

**THE LEGAL CHALLENGES FACING SELECTED AFRICAN COUNTRIES WITH  
REGARD TO THE IMPLEMENTATION OF THE ROME STATUTE OF THE  
INTERNATIONAL CRIMINAL COURT**

by

EDGAR RICHARD BOTES

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SUPERVISOR: Mrs P G Finney

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I would like to dedicate this dissertation to my parents Neville and Anne.

## Declaration

I declare that "*The legal challenges facing selected African countries with regard to the implementation of the Rome Statute of the International Criminal Court*" is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.

I further declare that I submitted the dissertation to originality checking software. The result summary is attached. I further declare that I have not previously submitted this work, or part of it, for examination at Unisa for another qualification or at any other higher education institution.

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E.R Botes

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**List of Abbreviations used in the Dissertation**

AU: African Union

BIA: Bilateral Immunity Agreement

DOJ&CD: Department of Justice and Constitutional Development

DPCI: Directorate of Priority Crimes Investigation

ECJ: European Court of Justice

EU: European Union

GA: General Assembly

HRC: Human Rights Committee

ICC: International Criminal Court

ICJ: International Court of Justice

ILC: International Law Commission

NPA: National Prosecuting Authority of South Africa

NDPP: National Director of Public Prosecutions

OTP: Office of the Prosecutor

PCLU: Priority Crimes Litigation Unit

SADC: Southern African Development Community

SAPS: South African Police Service

SC: Security Council

SCA: Supreme Court of Appeal

UN: United Nations

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## Chapter One

### Introduction

#### 1.1 Introduction and Background to the Topic of the Study

*"The ICC is here to address atrocious crimes committed against our fellow human beings. And it is our job to make sure that this is sound, meaningful justice that has a real impact in helping to restore and maintain a stable peace. ...I would like to emphasize as well the importance of national systems for the effective operation of the International Criminal Court. The ICC is a court of last resort based on the premise that the primary responsibility for investigating and prosecuting serious crimes of international concern lies with states. National judges under the Rome Statute system continue to be the main torchbearers of justice and the rule of law. That is why the adoption of adequate implementing legislation by states that adhere to the Rome Statute is fundamental for the effective functioning of the system. Implementing legislation is crucial to promote national investigations and prosecutions, to ensure full cooperation with the Court's activities and to allow the enforcement by national courts of judicial orders and decisions of the ICC".<sup>1</sup>*

Ever since the process of decolonisation started, Africa has experienced a very tumultuous period, with widespread political unrest, civil wars and a multitude of insurgencies.<sup>2</sup> In the post-election violence that erupted in Kenya after the presidential election that was held in December 2007, an estimated 1000 people died and almost 350 000 were displaced.<sup>3</sup> Recently the flare-up of a new type of sectarian-based violence manifested in Boko Haram's deadliest attack ever: the massacre of an estimated 2000 people in the north-eastern village of Doron Baga in

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<sup>1</sup> Keynote speech by Judge Silvia Fernández de Gurmendi, President of the International Criminal Court at an event marking the "Day of International Criminal Justice", The Hague, 26 June 2015.

<sup>2</sup> In the aftermath of the Second World War, African states began to achieve independence from colonial rule by European states, however a report prepared by Dr Monty G Marshall, a research professor at the Centre for Global Policy at the George Mason University, for the Government of the United Kingdom's Africa Conflict Prevention Pool (ACPP) 2006, details the past and current armed conflicts in Africa, and the reasons for these conflicts / Degomme O and Guha-Sapir D, "Patterns in mortality rates in Darfur" 2010 The Lancet, Volume 375, Number 9711, Pages 294-300, estimates that up to 2010, the cumulative death toll in the Darfur region is more than 178 363 people.

<sup>3</sup> [http://www.un.org/News/dh/infocus/sudan/fact\\_sheet.pdf](http://www.un.org/News/dh/infocus/sudan/fact_sheet.pdf) and [http://reliefweb.int/sites/reliefweb.int/files/resources/OCHA\\_Sudan\\_Weekly\\_Humanitarian\\_Bulletin\\_Is\\_sue\\_11\\_%287\\_-\\_13\\_March\\_2016%29.pdf](http://reliefweb.int/sites/reliefweb.int/files/resources/OCHA_Sudan_Weekly_Humanitarian_Bulletin_Is_sue_11_%287_-_13_March_2016%29.pdf) (Accessed on 25 October 2017).

Nigeria.<sup>4</sup> However, African countries are not the only states plagued by unrest. Countries like Turkey, Syria, Iraq and Colombia also experience high levels of armed conflict and insurgencies.

The coming into force of the Rome Statute of the International Criminal Court (hereafter referred to as the “Rome Statute”) was a truly great achievement for the international community, and especially for Africa.<sup>5</sup> African states were on the forefront of pursuing the realisation of the International Criminal Court<sup>6</sup> (hereafter referred to as the “ICC”), and this is reflected in the fact that African countries are the most represented of all the states that have acceded to the Rome Statute.<sup>7</sup>

Punishing those responsible for the commission of war crimes, or crimes against humanity, first gained a foothold after the First World War, when the Treaty of Versailles made provision for the punishment of German officers for serious violations of the conduct of warfare.<sup>8</sup> It was only after the conclusion of the Second World War, with the creation of the Nuremberg and Tokyo military tribunals, that major war criminals were prosecuted by the Allies. However, the concept of complementarity was only adopted in the Genocide Convention of 1948 and

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<sup>4</sup> Boko Haram is an Islamic terrorist group based in north-eastern Nigeria, also active in Chad, Niger and northern Cameroon.

<sup>5</sup> The Statute was adopted on 17 July 1998 by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court. This version of the Statute incorporates changes made to it by the procès-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002. The Statute entered into force on 1 July 2002.

<sup>6</sup> Article 1 of the Rome Statute.

<sup>7</sup> Cole R.J.V “Africa’s relationship with the International Criminal Court: More political than legal” 2013 Melbourne Journal of International Law, Volume 14, Pages 671-698 / 124 countries are state parties to the Rome Statute, and of those countries 34 are African states, [https://asp.icc-cpi.int/en\\_menus/asp/states%20parties/african%20states/Pages/african%20states.aspx](https://asp.icc-cpi.int/en_menus/asp/states%20parties/african%20states/Pages/african%20states.aspx) (Accessed on 31 March 2017).

<sup>8</sup> Part VII, Article 227 of Treaty of Versailles, signed on 28 June 1919, states that “*The Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties.*

*A special tribunal will be constituted to try the accused, thereby assuring him the guarantees essential to the right of defence. It will be composed of five judges, one appointed by each of the following Powers: namely, the United States of America, Great Britain, France, Italy and Japan.*

*In its decision the tribunal will be guided by the highest motives of international policy, with a view to vindicating the solemn obligations of international undertakings and the validity of international morality. It will be its duty to fix the punishment which it considers should be imposed.*

*The Allied and Associated Powers will address a request to the Government of the Netherlands for the surrender to them of the ex-Emperor in order that he may be put on trial.”*

thereafter, in the Geneva Conventions of 1949.<sup>9</sup> Yet the first prosecution pursuant to these treaties was only initiated 45 years later in 1994, when the Bosnian-Serb concentration camp commander Dragan Nikolić was indicted by the newly created International Criminal Tribunal for the former Yugoslavia.<sup>10</sup>

According to the Rome Statute the ICC may exercise its functions and powers on the territory of any state party and, by special agreement, on the territory of any other state.<sup>11</sup> The ICC has jurisdiction over the most serious crimes of concern to the international community namely, the crime of genocide, crimes against humanity, war crimes and the crime of aggression.<sup>12</sup>

Any statute is only effective if it is enforced. The Rome Statute relies on two very important principles for its application: the first of these principles is that of complementarity and the second is cooperation by state parties.<sup>13</sup> In the context of the Rome Statute, complementarity means that the national courts of the state parties have primary jurisdiction over international crimes and that the ICC is a court of last resort.<sup>14</sup> Under the complementarity principle, therefore, it is the duty of every state party to exercise its criminal jurisdiction over those responsible for international crimes. It implies that all state parties to the Rome Statute have a national criminal

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<sup>9</sup> The Convention on the Prevention and Punishment of the Crime of Genocide 1948 and the Four Geneva Conventions of 12 August 1949.

<sup>10</sup> Bothe M "Complementarity: Ensuring compliance with international law through criminal prosecutions, whose responsibility?" 2008, Die Friedens-Warte, Volume 83, Number 4, Pages 59-72 / The creation of the International Criminal Tribunal for the former Yugoslavia saw the prosecution and punishment of individuals for grave breaches of international humanitarian law during the Yugoslav wars / Goldstone R "Historical evolution from Nuremberg to the International Criminal Court" 2007 Penn State University International Law Review, Vol. 25, Issue 4 (Spring 2007), Pages 763-778

<sup>11</sup> Article 4 of the Rome Statute.

<sup>12</sup> Articles 5,6,7 and 8 of the Rome Statute.

<sup>13</sup> Complementarity is provided for in Article 1 of the Rome Statute read together with the Preamble. Cooperation is provided for in Part 9 of the Rome Statute. / Apreotesei A "The Principle of Complementarity and the International Criminal Court" 2008 Iustum Aequum Salutare 2008 Volume 4, Pages 93-120 / Kleffner J.K "The impact of complementarity on national implementation of substantive international criminal law" 2003 Journal of International Criminal Justice, Volume 1, Pages 86-113 / Carter L.E "The future of the International criminal Court: Complementarity as a strength or a weakness?" 2013 Washington University Global Studies Law Review, Volume 12, Pages 451-473 /

<sup>14</sup> In this regard paragraph 10 of the preamble to the Rome Statute states that "*the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions*" as well as Article 17(1)(a) and (b) of the Rome Statute which states that "*...the Court shall determine that a case is inadmissible where:*

- (a) *The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;*
- (b) *The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;...*"

justice system in place to assert jurisdiction and to deal judicially with international crimes.<sup>15</sup> There is no formal duty on a state party to prosecute a crime as provided for in the Rome Statute, and a party merely risks intervention by the ICC should they fail to investigate or prosecute such an offence.<sup>16</sup> Nouwen states that there is no responsibility, obligation or even duty on state parties to investigate and prosecute crimes, and that the only provision in the Rome Statute that explicitly refers to a relevant duty is in the preamble to the Rome Statute, where it states that “it is the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes”.<sup>17</sup> This was confirmed by the Appeals Chamber in the matter of *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, where the court made two key findings.<sup>18</sup> Firstly, the Appeals Chamber stated that under Article 17(1)(a) and (b) of the Rome Statute the question of unwillingness or inability by a state to act only has to be considered when, at the time of the proceedings in respect of an admissibility challenge, a domestic investigation or prosecution that could render the case inadmissible before the ICC has been instituted, or where the state that has jurisdiction has decided not to prosecute the person concerned.<sup>19</sup> Secondly, the

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<sup>15</sup> The Rome Statute is not meant to replace a state party's national criminal system, but rather to complement that system, and in certain instances, as provided for in Article 13 of the Statute, to prosecute individuals after referral of that situation to the ICC by a state party or the United Nations Security Council or if the Prosecutor initiated an investigation in terms of Article 15 of the Statute. / To comply with the complementarity principle, a state party that has ratified the Rome Statute has to provide under their national law for the investigation and prosecution of international crimes as specified in the Rome Statute. A number of other international treaties require state parties to enact domestic laws that would enable domestic prosecutions of crimes contained in those treaties. An example of this is Article 5 of the 1948 Genocide Convention which expressly specifies that a state party to the convention “...undertake[s] to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention...”. Similar provisions are also included in the four Geneva Conventions of 1949, as well as the Torture convention of 1984 / On 1 February 2010, the Office of the Prosecutor of the ICC, issued a Prosecutorial Strategy Paper for the period 2009-2012, detailing a strategy of “positive complementarity” wherein the OTP encourages national proceedings where possible, [https://www.icc-cpi.int/nr/rdonlyres/66A8dcdc-3650-4514-AA62\\_D229D1128F65/281506/otpProsecutorialStrategy20092013.pdf](https://www.icc-cpi.int/nr/rdonlyres/66A8dcdc-3650-4514-AA62_D229D1128F65/281506/otpProsecutorialStrategy20092013.pdf) also refers to the OTP's 2016-2018 prosecutorial Policy [https://www.icc-cpi.int/iccdocs/otp/070715-otp\\_strategic\\_plan\\_2016-2018.pdf](https://www.icc-cpi.int/iccdocs/otp/070715-otp_strategic_plan_2016-2018.pdf) (Accessed on 27 March 2017).

