minty, Acting Director General in the South African Foreign Ministry, suggested that a joint effort with European countries was required to counter US advances.[78]

76 Ibid.

77 Panafrican News Agency (PANA) Daily Newswire, "Kenya, South African Oppose US Stand on UN Court", 20 July 2003.

78 Ibid.