<sup>16</sup> As per Articles 17(1)(a) and 20(3) of the Rome Statute.

<sup>17</sup> Nouwen S.M.H Complementarity in the Line of Fire: The catalysing effect of the International Criminal Court in Uganda and Sudan 2013 (Cambridge University Press).

<sup>18</sup> Situation: Democratic Republic of the Congo: The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui No. ICC-01/04-01/07 OA 8, judgment by the Appeals Chamber on 25 September 2009.

<sup>19</sup> Judgement by the Appeals Chamber of the ICC, dated 25 September 2009 in the matter of: Situation in the Democratic Republic of the Congo, The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui at paragraphs 75 to 86 of the judgment.

court found that inaction on the part of a state that has jurisdiction will render a case admissible before the ICC, subject to Article 17(1)(d) of the Rome Statute.<sup>20</sup>

The principle of cooperation and judicial assistance is set out in Part 9 of the Rome Statute and determines that state parties shall cooperate fully with the Court in the investigation and prosecution of crimes within the jurisdiction of the Court.<sup>21</sup> The ICC is not endowed with a police force authorised and empowered to apprehend suspects or to gather evidence. Therefore, the ICC relies on the cooperation of existing national criminal justice systems for assistance.<sup>22</sup> By ratifying the Rome Statute, states are bound by the terms of the treaty provisions and failure to cooperate with the ICC should be seen in a very serious light.<sup>23</sup>

The Rome Statute is a powerful tool to investigate and prosecute international crimes.<sup>24</sup> Since the adoption of the Rome Statute on 17 July 1998, and entering into force on 1 July 2002, 124 countries have become parties, the majority being African countries. Yet only a few of those African state parties have implemented domestic legislation.<sup>25</sup> Even though state parties are not compelled to domesticate the Rome Statute by way of an implementation act as South Africa has done, a state party's commitment to the Rome Statute implies that they would be in a position to punish the crimes listed in the Rome Statute by relying on their domestic statutes. According to Yang "the precondition for a state to exercise her national criminal jurisdiction is to recognize that the crimes listed in the Rome Statute are crimes also punishable

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<sup>20</sup> The Prosecutor v. Germain Katanga ICC-01/04-01/07 and The Prosecutor v. Mathieu Ngudjolo Chui ICC-01/04-02/12.

<sup>21</sup> Article 86 of the Rome Statute.

<sup>22</sup> Ngari A.R *State cooperation within the context of the Rome Statute of the International Criminal Court* (LLM thesis Stellenbosch University 2013).

<sup>23</sup> In terms of international treaties, the principle of *Pacta sunt servanda* requires a state party to honour the obligations incurred by that country when signing and ratifying a treaty. It also signals to other parties to the treaty that they can rely upon one another to respect the rights which they have incurred by becoming a state party to the treaty.

<sup>24</sup> Dicker R and Duffy H "National Courts and the ICC" 1999 *The Brown Journal of World Affairs*, Volume 6, Issue 1 Pages 53-63 / Nanda V.P "The establishment of a permanent International Criminal Court: Challenges ahead" 1998 *Human Rights Quarterly*, Volume 20, Number 2, Pages 413-428.

<sup>25</sup> According to a report by the Coalition for the International Criminal Court, on the status of the Rome Statute around the world, the following statistics are available for African state parties: 10 countries have enacted implementation legislation, 9 countries have partial legislation in place, and 3 countries have started drafting legislation but the process has stalled. What is worrying is the fact that 23 African countries have made no effort to domesticate the Rome Statute. / A copy of the report can be accessed at [http://www.iccnw.org/documents/RomeStatuteUpdate\\_2013\\_web.pdf](http://www.iccnw.org/documents/RomeStatuteUpdate_2013_web.pdf) (Accessed on 22 March 2017).

under her national legislation”.<sup>26</sup> This creates a problematic situation as it forces the ICC, which is meant to be a court of last resort to prosecute offenders that could have been prosecuted by a state party.<sup>27</sup> The complementarity principle is also designed to protect and to enhance the sovereignty of a state party, and by failing to investigate and prosecute offenders, a state would in fact undermine this principle.<sup>28</sup> According to the Parliamentarians for Global Action, a state party is also in a better position to prosecute an individual and domestic prosecution also carries with it important benefits for the state concerned.<sup>29</sup> For instance, it allows the state an opportunity to strengthen its own criminal justice system to prosecute international crimes at a domestic level. Domestic implementation legislation has a deterrent effect in that a potential perpetrator might reconsider his actions before committing them due to the high probability of a local arrest and prosecution.<sup>30</sup> Effective legislation also ensures direct cooperation and communication between national authorities and their counterparts at the ICC.<sup>31</sup> The complementarity principle further provides for the precise and detailed definitions of crimes and their penalties ensuring legal certainty. Lastly, it strengthens the rights of the victims by ensuring that fair trials are conducted at a national level.<sup>32</sup>

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<sup>26</sup> Yang L “On the principle of complementarity in the Rome Statute of the International Criminal Court” 2005 Chinese Journal of International Law, Volume 4, Issue 1 , Pages 121-132. Yang is of the opinion that there are mainly three ways in which a state party can implement substantive legislation to ensure compliance with their obligations namely, a. Drafting new implementation legislation, b. Amending its existing criminal legislation by ensuring that the crimes in the Rome Statute are incorporated into the existing legislation or c. Applying the domestic criminal law in prosecuting international crimes as ordinary offences.

<sup>27</sup> The ICC also has limited resources, and failure by a state party to prosecute offenders would result in impunity, which defeats one of the primary objectives of the Rome Statute.

<sup>28</sup> Benzing M “The complementarity regime of the International Criminal Court: International criminal Justice between state sovereignty and the fight against impunity” 2003, Max Planck Yearbook of United Nations Law, Volume 7, Pages 591-632. The principle relates to the protection of the primacy of national jurisdiction.

<sup>29</sup> <http://www.pgaction.org/about/> (Accessed on 22 March 2017).

<sup>30</sup> Sainati T “Divided we fall: How the International Criminal Court can promote compliance with international law by working with regional courts” 2016 Vanderbilt Journal of Transnational Law, Volume 49, Pages 191-243.

<sup>31</sup> This also provides additional safeguards for the protection of judicial independence of courts and prosecuting authorities against interference by executive and/or legislative organs of state.

<sup>32</sup> Bergsmo M, *Complementarity and the exercise of universal jurisdiction for core international crimes* (Torkel Opsahl Academic EPublisher and Peace Research Institute Oslo, 2010) / Burke-White W.B “Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice” 2008, Harvard International Law Journal, Volume 49, Issue 1, Pages 53-108, where the author discusses the implications of a policy of proactive complementarity by a state party.



## 1.2 Justification and Objective of the Study

The main problem this work seeks to address is the challenges facing selected African countries with regard to the implementation of the Rome Statute. As discussed above, the issues surrounding the implementation of the Rome Statute relate to complementarity and cooperation by state parties. In this light, it is important to differentiate between objective and subjective challenges faced by the selected countries.

Four African countries will be studied in this work. The work will focus on two Southern African Development Community (hereinafter referred to as “SADC”)<sup>33</sup> countries, namely South Africa and Botswana, South African legislation in the form of the Implementation of the Rome Statute of the International Criminal Court Act, 2002<sup>34</sup> (hereinafter referred to as the “ICC Act”) and Botswana, who introduced the Rome Statute of the International Criminal Court Bill, in Botswana’s National Assembly.<sup>35</sup>

According to Stone the official explanation put forward by Botswana’s government for the country’s long delay in drafting implementation legislation is a severe lack of expertise and human capital on the specific issue.<sup>36</sup> Stone goes on to state that a further explanation for their delay in compliance is the proliferation of treaty obligations on the part of Botswana. ICC matters are also viewed as low priority matters, and resources are diverted to other more pressing matters. Currently

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<sup>33</sup> The Southern African Development Community (SADC) is an inter-governmental organization headquartered in Gaborone, Botswana. Its goal is to further socio-economic cooperation and integration as well as political and security cooperation among 15 southern African states. It complements the role of the African Union. <http://www.sadc.int/> (Accessed on 31 March 2017).

<sup>34</sup> South Africa was the first African country to sign the Rome Statute of the ICC on 17 July 1998. This was ratified on 27 November 2000. South Africa then incorporated the Rome Statute into domestic law in terms of Section 231(4) of the Constitution by enacting the Implementation of the Rome Statute of the International Criminal Court Act (Act 27 of 2002), which was assented to on 12 July 2002.

<sup>35</sup> The Rome Statute of the International Criminal Court Bill, Bill No. 22 of 2014. The Bill was passed during 2017, and The Rome Statute of the International Criminal Court Act was adopted by the Botswana Parliament. The Act is however not yet accessible, and for purposes of this study the Bill will be used.

<sup>36</sup> Stone L “Unable or Unwilling” Case Studies on Domestic Implementation of the ICC Statute in Selected African Countries <https://www.issafrica.org/chapter-4-country-study-i-botswana-lee-stone> (Accessed on 4 May 2016).



Botswana has failed to report to any of the treaty monitoring bodies that were established to monitor compliance with the various international law treaties.<sup>37</sup>

This work will also include a review of two non-SADC countries, namely Kenya and Uganda. Kenya signed the Rome Statute on 11 August 1999, and ratified it on 15 March 2005, and thereafter adopted the International Crimes Act in 2008 into its domestic legislation. Kenya was chosen for the study in order to judge the effectiveness of the legislation in dealing with international crimes that were perpetrated after the 2007-2008 Kenyan presidential elections. Uganda signed the Rome Statute on 17 March 1999, and ratified it on 14 June 2002. On 10 March 2010, the International Criminal Court Act was unanimously adopted by its Parliament. The Act entered into force on 25 June 2010, and makes provision for both cooperation and complementarity. Although implementation of the Rome Statute has been achieved by Uganda, additional legislation will be required to ensure that Uganda can close the impunity gap that currently exists.<sup>38</sup>

African countries have a very poor record when it comes to honouring their compliance with regard to their obligations under international human rights treaties.<sup>39</sup> There is no straightforward answer to the question of non-compliance, and it seems to be a much more complicated situation than merely their lacking the will to comply. Accordingly, some scholars are of the view that instead of deliberately disregarding the relevant human rights instruments, many of the countries quite simply lack the necessary skills, manpower and resources required to comply with the increasingly complex set of obligations and norms incurred by their governments through the signing of these treaties.<sup>40</sup> Furthermore, some of the more important

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<sup>37</sup> Stone L "Unable or Unwilling" Case Studies on Domestic Implementation of the ICC Statute in Selected African Countries.

<sup>38</sup> Moffett L, The Ugandan International Criminal Court Act 2010: What does it mean for victims? <http://www.vrwg.org/home/home/post/21-the-ugandan-international-criminal-court-act-2010-what-does-it-mean-for-victims> (Accessed on 25 January 2017) / Oko O "The challenges of international criminal prosecutions in Africa" 2007-2008 Fordham International Law Journal, Volume 31, Pages 343-414.

<sup>39</sup> According to the universal periodic review from the Office of the United Nations High Commissioner for Human Rights. <http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRImplementation.aspx> and <http://www.ohchr.org/EN/Countries/AfricaRegion/Pages/ZWIndex.aspx> (Accessed on 23 March 2017).

<sup>40</sup> Odinkalu C.A "Back to the future: the imperative of prioritizing for the protection of human rights in Africa" 2003 Journal of African Law, Volume 47, Number 1, Pages 1-37 / Odinkalu C.A " Human rights mechanisms in Africa: Recent developments in their norms, institutions and jurisprudence" 2003 Human Rights Law Review, Volume 3, Issue 1, Pages 105-126 / Viljoen F " Africa's contribution to the development of international human rights and humanitarian law" 2001 African Human Rights Law Journal, Vol. 1, Issue 1, Pages 18-39.

factors that play a role with regard to the implementation of the Rome Statute by African countries can be described as political obstacles. In this regard the work seeks to study the African Union (hereafter referred to as the “AU”) and its influence on its member states.<sup>41</sup>

The focus of this work, however, will be to explore the more objective factors such as insufficient legislation, lack of resources and different legal systems, for example, some countries’ laws only provide for either complementarity or cooperation clauses and are fraught with implementation problems. The question then arises whether the domestication of the Rome Statute in these countries should not be standardised. According to Tladi, at the moment there is no comprehensive treaty or instrument that places an obligation on a state party to criminalise and exercise jurisdiction of international crimes as specified in the Rome Statute at a national level.<sup>42</sup> Furthermore, there is no convention in place to regulate interstate cooperation, which hampers the successful investigation of international crimes.<sup>43</sup> At this stage, states are reliant on mutual legal assistance agreements in investigating international crimes.<sup>44</sup>

As already mentioned, certain African countries rarely have the capacity, both human and administrative, to implement a system of complementarity and cooperation. Yet another problem is that some countries’ lack the necessary detailed legislation, and as a result these countries can only prosecute certain international

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<sup>41</sup> The African Union is a continental union consisting of 55 countries in Africa. The AU was established on 26 May 2001 in Addis Ababa and launched on 9 July 2002 in South Africa, with the aim of replacing the Organisation of African Unity (OAU). <https://www.au.int/> (Accessed on 31 March 2017).

<sup>42</sup> Tladi D “Complementarity and cooperation in international criminal justice: Assessing initiatives to fill the impunity gap” 2014 Institute for Security Studies, Paper 277 / Tladi D “A horizontal treaty on cooperation in international criminal matters: The next step for the evolution of a comprehensive international criminal justice system” 2014 Southern Africa Public Law, Volume 29, Issue 2, Pages 368-387.

<sup>43</sup> According to Tladi, the Rome Statute itself is not sufficient as an international legal framework for improving and enhancing action on a domestic level against international crimes.

<sup>44</sup> On the First of March 2007, the SADC Protocol on Mutual Legal Assistance entered into force. The Protocol’s aim is to ensure regional integration in the areas of social welfare peace and security, and to extend to SADC member states the widest possible mutual legal assistance within the limits of the laws of their respective jurisdictions. To afford this mutual legal assistance, SADC has adopted common rules with regard to assistance in criminal matters. In signing the Protocol, member states have agreed to assist each other in respect of investigations, prosecutions and proceedings in a criminal matter. The protocol provides guidance on how such assistance will be given, the authorities responsible and grounds on which such assistance can be denied. [http://www.sadc.int/documents-publications/show/Protocol\\_on\\_Mutual\\_Legal\\_Assistance\\_in\\_Criminal\\_Matters\\_2002.pdf](http://www.sadc.int/documents-publications/show/Protocol_on_Mutual_Legal_Assistance_in_Criminal_Matters_2002.pdf) (Accessed on 31 March 2017).

crimes, and not all the crimes specified by the Rome Statute.<sup>45</sup> Different countries have different legal systems, and with countries that follow a dualist system, international law is not directly incorporated into their domestic legal system and first needs to be legislated before it can be applied by their national courts.<sup>46</sup>

As previously stated, the objective of the study is to identify problem areas with regard to the implementation of the Rome Statute, and after identifying these issues, to suggest solutions that can be implemented to give full effect to the Rome Statute. According to Amnesty International's Checklist for the Effective Implementation of the Rome Statute, the implementation of a state's obligations under the Rome Statute is not merely limited to enacting legislation, but also extends to actually implementing that legislation through investigations and prosecutions in national courts, and to promptly cooperate with all requests made by the ICC. Additionally, the checklist also includes the training of officials as well as educating the general public.<sup>47</sup>

Should African countries not find a solution to the challenges facing the implementation of the Rome Statute, and with the AU's despondency with the workings of the ICC, there exists a real possibility that the AU might create a separate court to prosecute international crimes. Former Deputy Chief Justice Dikgang Moseneke has endorsed the idea of an African international criminal court, observing:

*"Will an African ICC serve us better? The answer may be yes. African people deserve to be spared atrocities by their leaders. African leaders have no right to oppress their people and think there will be no consequences. An African ICC could work".<sup>48</sup>*

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<sup>45</sup> Not all crimes provided for in the Rome Statute may be defined in state parties' domestic legislation therefore creating a lacuna. This will be dealt with in Chapter 4 of the study, when Botswana, Kenya and Uganda's legislation is examined.

<sup>46</sup> For a more detailed discussion on monist and dualist legal systems and how they implement the Rome Statute see <http://www.peaceandjusticeinitiative.org/implementation-resources/dualist-and-monist> (Accessed on 24 March 2017).

<sup>47</sup> International Criminal Court Updated Checklist for Effective Implementation is an online publication by Amnesty International containing recommendations to states that have ratified the Rome Statute on what they should do to ensure that the ICC is an effective complement to their national courts and that their authorities are in a position to fully cooperate with the ICC. In this regard see <https://www.amnesty.org/en/documents/ior53/009/2010/en/> (Accessed on 24 March 2017).

<sup>48</sup> Lewis C "Deputy Chief Justice backs call for African ICC"

However, as the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (aimed at providing that court with jurisdiction over international crimes), which the AU adopted at its 23rd ordinary session in June 2014, identified “structural and financial challenges”, it is doubtful whether an African criminal court will become a reality in the near future.<sup>49</sup> It is the present author’s view that a separate African criminal court would constitute a major setback for international criminal justice, and would certainly create more problems than it would solve. The creation of a separate Criminal Chamber in the African Court of Justice and Human Rights could trigger a mass exodus by African states from the ICC, and would also result in jurisdictional problems for the remaining ICC state parties, since they are not part of the AU, and would not have access to the Criminal Chamber.

It is therefore imperative that a truly workable solution is proposed to facilitate the implementation of the Rome Statute and to address any misgivings that exist between the ICC and the AU. One such solution as proposed by Du Plessis and Gevers,<sup>50</sup> is to employ the doctrine of effective construction in order to balance the competing obligations countries have when they are both state parties to the Rome Statute and member states of the AU. Whether this could be a lasting solution remains to be seen.

Enhancing complementarity has obvious benefits in that African states will be in a position to prosecute international crimes independently, which would reduce the need for the ICC’s involvement, while at the same time mitigating the AU’s criticism that the ICC is biased against Africa.<sup>51</sup> There are two recent international initiatives focused on facilitating a state’s capacity to exercise criminal jurisdiction over international crimes. The first of these is the study by the International Law

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<http://www.sabc.co.za/news/a/6324df8049117a8cbf75bf70b5a2a8d2/Deputy-Chief-Justice-backs-call-for-African-ICC-20151107> (Accessed on 16 May 2016).

<sup>49</sup> Swanepoel C.F South Africa’s obligation as member state of the International Criminal Court: the Al-Bashir controversy 2015, *Journal for Juridical Science* 40 (at pages 65-66).

<sup>50</sup> Du Plessis M, Gevers C “Balancing competing obligations: The Rome Statute and the AU decisions” 2011 Institute for Security Studies, Paper 225.

<sup>51</sup> Van der Vyver J.D “Prosecuting the President of Sudan: A Dispute between the African Union and the International Criminal Court” 2011, *African Human Rights Law Journal*, 2011, Volume 11, Pages 683-698 / Cole R.J.V “Africa’s relationship with the International Criminal Court: More political than legal” 2013 *Melbourne Journal of International Law*, Volume 14, Pages 670-698 / Naldi G, Magliveras K “The ever difficult symbiosis of Africa with the International Criminal Court” 2013 *Revue Hellenique de Droit International Journal*, Pages 59-125 / Keppler E “Managing setbacks for the International Criminal Court in Africa” 2011 *Journal of African law*, Page 1-14.

Commission of crimes against humanity. The second is the initiative by Belgium, Slovenia and the Netherlands to create a convention on mutual legal assistance with respect to the Rome Statute.<sup>52</sup> Creating a convention focused on African countries could also facilitate compliance by African state parties to the Rome Statute. SADC very early on developed a model enabling act as part of their process towards ratification of the Rome Statute.<sup>53</sup> This model enabling act was presented at the SADC workshop on the ratification of the Rome Statute, which took place in Pretoria during July 1999.<sup>54</sup> Although basic in its design it does provide all the necessary guidelines for states to incorporate the Rome Statute into their domestic legislation.

In order to identify problem areas with regard to the implementation of the Rome Statute by the four African countries being studied, the work will follow a quantitative and comparative desktop approach making use of a literature review. The approach to be adopted in this study will be one of problem solving; comparing South Africa's ICC Act to those of Uganda, Kenya and Botswana, and providing solutions to their implementation challenges. South African legislation and jurisprudence will as a general rule be the benchmark to test the standard of implementation of the Rome Statute in Botswana, Kenya and Uganda. The study is significant in that it suggests certain legal reforms or policy guidelines that could be implemented by the selected African countries in order to guarantee full implementation of the Rome Statute in a practical manner enabling the countries to prosecute international crimes in their domestic courts. The study also aims to provide a solution to the strained relationship between the AU and the ICC.

The ICC Act will be discussed in the second chapter. Chapter three will be devoted to subjective factors influencing the implementation and application of the Rome Statute in African countries. Here the decisions made by the Assembly of the African

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<sup>52</sup> At its sixty-eighth session, in 2016, the International Law Commission had before it the second report of the Special Rapporteur on the topic of crimes against humanity, as well as a memorandum by the Secretariat, which can be accessed at [http://legal.un.org/ilc/summaries/7\\_7.shtml](http://legal.un.org/ilc/summaries/7_7.shtml) and <http://legal.un.org/docs/?symbol=A/CN.4/690> and also <http://legal.un.org/docs/?symbol=A/CN.4/698>. The initiative by Belgium, Slovenia and the Netherlands are available at [http://www.iap-association.org/getattachment/Conferences/Annual-Conferences/Annual-Conference-2015/Wednesday-16-September-2015/20AC\\_SIGM\\_SB\\_Annex5-\(1\).pdf.aspx](http://www.iap-association.org/getattachment/Conferences/Annual-Conferences/Annual-Conference-2015/Wednesday-16-September-2015/20AC_SIGM_SB_Annex5-(1).pdf.aspx) and [https://asp.icc-cpi.int/en\\_menus/asp/complementarity/List-of-Actors/Lists/Actorslist/DispForm.aspx?ID=19](https://asp.icc-cpi.int/en_menus/asp/complementarity/List-of-Actors/Lists/Actorslist/DispForm.aspx?ID=19) (Accessed on 15 January 2018).

<sup>53</sup> Maqungo S "The establishment of the International Criminal Court: SADC's participation in the negotiations" 2000 African Security Review Volume 9 Number 1.

<sup>54</sup> Maqungo S "The establishment of the International Criminal Court: SADC's participation in the negotiations" 2000 African Security Review Volume 9 Number 1.

Union challenging the ICC and its prosecution strategy, especially the decision regarding President Al Bashir will be discussed, and what effect this has on the AU's current discontent with the ICC. As this is a comparative study, chapter four will look at Botswana, Kenya and Uganda and the challenges faced by these countries with the implementation of the Rome Statute. The fifth and last chapter will be dedicated to providing a workable solution to the challenges faced and conclusion of the study.

### 1.3 Conclusion

As progressive as the Rome Statute may be in ensuring that perpetrators of the most serious crimes of concern to the international community are brought to justice, the Rome Statute will remain only an ideal if it is not effectively implemented by state parties.<sup>55</sup> Even after domesticating the Rome Statute into their respective national legal systems, the various implementation acts need to be effectively employed by the courts, law enforcement authorities and prosecution authorities in order to ensure justice. The necessary political willpower also needs to exist to facilitate the process. The ICC commenced its activities on the 1<sup>st</sup> of July 2002, but to date only four individuals have been found guilty.<sup>56</sup> There is a need for state parties to not only cooperate with the ICC, but also to actively investigate and prosecute offenders through their domestic criminal legal systems. State parties are the first and most important line of defence against impunity, and prosecution of individuals by The Hague should be seen as a last resort.

The following chapter will focus on South Africa's implementation of the Rome Statute, as well as some of the legal challenges faced in this regard. As previously mentioned, South Africa's legislation will serve as the benchmark to measure the

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<sup>55</sup> Turner J.I "Nationalizing International Criminal Law" 2005, Stanford Journal of International Law, Volume 41, Issue 1, Pages 1-52.

<sup>56</sup> Germain Katanga was found guilty, on 7 March 2014, as an accessory to one count of murder and four counts of war crimes committed during February 2003, during an attack on the village of Bogoro, in the Ituri district of the Democratic Republic of the Congo (The Katanga Case: ICC-01/04-01/07), Thomas Lubanga Dyllo was found guilty, on 14 March 2012, of the war crimes of enlisting and conscripting child soldiers and using them to participate actively in hostilities (The Lubanga Case: ICC-01/04-01/06), Ahmad Al Faqi Al Mahdi, who was found guilty as a co-perpetrator for crimes consisting of directing attacks against historic and religious buildings in Timbuktu, Mali during June and July 2012 (The Al Mahadi Case: ICC-01/12-01/15) , and Jean-Pierre Bemba Gombo who was Found guilty, on 21 March 2016, of murder and rape and three counts of war crimes (murder, rape, and pillaging) (The Bemba Case: ICC-01/05-01/08), although this case is currently before the appeals chamber. <https://www.icc-cpi.int/Pages/cases.aspx> (Accessed on 29 March 2017).

implementation of the Rome Statute in the selected African countries researched in this work.



## Chapter 2

### South Africa and the Implementation of the Rome Statute of the International Criminal Court Act

#### 2.1 Introduction

*“So, we would suggest to all those war criminals internationally who perpetrate these most heinous crimes against mostly innocent populations not to look for a haven in South Africa, because the opportunity to prosecute them is there. If we do not do it, we will definitely collaborate with the international court to bring such persons to book....Another very important principle spelled out in this legislation is that heads of state, heads of government and members of parliaments will not be able to raise a defence that they are heads of state. For example, if honourable members followed the Pinochet case in England, that was the defence which was raised. This legislation will not allow a person to raise such a defence. If one is a member of an army or police force who took orders which are manifestly unlawful and one tries to use that as a defence, it will not be allowed as a defence in this legislation. So, in that sense, this legislation is being very innovative in not allowing that to happen...”<sup>57</sup>*

From the abovementioned Hansard extract it is clear that the Government’s intention with introducing the ICC Act was to stop impunity and to simultaneously prevent the occurrence of mass atrocities against innocent civilian populations in war-torn countries. South Africa was leading by example on the continent, and the ICC Act could truly be described as innovative and progressive.

Yet at a recent question and answer session in Parliament<sup>58</sup> the Minister of Justice and Constitutional Development was asked whether the government of South Africa intends to resign as a signatory of the Rome Statute, in light of the government’s

<sup>57</sup> Advocate Johnny De Lange, addressing Parliament regarding the Implementation of the Rome Statute of the International Criminal Court Bill. Hansard Debates 2002.  
[http://www.parliament.gov.za/live/content.php?Category\\_ID=119&fYear=2002&fMonth=DontShow](http://www.parliament.gov.za/live/content.php?Category_ID=119&fYear=2002&fMonth=DontShow)  
(Accessed on 6 February 2017).

<sup>58</sup> Parliamentary Question Number 235, asked by Mr M.A Mncwango (IFP) on 30 July 2015, and responded to by Minister M Masuta (Minister of Justice and Constitutional Development) on 31 July 2015 (written response).



failure to meet its obligations not only as a state party to the Rome Statute, but also in terms of the ICC Act, due to the fact that it failed to arrest president Al-Bashir when he attended the Summit Meeting of the AU which was held in Johannesburg, in June 2015, and the subsequent litigation that followed that event.<sup>59</sup> The response from Minister Masuta at the time was that *“the government has not taken any decision to resign as a signatory of the Rome Statute of the International Criminal Court”*. Although this was a positive sign, on 6 June 2016, it was reported that a draft bill was circulated at a Cabinet meeting, the purpose of which was to withdraw South Africa as a state party from the Rome Statute.<sup>60</sup> It is clear that the on-going Al-Bashir debacle and pressure from the AU placed the South African government in an unenviable position and provoked a very strong reaction from academics and civil society alike.

Indeed, the question should be asked how it is possible for South Africa to change from a position of actively supporting the creation of an international criminal court, to not adhering to its authority and to risk being reported to the United Nations Security Council, and, as has now happened, needing to explain its failure to cooperate before the Bureau of the Assembly of State Parties to the ICC. It seems there is no clear-cut answer to this question as there currently exists a conflict between political interests on the one hand and both international- and domestic legal obligations on the other. On 19 October 2016, the Minister of International Relations and Cooperation filed an instrument of withdrawal in terms of Section 127(1) of the Rome Statute, and on 2 February 2017, the Minister of Justice and Correctional Services formally introduced the Implementation of the Rome Statute of the International Criminal Court Act Repeal Bill,<sup>61</sup> which aims to repeal the ICC Act in its entirety. For the purpose of this study, and as the ICC Act has not yet been repealed, the Act will be used to measure compliance and implementation of the Rome Statute by other African state parties.

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<sup>59</sup> Judgments will be discussed in this Chapter hereunder.

<sup>60</sup> Du Plessis C “Cabinet puts bill to pull out of ICC on hold” <http://www.news24.com/SouthAfrica/News/cabinet-puts-bill-to-pull-ou-of-icc-on-hold-20160605> (Accessed on 6 June 2016).

<sup>61</sup> Bill 23 of 2016, as introduced in the National Assembly, and as published in Government Gazette No. 40403 of 3 November 2016.

## 2.2 Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002

By the time South Africa attended the Rome Conference, it had already as a member of the SADC countries, participated in efforts to establish such a court as early as 1993. After 1993, the SADC countries met on various occasions to ensure that they would present a joint and uniform front during the Rome Statute negotiations. The SADC countries adopted a document called “*the Principles of Consensus*” in Pretoria 14 September 1997. This document later became the “instruction manual” for SADC negotiations during the Rome Conference. Thereafter an African Conference on the International Criminal Court was held from 5 to 6 February 1998, where the Dakar Declaration of the Establishment of the International Criminal Court was adopted. The ten SADC negotiating principles,<sup>62</sup> adopted by SADC members a few months prior, consequently formed the basis on which the Dakar Declaration was adopted.<sup>63</sup> After the successful adoption of the Rome Statute, a follow-up meeting was held by the SADC countries where the Model Enabling Act, Ratification Kit for the ICC and a Common Understanding which would guide the states in their approach in ratification of the Statute was adopted.<sup>64</sup> South Africa lodged its instrument of ratification of the Rome Statute on 10 November 2000, becoming the 23rd state party, and on 1 July 2002 the Statute became operational. Shortly thereafter, on 18 July 2002, Parliament passed the Implementation of the Rome Statute of the International Criminal Court

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<sup>62</sup> Maqungo S “The establishment of the International Criminal Court: SADC’s participation in the negotiations” 2000 African Security Review Volume 9 Number 1, states the negotiating principles : “(1) Support for an early Establishment of an International Criminal Court. (2) The ICC should be effective, independent and impartial and operating within the highest standards of international criminal justice. (3) The ICC should decide whether it has jurisdiction in circumstances where the national judicial system is not available, fails to prosecute or investigate or is ineffective. (4) The ICC should be complementary to national criminal justice systems in cases where such trial procedures may not be available or may be ineffective. (5) The ICC should be responsive and give consideration to plights of victims especially women and children. (6) The ICC should be unfettered by veto of the Security Council. (7) Independence of the Prosecutor should be guaranteed and he/she must have ex officio powers to initiate investigations (8) The ICC should enjoy maximum cooperation of States. (9) The ICC ought to have inherent jurisdiction over the crime of genocide, crimes against humanity, and serious violations of the principles applicable in armed conflicts and if consensus is reached in respect of the crime of aggression it should also fall under inherent jurisdiction of the ICC. Opt in or prior consent should be in respect of treaty-based crimes. (10) Human rights must be respected in all aspects of the ICC Statute, especially rights of the accused to a fair trial”.

<sup>63</sup> Maqungo S “The African contribution towards the establishment of an International Criminal Court” 2000 African Yearbook on International Law, Pages 333 to 350.

<sup>64</sup> Olugbuo B.C “Implementation of the Rome Statute in Africa: An analysis of the South African Legislation” 2004 Eyes on the International Criminal Court Journal, Volume 1:1 2004 Pages 219-232.

Act 27 of 2002 (the ICC Act), which came into effect on 16 August of that year. In all of this it can be said that South Africa led by example.

In line with South Africa's duty as a state party, and in terms of Section 231(4) of the Constitution, on 18 July 2002, Parliament passed the ICC Act. The Act was implemented to ensure that South Africa complies with its obligations as a state party to the Rome Statute. The ICC Act incorporated the Rome Statute in its entirety as a schedule to the Act. According to du Plessis, the Act:

*“has three main aims, the first of which is to do justice to the complementarity principle built into the Rome Statute whereby states are expected to prosecute individuals within their national criminal justice jurisdictions for crimes the ICC would otherwise have jurisdiction over. The second aim of the Act is to ensure that South Africa is able to cooperate fully with the ICC, and thirdly, it enacts into South African domestic law the substantive offences the ICC may assert jurisdiction over, the core crimes of genocide, crimes against humanity and war crimes”*.<sup>65</sup>

So thorough was South Africa's commitment to comply with the Rome Statute that the preamble of the ICC Act states:

*“...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 principles espoused above were also included in the Department of Justice and Constitutional Development's memorandum setting out the objects of the bill to the Portfolio Committee on Justice and Constitutional Affairs, when it was first referred to

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<sup>65</sup> Du Plessis M “Bringing the International Criminal Court Home: The implementation of the Rome Statute of the International Criminal Court Act 2002” 2003 South African Journal of Criminal Justice, Volume 1, Pages 1 to 16, and Section 3(a);(b) and (c) of the ICC Act.

them in August of 2001.<sup>66</sup> After the commencement of the Act, by presidential proclamation,<sup>67</sup> on 23 May 2003, the Priority Crimes Litigation Unit (PCLU) was created. The unit is located within the Office of the National Director of Public Prosecutions, and is responsible for managing and directing investigations and prosecutions arising from the ICC Act.<sup>68</sup> The Directorate of Priority Crimes Investigation (the DPCI or “Hawks”) is the specialised investigative unit within the SAPS responsible for the investigation of international crimes.

### **2.3 A closer look at the ICC Act**

The ICC Act consists of five chapters. As with the Rome Statute, Chapter One of the Act defines genocide, crimes against humanity and war crimes. Chapter Two deals with the jurisdiction of South African courts as well as the institution of prosecutions in South Africa with respect to the defined crimes. In Chapter Three the functioning, privileges and immunities of the Court are dealt with, whilst in Chapter Four cooperation with and assistance to the Court in or outside the country is discussed. Chapter Five deals with miscellaneous matters incidental to the functioning of the Court. Only the parts of the ICC Act most relevant to this study will be discussed, as a complete detailed discussion of the workings of the Act falls outside the scope of this dissertation.

#### *2.3.1 Jurisdiction of South African Courts*

International criminal law recognises five different bases for the establishment of jurisdiction by a state. They are territoriality, nationality, passive personality jurisdiction, the protective principle and the universality principle.<sup>69</sup>

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<sup>66</sup> <http://0-discover.sabinet.co.za.oasis.unisa.ac.za/document/BTD10123> (Accessed on 15 January 2018).

<sup>67</sup> Proclamation Number 46 of 2003, as published in Government Gazette Number 24876 on 23 May 2003.

<sup>68</sup> <https://www.npa.gov.za/sites/default/files/pclu/About%20PCLU%20signedoff.pdf>, (Accessed on 25 October 2017).

<sup>69</sup> O’Keefe R “Universal Jurisdiction: Clarifying the basic concept” 2004, *Journal of International Criminal Justice*, Volume 2, Pages 735-760.

In terms of the doctrine of universal jurisdiction, national courts have jurisdiction over a crime without reference to the place of the crime, the nationality of the victim or perpetrator, or any other link between the crime and the nation that is prosecuting the matter. The doctrine of universal jurisdiction is linked to the peremptory norm of “*ius cogens*”<sup>70</sup> and the concept of “*erga omnes*”.<sup>71</sup> South Africa exercises universal jurisdiction based on its international obligations under both treaty law and customary international law.<sup>72</sup> South Africa is also a state party to the Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment,<sup>73</sup> colloquially referred to as the United Nations Convention Against Torture.

The ICC Act establishes a number of jurisdictional grounds by which a South African court might be seized with the prosecution of a person alleged to be guilty of the abovementioned crimes. Not only does the ICC Act create jurisdiction for South African courts over international crimes as defined by the Rome Statute, but in terms of Section 4(3) it endows our courts with extraterritorial jurisdiction to prosecute a person who commits a core crime outside the territory of South Africa in four instances. Section 4(3) reads as follows:

*”In order to secure the jurisdiction of a South African court for purposes of this Chapter, any person who commits a crime contemplated in subsection (1) outside the territory of the Republic, is deemed to have committed that crime in the territory of the Republic if—(a) that person is a South African citizen; or*

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<sup>70</sup> Article 53 of the Vienna Convention on the Law of Treaties states that “a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”.

<sup>71</sup> Cannizzaro E *The Law of Treaties Beyond the Vienna Convention* (Oxford online publication, 2011). *Erga omnes* refers to rights or obligations that are owed towards everyone, and to which all are entitled. According to Bassiouni, the concepts of *ius cogens* and *erga omnes* differ from each other in that *ius cogens* refers to the legal status that is ascribed to certain international crimes such as genocide, whereas obligations *erga omnes*, pertains to the legal implications that arise from these international crimes characterization as *ius cogens*. Bassiouni M.C “International Crimes: “Jus Cogens” and “Obligatio Erga Omnes” 1996, Law and Contemporary Problems, Vol. 59, No. 4, Pages 63-74.

<sup>72</sup> Nakitto S “South Africa’s Exercise of Universal Jurisdiction: An analysis of the Supreme Court decision in the National Commissioner of the South African Police Service and Another v Southern African Human Rights Litigation Centre and others (2013)” 2014 International Human Rights Law Review, Volume 3, Pages 146-158.

<sup>73</sup> South Africa signed the treaty on 29 January 1993, and ratified it on 10 December 1998.

*(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.”*

Before the ICC Act came into force, the position in South Africa, as in most other common law countries, was that the exercise of criminal jurisdiction relied upon the principle of territoriality.<sup>74</sup> However according to du Plessis,<sup>75</sup> Section 4(3)(c) even goes as far

*“...as to create universal jurisdiction for South African courts with respect to 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 provision uniquely allows South Africa to prosecute an individual for the commission of a crime in another country, when that person is present in our country afterwards. From the above it is clear that this legislation's intent was that crimes covered by the ICC Act should be prosecuted regardless of where they have been committed. This interpretation of Section 4(3)(c) of the ICC Act was confirmed in a unanimous judgment by the Constitutional Court in the judgment of *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and Another*,<sup>76</sup> which was handed down on 30 October 2014. In short, the factual background that gave rise to the Constitutional Court judgment related to accusations of torture inflicted upon supporters of the opposition political party by the Zimbabwean Police Force prior to national elections being held in Zimbabwe.

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<sup>74</sup> According to Jessberger and Powell, “*there is a presumption in South African law against extra-territorial operation of criminal laws.*” Jessberger F and Powell C ‘Prosecuting Pinochets in South Africa- Implementing the Rome Statute of the International Criminal Court’ 2001, South African Criminal Justice, Volume 14, Pages 344-362.

<sup>75</sup> Du Plessis M “South Africa's implementation of the ICC: An African example” 2007 Journal of International Criminal Justice 2007, Volume 5, Issue 2, Pages 460-479.

<sup>76</sup> *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and Another* [2014] ZACC 30.

In the judgment, the court held that South Africa had the power and duty to investigate crimes against humanity that occurred in a foreign territory against foreign nationals.<sup>77</sup> This judgement can truly be seen as a landmark in South Africa's international criminal law, as it clearly sets out South Africa's obligations as a state party and the conditions that would trigger the duty to investigate a crime under the ICC Act. As stated by Majiedt AJ, the very core of the judgment goes to South Africa's responsibility as a "*member of the family of nations*" to investigate crimes against humanity.<sup>78</sup> The importance of the judgment lies in the court's interpretation of South Africa's duty to *investigate* allegations of crimes against humanity even though the perpetrator may not be present in the territory of South Africa.<sup>79</sup> Without this interpretation of Section 4(3) of the ICC Act, South Africa's hands would effectively be tied.

This reasoning is in accordance with both the Constitution and the Rome Statute which also distinguishes between the investigation of crimes on the one hand, and the prosecution of those crimes on the other.<sup>80</sup> The court did however state that universal jurisdiction to investigate international crimes cannot be absolute, and that it is subject to two very important limitations.<sup>81</sup> The first limitation relates to the principle of subsidiarity which entails that there must be a substantial and true connection between the subject matter and the source of the jurisdiction, and that South African authorities can only investigate a matter where the other country is unwilling or unable to do so.<sup>82</sup> The second limitation relates to the principle of

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<sup>77</sup> South Africa enacted the Prevention and Combating of Torture of Persons Act, Act 13 of 2013, thereby domesticating the United Nations Convention Against Torture.

<sup>78</sup> At paragraph 3 of the judgment.

<sup>79</sup> The Supreme Court of Appeal in the matter of National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre (485/2012) [2013] ZASCA168, endorsed the principle of jurisdiction *in absentia*, and disregarded the requirement that perpetrators of crimes against humanity should be present in the territory of South Africa for the SAPS to initiate an investigation, which principle was confirmed by the Constitutional Court.

<sup>80</sup> Part V, Articles 53 to 61 of the Rome Statute. It should however be noted that the International Criminal Court does not have universal jurisdiction. The court only has jurisdiction over crimes that have been committed in the territory of state parties or by one of its nationals. The only other alternative is if the Security Council refers a situation to the court in terms of Chapter VII of the United Nations Charter. Section 35(3)(c) of the Constitution states that "*Every accused person has a right to a fair trial, which includes the right to be present when being tried*".

<sup>81</sup> Paragraph 61 to 64 *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and Another* [2014] ZACC 30.

<sup>82</sup> The phrase "unwilling or unable" was taken by the court from the Rome Statute, and has now been incorporated into South Africa's domestic jurisprudence as a limitation for the institution of an investigation.

practicality, and whether an investigation can actually result in the prosecution of a perpetrator.

The court also noted that the need for state parties to comply with their international obligations to prosecute these crimes is most crucial when the crimes are committed by citizens of countries that are not parties to the Rome Statute. This makes perfect sense, because, should a state party fail to investigate and prosecute such cases, it would permit impunity. The only way to bring such perpetrators to book would be for courts to exercise universal jurisdiction, subject to, certain limitations.<sup>83</sup>

What is of crucial importance to the current study, are some of the reasons identified by the court furnished by the South African authorities for not investigating the matter. The first of these reasons relate to the South African Police Service's lack of insight into the facts of the matter and their misinterpretation of the law applicable thereto.<sup>84</sup> The SAPS took the view that South African courts would not have jurisdiction to adjudicate crimes committed in Zimbabwe, by Zimbabweans, against their own countrymen. However the court correctly pointed out the differences between the jurisdiction relating to the investigation of a crime and the jurisdiction relating to the prosecution thereof where an individual's presence is necessary.<sup>85</sup>

The second reason given by the SAPS was that any investigation would be potentially harmful to South Africa – Zimbabwe relations. It seems that political considerations were seen to outweigh the duty of the SAPS to investigate crime as mandated by the Constitution. The court however stated that

*“Political inter-state tensions are, in most instances, virtually unavoidable as far as the application of universality, the Rome Statute and, in the present instance, the ICC Act is concerned”.*<sup>86</sup>

The court further stated that *“an investigation within the South African territory does not offend against the principle of non-intervention...”*<sup>87</sup> Again, political and diplomatic considerations seem to halt the effective implementation of the Rome

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<sup>83</sup> Section 4(3) of the ICC Act.

<sup>84</sup> The law in this case relates to the interpretation of the Constitution, the ICC Act and the South African Police Service Act, Act 68 of 1995.

<sup>85</sup> At paragraphs 77 to 81 of the judgment.

<sup>86</sup> At paragraph 74 of the judgment.

<sup>87</sup> At paragraph 78 of the judgment.



Statute. As stated by Werle and Bornkamm, the SAPS and National Prosecuting Authority should be guided solely by legal considerations.<sup>88</sup> Ventura is of the view that despite the court clearly stating that political considerations should not influence the decision to investigate, it would always be possible to dress a decision not to investigate in non-political colours, such as the geographical remoteness of the crime, the unrealistic prospects of obtaining the requisite evidence, that the relevant state would not agree to extradition, or that the amount of resources necessary for the investigation would not be available.<sup>89</sup> He further states that

*“It could very well be that upon judicial review these grounds are held to be well founded and rational, but at the same time there will always be the lingering doubt as to whether politics played a role and just simply not put on paper”.*<sup>90</sup>

According to Ventura, the National Prosecuting Authority and the Hawks would have been obliged to amend their policies and internal processes in order to give effect to the judgement.<sup>91</sup> What effect the judgement will have on the practical processes of the investigation and the prosecution of international crimes in South Africa remains to be seen.

### 2.3.2 Complementarity

As stated in Chapter 1, the concept of complementarity was only adopted in the Genocide Convention of 1948, and thereafter in the Geneva Conventions of 1949. It was however with the establishment by the United Nations Security Council of tribunals in Yugoslavia and Rwanda for the prosecution and punishment of violations of fundamental norms of the international community that the concept of concurrent jurisdiction, with the primacy of international jurisdiction was first created.<sup>92</sup> The tribunals did not have exclusive jurisdiction over the crimes that fell within their ambit,

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<sup>88</sup> Werle G and Bornkamm P.C “Torture in Zimbabwe under Scrutiny in South Africa: The judgment of the North Gauteng High Court in SALC v National Director of Public Prosecutions” 2013, Journal of International Criminal Justice, Volume 11, Page 659-675.

<sup>89</sup> Ventura M.J “The Duty to Investigate Zimbabwe Crimes Against Humanity (Torture) Allegations: The Constitutional Court of South Africa Speaks on Universal Jurisdiction and the ICC Act” 2015, Journal of International Criminal Justice, Volume 13, Pages 861-889.

<sup>90</sup> At page 887 of the article.

<sup>91</sup> At page 885 of the article.

<sup>92</sup> Bothe M, “Complementarity: Ensuring compliance with international law through criminal prosecutions-whose responsibility?” 2008, Die Friedens-Warte, Volume 83, Number 4, Pages 59-72

and the national courts of Yugoslavia and Rwanda also had the necessary jurisdiction to institute prosecutions.<sup>93</sup> With the creation of the Rome Statute, the concept was included, albeit with some compromise on the side of the drafters of the statute, in that a state party must genuinely be unwilling or unable to prosecute a perpetrator before the ICC's jurisdiction in the matter will be triggered. The ICC therefore does not have primary jurisdiction, and the Court's jurisdiction therefore differs from that of the ICTY and ICTR tribunals. Article 17(1) of the Rome Statute states as follows

*“Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;*

*(b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;*

*(c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;*

*(d) The case is not of sufficient gravity to justify further action by the Court.”*

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<sup>93</sup> In this regard, see for instance Article 9 of the Statute of the International Tribunal for the Former Yugoslavia, which states as follows: *“Article 9 Concurrent jurisdiction*

*1. The International Tribunal and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991.*

*2. The International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal”* As well as Article 8 of the Statute of the International Criminal Tribunal for Rwanda, which states that: *“1. The International Tribunal for Rwanda and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens for such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994.*

*2. The International Tribunal for Rwanda shall have primacy over the national courts of all States. At any stage of the procedure, the International Tribunal for Rwanda may formally request national courts to defer to its competence in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal for Rwanda.”*

According to McHenry, Article 17(1) of the Rome Statute sets forth four conditions under which the ICC must make a determination that a case is inadmissible.<sup>94</sup> Two of these conditions specifically refer to state sovereignty. The first condition being that a pending investigation or prosecution is being instituted in a domestic court that has the necessary jurisdiction, or the second, that after an investigation has been conducted, a state with the necessary jurisdiction has taken a decision not to prosecute the individual(s).<sup>95</sup> Complementarity was incorporated into the ICC Act, although no prosecution has ever been instituted by South Africa.

As stated by Jurdi, complementarity is a complex jurisdictional relationship between the ICC and national systems of state parties that has a wide impact on state sovereignty on the one hand and the fight against impunity on the other.<sup>96</sup> Crimes against humanity are widely accepted as *ius cogens* crimes, which would elicit prosecution by states. Jurdi mentions that

*“The principle of complementarity emerges from the community’s intention to end impunity for these heinous crimes. If the state is unwilling or unable, then the Court will fill the gap. Through complementarity, either the member state or the Court is able to fulfil an international duty to prosecute these crimes”.*<sup>97</sup>

The procedure for the institution of a prosecution in South Africa is set out in Section 5 of the ICC Act, which states as follows

*“(1) No prosecution may be instituted against a person accused of having committed a crime without the consent of the National Director.*

*(2) No 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.*

*(3) The National Director must, when reaching a decision on whether to institute a prosecution contemplated in this section, give recognition to the obligation that the Republic, in the first instance and in line with the principle of complementarity*

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<sup>94</sup> Teresa McHenry is the Chief, Human Rights and Special Prosecutions, U.S Department of Justice and a member of the U.S delegation to the ICC Review Conference.

<sup>95</sup> Article 17(1)(a) and (b) of the Rome Statute.

<sup>96</sup> Jurdi N.N *The International Criminal Court and National Courts A Contentious Relationship*(Routledge New York 2016).

<sup>97</sup> At page 31.

*as contemplated in Article 1 of the Statute, has jurisdiction and the responsibility to prosecute persons accused of having committed a crime.*

*(4) The Cabinet member responsible for the administration of justice must, in consultation with the Chief Justice of South Africa and after consultation with the National Director and, in writing, designate an appropriate High Court in which to conduct a prosecution against any person accused of having committed a crime.*

*(5) If the National Director, for any reason, declines to prosecute a person under this section, he or she must provide the Central Authority 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.*

*(6) A decision by the National Director not to prosecute a person under this section does not preclude the prosecution of that person in the Court.”*

An interesting aspect of this section is that permission from the National Director of Public Prosecutions is necessary before any criminal action can be instituted against an individual. Other than interests of national security or perhaps a conflict of interest with a pre-existing international obligation, it is not clear on what grounds the NDPP could refuse to institute a prosecution. In the matter of *Southern African Litigation Centre and Another v National Director of Public Prosecutions and Others*, Judge Fabricius stated as follows:

*“Respondents failed to discharge their individual and or collective responsibility to initiate, manage and direct an investigation in a co-operative manner as envisaged by the ICC Act, and legally required in terms of the NPA Act and SAPS Act, as read with the Presidential Proclamation relating to the Second Respondent. It was submitted that the reasons filed by the Respondents together with their answering affidavits confirmed that they had failed to apply their mind seriously to their obligations under the ICC Act, and to have wholly misunderstood the nature of that Act and their duties hereunder”<sup>98</sup>*

This would mean that the NDPP in giving reasons for not prosecuting, had failed to even consider the ICC Act and the obligations it places on South Africa.

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<sup>98</sup> *Southern African Litigation Centre and another v National Director of Public Prosecutions and Others* [2012] 3 All SA 198 (GNP), at paragraph 15 of the judgment.

Section 5(1) of the ICC Act is open to the risk of being abused, either for political reasons or due to a lack of will to prosecute. This is very disconcerting if one takes into consideration that complementarity is one of the cornerstones of the ICC, and by prosecuting an individual through a state party's domestic legislation, an ICC prosecution will be avoided. Currently the Rome Statute only makes provision for an ICC prosecution if a state party is genuinely "*unwilling or unable*" to prosecute. Fortunately, the Constitutional Court judgment that followed after the SCA judgement of the abovementioned case set the record straight as to South Africa's duty to investigate international human rights crimes.<sup>99</sup>

Another problem foreseen with complementarity is that in certain instances the charges in a domestic prosecution of an individual will not necessarily cover the same conduct that is being pursued by the ICC, or yet another, that the parameters of a domestic prosecution will be limited by that state party's inability to effectively prosecute the individual, irrespective of whether this is due to ineffective local statutes, limited resources or human capital, or even the fact that the defendant in the matter will not receive a fair trial should he or she be prosecuted by the domestic courts, as has been the case in Libya in the post Gaddafi era.<sup>100</sup>

### 2.3.3 *Cooperation with and assistance to the ICC*

This part of the ICC Act has been divided into two parts. The first part deals with cooperation with the ICC by South Africa in the form of the arrest and/or surrender of wanted individuals to the ICC. The second part deals with judicial assistance to the ICC, and the various ways in which South Africa as a state party can provide such assistance. It was Chapter 4 of the ICC Act that came under scrutiny when President Al-Bashir visited South Africa in June 2015, in order to attend the AU

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<sup>99</sup> National Commissioner of The South African Police Service v Southern African Human Rights Litigation Centre and Another, 2015 (1) SA 315 (CC) at paragraphs 50 and 81 of the judgment Majiedt AJ states that South Africa has an international legal commitment to investigate crimes against humanity, including torture, which duty must be discharged through South Africa's law enforcement agencies, and that the SAPS's decision not to conduct an investigation was wrong in law.

<sup>100</sup> Zawati H.M "The International Criminal Court and Complementarity" 2016 Journal of International Law and International Relations, Volume 12, Number 1, Pages 208-228; and Burke-White W.W "Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice" 2008, Harvard International Law Journal, Volume 49, Number 1, Pages 53-108.

Summit Meeting which was held in Johannesburg, and his subsequent exit from South Africa whilst an arrest warrant and court order from the North Gauteng High Court was granted which effectively ordered the authorities to arrest him. The study will discuss and analyse the current Supreme Court of Appeal judgment delivered on 15 March 2016 in the matter of *The Minister of Justice and Constitutional Development v The Southern African Litigation Centre*,<sup>101</sup> as it is unlikely that the Constitutional Court will have the opportunity to deliver a judgment, since the state withdrew its appeal of the SCA judgment.<sup>102</sup> The judgment also deals with immunity of heads of state. In the abovementioned case, the court stated that in passing the ICC Act, South Africa did so on the basis that all forms of immunity, including head of state immunity, could not be relied upon to either stop a prosecution of international crimes in South Africa, or to prevent South Africa from cooperating with the ICC by way of arresting and surrendering any person charged with such crimes by the ICC.<sup>103</sup>

Can immunity by a non-states party be used as a way to frustrate the application of the ICC Act? For the purposes of this study, international law in general recognises two types of immunity. Immunity of state officials *ratione personae*, meaning immunity that is attached to an office or status held by an official, and secondly, immunity of state officials *ratione materiae*, being immunity that is attached to official acts performed by officials. South African legislation in the form of the Diplomatic Immunities and Privileges Act<sup>104</sup> provides for head of state immunity from civil and criminal jurisdiction to the extent provided for by customary international law.<sup>105</sup> However, Section 4(2) and 10(9) of the ICC Act explicitly states that being a head of state or government<sup>106</sup> cannot be used as a defence when being charged for international crimes. Likewise, Article 27 of the Rome Statute states that

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<sup>101</sup> *The Minister of Justice and Constitutional Development v The Southern African Litigation Centre* (867/15) [2016] ZASCA 17.

<sup>102</sup> <http://www.constitutionalcourt.org.za/uhtbin/cgiisr/si/AJNfmu6fL1/MAIN/293440010/9#top>, (Accessed on 25 October 2017).

<sup>103</sup> Paragraph 103 of the judgment.

<sup>104</sup> Act 37 of 2001, hereinafter referred to as "DIPA".

<sup>105</sup> De Wet E "The Implications of President Al-Bashir's Visit to South Africa for International and Domestic Law" 2015, *Journal of International Criminal Justice*, Volume 13, Pages 1049-1071

<sup>106</sup> Section 4(2) of the ICC Act states as follows:

"Despite any other law to the contrary, including customary and conventional international law, the fact that a person—

*“1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, 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, nor shall it, in and of itself, constitute a ground for reduction of sentence.*

*2. Immunities 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”.*

The first time the defence of immunity was tested in South Africa with regard to the ICC Act was in the matter of *The Southern Africa Litigation Centre v The Minister of Justice and Constitutional Development*, in the North Gauteng High Court, and the subsequent appeal to the Supreme Court of Appeal in the matter of *The Minister of Justice and Constitutional Development v The Southern African Litigation Centre*. The appeal court held that

*“...when South Africa decided to implement its obligations under the Rome Statute by passing the Implementation Act it did so on the basis that all forms of immunity, including head of state immunity, would not constitute a bar to the prosecution of international crimes in this country or to South Africa cooperating with the ICC by way of the arrest and surrender of persons charged with such crimes before the ICC, where an arrest warrant had been issued and a request for cooperation made”.*<sup>107</sup>

Although the Constitutional Court will probably not have an opportunity to rule in the matter, it is the author’s view that the Constitutional Court would in all likelihood have concurred with the SCA judgement.

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*(a) is or was a head of State or government, a member of a government or parliament, an elected representative or a government official; or*  
*(b) being a member of a security service or armed force, was under a legal obligation to obey a manifestly unlawful order of a government or superior, 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.”*

Further Section 10(9) of the ICC Act states that:

*“The fact that the person to be surrendered is a person contemplated in section 4 (2) (a) or (b) does not constitute a ground for refusing to issue an order contemplated in subsection (5)”*

<sup>107</sup> At 103 of the judgment.

### 2.3.4 The Limitations of the ICC Act

Although the ICC Act is a very powerful piece of legislation, it does have certain limitations. It is a trite legal principle that, unless the contrary appears either expressly or by necessary implication, an act of parliament does not have retroactive working.<sup>108</sup> The ICC Act can therefore only be applied to crimes that took place after the Act came into force on 16 August 2002. Gevers is of the view that in terms of Section 35(3)(l) of the Constitution, the ICC Act could be extended to crimes under customary international law that took place before the ICC Act came into force.<sup>109</sup> This argument will be discussed further in Chapters 4 and 5 of the study. The ICC Act is also limited in its scope in terms of crimes that can be investigated and prosecuted in South Africa, these crimes being the crime of genocide, crimes against humanity and war crimes.<sup>110</sup>

## 2.4 The Constitution of the Republic of South Africa<sup>111</sup>

South Africa's Constitution in relation to international law and its place in our legal system is the golden thread that runs through all of the abovementioned cases. Our Constitution is very clear regarding the status of international law in South Africa. Section 233 of the Constitution states that

*“When interpreting any legislation, every 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”.*

In the matter of *Glenister v President of the Republic of South Africa and Others*, Ngcobo CJ states that *“Our Constitution reveals a clear determination to ensure that the Constitution and South African law are interpreted to comply with international*

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<sup>108</sup> Botha C “Statutory Interpretation: An introduction for students” 4<sup>th</sup> Edition (Juta and Company, 2005) states that in the matter of *Katzenellenbogen Ltd v Mullin 1977 (4) SA 855 (A)* “the court stated that unless a retrospective intention is clear, it is presumed that legislation applies to the future and not the past”.

<sup>109</sup> Gevers C “Southern African Litigation Centre & Another v National Director of Public Prosecutions & Others” 2013 South African Law Journal, Volume 130, Pages 293-309.

<sup>110</sup> Although it must be mentioned that Schedule 1 to the ICC Act defining the crimes of Genocide, Crimes against humanity and War crimes are very detailed and do define the actions that constitute these crimes in a comprehensive manner.

<sup>111</sup> Constitution of the Republic of South Africa, Act No 108 of 1996 (hereinafter referred to as “the Constitution”).



law, in particular international human rights law".<sup>112</sup> This sentiment was again expressed by Majiedt AJ, in *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and Another* and in the matter of *The Minister of Justice and Constitutional Development v The Southern African Litigation Centre*.<sup>113</sup>

## 2.5 South Africa's Withdrawal from the Rome Statute

On 19 October 2016, the Minister of International Relations and Cooperation filed an instrument of withdrawal in terms of Section 127(1) of the Rome Statute, thereby giving the United Nations Secretary-General one year's notice of South Africa's intention to withdraw from the Rome Statute. In a media briefing dated 21 October 2016, the Minister of Justice and Correctional Services gave reasons why the cabinet took the decision to withdraw from the Rome Statute.<sup>114</sup>

On 21 October 2016, the Minister of Justice also wrote to the Chairperson of the National Council of Provinces (NCOP) informing her, *ex post facto*, of Cabinet's decision to withdraw from the Rome Statute.<sup>115</sup> Apart from setting out the reasons for Cabinet's decision and confirming that the SCA judgment was in fact correct when it found that the ICC Act overrides head of state immunity, the letter went on to suggest that South Africa would still continue to pursue perpetrators of international crimes.

From the abovementioned it is clear that should the ICC Act be repealed by parliament, it will need to be replaced with new substantive legislation that provides a similar mechanism for domestic prosecution of international crimes in South Africa. It can only be assumed that such new legislation will be based on the fundamental

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<sup>112</sup> *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) at Paragraph 97 of the judgment.

<sup>113</sup> At paragraphs 62 to 64 of the judgment.

<sup>114</sup> The reasons given by the Minister of Justice states that the ICC Act is hindering South Africa "*in exercising its international relations with foreign countries*" and that South Africa "*wish to give effect to the rule of customary international law which recognises the diplomatic immunity of heads of state and others*". The real reason for South Africa's withdrawal from the Rome Statute however seems to be to avoid an adverse Constitutional Court judgment.

<sup>115</sup> Phakathi B "Justice Minister sends Parliament notice of Cabinet move to quit ICC" <https://www.businesslive.co.za/news/latest-news/2016-10-21-justice-minister-sends-parliament-notice-of-cabinet-move-to-quit-icc/> (Accessed on 8 January 2018).

human rights enshrined in the Bill of Rights. Sections 9, 10, 11 and 12 of the Constitution will have to act as guidelines.

In the matter of *The Democratic Alliance v The Minister of International Relations and Cooperation and 9 Others*, Deputy Judge President Mojapelo, writing on behalf of a full bench, found that the notice of withdrawal signed by the Minister of International Relations and Cooperation and delivered to the UN Secretary-General, without prior parliamentary approval, was unconstitutional and invalid, and that the notice should be revoked by the government.<sup>116</sup> The judgment deals with the powers of the national executive to negotiate, sign and withdraw from international treaties. The court refrained from expressing any view on the substantive grounds for the government to withdraw from the Rome Statute.<sup>117</sup> The court did however state that

*“The question should be: what is so pressing for the national executive about the withdrawal from the Rome Statute which cannot wait for our legislative processes (and possibly judicial pronouncements) to take their course? Government respondents have not provided any explanation for this seemingly urgent need to withdraw from the Rome Statute. All these, in our view, point to one conclusion: the prematurity and procedural irrationality of the lodging of the notice of withdrawal by the national executive without first consulting parliament. This unexplained haste, in our view, itself constitutes procedural irrationality”.*<sup>118</sup>

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<sup>116</sup> *The Democratic Alliance v The Minister of International Relations and Cooperation and 9 Others*, Case Number 83145/2016 in the High Court of South Africa, North Gauteng Division, Pretoria (as yet unreported judgment). Full bench judgment dated 22 February 2017. The court stated at paragraph 57 as follows: *“In sum, since on the structure of s 231, the national executive requires prior parliamentary approval to bind South Africa to an international agreement, there is no cogent reason why the withdrawal from such agreement should be different. The national executive did not have the power to deliver the notice of withdrawal without obtaining prior parliamentary approval. The inescapable conclusion must therefore be that the notice of withdrawal requires the imprimatur of parliament before it is delivered to the United Nations. Thus, the national executive’s decision to deliver the notice of withdrawal without obtaining prior parliamentary approval violated s 231(2) of the Constitution, and breached the separation of powers doctrine enshrined in that section”.*

<sup>117</sup> The court stated at paragraph 77 as follows: *“In summary, the following conclusions are reached on the issues in dispute. Procedurally, the decision by the national executive to deliver the notice of withdrawal of South Africa from the Rome Statute of the ICC without prior parliamentary approval is unconstitutional and invalid. So is that decision, without it being preceded by the repeal of the Implementation Act. This court declines the invitation to pronounce on the substantive merits of South Africa’s withdrawal from the Rome Statute of the ICC. That decision is policy-laden, and one residing in the heartland of the national executive in the exercise of foreign policy, international relations and treaty-making, subject, of course, to the Constitution”.*

<sup>118</sup> At paragraph 70 of the judgment.

## 2.6 Conclusion

By signing the Rome Statute and by domesticating it by way of passing the ICC Act, South Africa incorporated the Statute into the country's legal system. This was a momentous occasion and signalled South Africa's will to put a stop to impunity. The Constitutional Court judgment in the matter of *National Commissioner of the South African Police Service v Southern African Litigation Centre and Another* showed that there are still hurdles facing African countries with regard to the implementation of the Rome Statute, be that due to the complex nature of the investigation and prosecution of international crimes or, as in the case of *The Minister of Justice and Constitutional Development v The Southern African Litigation Centre* due to political intervention and the traditionally recognised concept of Head of State immunity. What is clear is that by failing to arrest President Al-Bashir on an international arrest warrant whilst present in our country, South Africa's executive demonstrated that it can choose which national law and which international obligation to honour in order to suit the government's interests. This not only creates legal uncertainty in South Africa, but also sets a precedent for the future conduct of the government and denies the victims of core international crimes the justice which they deserve. This alone creates one of the biggest stumbling blocks for the effective implementation of the Rome Statute.

De Wet<sup>119</sup> is of the view that the issuing of the host state agreement by South Africa prior to the hosting of the AU summit may have been a way to try and circumvent South Africa's obligations under the ICC Act, and that there is a very noticeable shift in the government's attitude and an increasing reluctance to give effect to the country's domestic obligations. She notes that in 2009, South Africa cautioned President Al-Bashir not to attend the inauguration of President Zuma, as he would risk being surrendered to the ICC upon his arrival here. However the decision by South Africa to host the summit in 2015, without issuing a similar warning indicates a change in attitude towards the country's obligations under the ICC Act.

On 6 July 2017, the Pre-Trial Chamber II delivered judgment in the matter of *The Prosecutor v Omar Hassan Ahmad Al-Bashir*, regarding South Africa's non-

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<sup>119</sup> de Wet E "The Implications of President Al-Bashir's Visit to South Africa for International and Domestic Law" 2015, *Journal of International Criminal Justice*, Volume 13, Pages 1049-1071, at page 1069.

compliance to a request by the ICC to arrest and surrender President Al-Bashir.<sup>120</sup> The Court stated that in terms of customary international law, a state is prevented from exercising criminal jurisdiction against the head of state of another country.<sup>121</sup> However, the court found that Article 27(2) of the Rome Statute excludes the immunity of heads of state from arrest. The Court went on to state that

*“...the Chamber considers that since immunity from arrest would bar the Court from the exercise of its jurisdiction, the general exclusionary clause of article 27(2) of the Statute, in its plain meaning, also encompasses that immunity. Had the drafters of the Statute intended exclusion only of a narrow category of immunities, they would have expressed it in plain language. The language used in that provision, however, conveys comprehensiveness and is not compatible with the proposition that the immunity from arrest of Heads of State is excluded from it.”<sup>122</sup>*

The Court also stated that reliance by state parties on immunities or special procedural rules to circumvent cooperation with the ICC would create “*an insurmountable obstacle to the Court’s ability to exercise its jurisdiction*”.<sup>123</sup> Although South Africa failed to comply with the ICC request, the Court, in its discretion, decided not to refer the matter to the Assembly of State Parties or to the UN Security Council.

In chapter three the role and influence that the AU has on its member states’ compliance with the Rome Statute will be discussed in more detail. There is no doubt that the AU is an influential and powerful organisation. With a large percentage of its members also state parties to the Rome Statute, the AU is in a position to play a positive role in ensuring implementation of the Rome Statute. However the opposite seems to be the case at this stage, with the AU actively encouraging its members not to adhere to arrest warrants issued by the ICC. Chapter three will discuss the current situation in an attempt to clarify the source of the AU’s animosity towards the ICC, and propose solutions to the problem.

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<sup>120</sup> Situation in Darfur, Sudan in the matter of The Prosecutor v Omar Hassan Ahmad Al-Bashir, ICC 02/05-01/09, which can be accessed at: [https://www.icc-cpi.int/CourtRecords/CR2017\\_04402.PDF](https://www.icc-cpi.int/CourtRecords/CR2017_04402.PDF) , (Accessed on 25 October 2017).

<sup>121</sup> At paragraph 68 of the judgment.

<sup>122</sup> At paragraph 74 of the judgment.

<sup>123</sup> At paragraph 75 of the judgment.

## Chapter 3

### The African Union and its relationship with the International Criminal Court, and the influence that relationship has on the successful implementation of the Rome Statute

#### 3.1 Introduction

*“The ICC is our court, created through the demand and with overwhelming support of African states, governments and civil society alike, to try to overcome their own legacies of massive human rights violations, including apartheid, genocide and multiple civil conflicts. It is time to tell those who complain that the Court is targeting Africa that the true position is that it is rather African victims who are accessing their Court in pursuit of justice. This is especially true when we remember that the ICC is a court of last resort which only intervenes where states are either unwilling or unable to investigate and prosecute serious crimes according to the principle of complementarity. There is a simple answer to African states that feel ‘targeted’ by the ICC to address the situation: Prosecute atrocity crimes occurring in your territories or committed by your nationals and deliver justice to the victims at home”.*<sup>124</sup>

Any study into complementarity by African countries would not be complete without evaluating the dynamics of the relationship between the ICC, AU and Africa, and the factors that shape and influence this relationship. The biggest challenge faced by African countries with regard to the implementation of the Rome Statute seems to be of a political nature, however there are also legal challenges hampering its implementation. There is a general perception that the ICC is biased against African countries when it comes to the prosecution of perpetrators. This perception is fuelled by the fact that only African cases have been brought before the ICC even though the ICC is seized with jurisdiction over all countries, whether they are state parties or not. It should be kept in mind that the current investigations by the OTP all relate to

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<sup>124</sup> Extract of a speech entitled “We stay, we respond” delivered by human rights lawyer Njonjo Mue to the plenary session of the Assembly of State Parties of the ICC during November 2016. The complete speech can be accessed at: <https://justiceinconflict.org/2016/11/21/we-stay-we-respond-a-speech-on-africa-and-the-international-criminal-court/> (Accessed on 04 April 2017).

referrals from the respective African countries,<sup>125</sup> which include the situations in the Democratic Republic of the Congo, Uganda and the Central African Republic.

It has been suggested that the current tension is not actually between the AU and the ICC, but rather between the AU and the UN Security Council, and that the ICC is actually just a casualty of that war,<sup>126</sup> and that it would be in the best interest of both the AU and the ICC if they collaborated with each other. After all, the Constitutive Act of the AU states that

*“We, Heads of State and Government of the Member States of the Organization of African Unity is conscious of the fact that the scourge of conflicts in Africa constitutes a major impediment to the socio-economic development of the continent and of the need to promote peace, security and stability as a prerequisite for the implementation of our development and integration agenda, ... and determined to promote and protect human and people’s rights, consolidate democratic institutions and culture, and to ensure good governance and the rule of law...”*<sup>127</sup>

It is clear from the above that almost all African states share the same vision of peace, democracy and the protection of human rights. One can therefore assume that African states should encourage the workings of the ICC, and actively support its efforts to put an end to impunity of the perpetrators of crimes of concern to the international community as a whole and thus contribute to the prevention of such crimes. Yet currently, this is not the case. In this chapter, the study will explore the nature of the tension between the AU and the ICC, and how it might be resolved to ensure accountability of perpetrators of international crimes, and to realise the goals of both the AU and the ICC in harmony with each other.<sup>128</sup>

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<sup>125</sup> du Plessis M “The International Criminal Court that Africa wants” 2010, Monograph 172 by the Institute for Security Studies, August 2010.

<sup>126</sup> Imoedemhe O “Unpacking the tension between the African Union and the International Criminal Court: The way forward” 2015, African Journal of International and Comparative Law, Volume 23.1, Pages 74-105.

<sup>127</sup> The AU Constitutive Act: [http://www.au2002.gov.za/docs/key\\_oau/au\\_act.htm](http://www.au2002.gov.za/docs/key_oau/au_act.htm) (Accessed on 4 April 2017).

<sup>128</sup> al-Qawi, Yusuf Abd, “Chapter III. Pan-Africanism and the emergence of African States as subjects of international law (369)”, in: Collected Courses of the Hague Academy of International Law, The Hague Academy of International Law. (Accessed on 31 January 2017) / [http://0-dx.doi.org.oasis.unisa.ac.za/10.1163/1875-8096\\_pplrdc\\_ej.9789004267978.161\\_360.5](http://0-dx.doi.org.oasis.unisa.ac.za/10.1163/1875-8096_pplrdc_ej.9789004267978.161_360.5) First published online during 2015.

### 3.2 Complementarity in Africa

As stated earlier, the majority of cases currently before the ICC involve situations in African countries or perpetrators from African countries. As the ICC is a court of last resort, it would be logical to assume that the complementarity principle is not effectively administered by African state parties, yet studies have shown that the problem is not always necessarily due to a lack of capacity or priority of investigations and prosecutions, but that it can also be attributed to politics and diplomacy between African states.<sup>129</sup> According to Savelsberg, diplomacy differs from justice in that it is oriented towards substantive outcomes in contrast to the procedural orientation of criminal proceedings. More often than not, countries choose to follow a diplomatic route rather than use force or legal means in an attempt to secure peace in cases where human rights atrocities have been committed. Countries are often also cautious in assigning individual blame or responsibility for human rights violations, and argue that it would not be helpful in resolving issues and ensuring a lasting peace.<sup>130</sup> When the ICC therefore proceeds with the prosecution of an indicted African statesman it naturally causes tension. On 12 October 2016, Burundi's lower house of parliament overwhelmingly voted in favour of withdrawing from the Rome Statute.<sup>131</sup> The Senate also approved this withdrawal, and on 19 October 2016, the president of Burundi officially signed the legislation into effect. Burundi therefore became the first states party to withdraw from the Rome Statute. In October 2015, Kenya also gazetted the International Crimes Repeal Bill, to repeal the International Crimes Act of 2008 in its entirety. These actions could in all probability lead to more withdrawals from the Rome Statute by African countries, and would be the end result of the current factious relationship between the AU and the ICC.

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<sup>129</sup> Savelsberg J.J *Representing Mass Violence: Conflicting responses to human rights violations in Darfur* 1<sup>st</sup> Edition, (University of California Press, Oakland California, 2015).

<sup>130</sup> Dudouet V and Schmelzle B *Human Rights and Conflict Transformation: The Challenges of Just Peace* (Berghof Conflict Research Berlin 2010).

<sup>131</sup> <http://www.aljazeera.com/news/2016/10/burundi-moves-quit-international-criminal-court-161012132153065.html> (Accessed on 27 October 2017).

### 3.3 Political Challenges

The following “political” challenges have been identified, which have an influence on the implementation of the Rome Statute. They are:

- a. The seemingly afro-focused prosecutorial approach by the Office of the Prosecutor, and the Security Council’s perceived double standard,
- b. The apparent scuttling of peace projects implemented by the AU, by the ICC and the UN Security Council, the “peace versus justice debate”.

#### 3.3.1 *Is the ICC unfairly targeting African leaders and/or situations for prosecution? The “Selective Prosecution Theory” and the Security Council’s perceived double standard.*

There is a growing perception that the ICC is very selective in deciding who should be prosecuted. Prosecutorial discretion is found in all criminal legal systems, and is not inherently wrong. The problem identified here is that political influence should not play a part when that discretion is applied by the OTP in deciding who should be investigated and prosecuted by the ICC. As stated by Imoedemhe, the question is not whether selective prosecution should occur, but rather when that selective prosecution would become unacceptable.<sup>132</sup> This is one of the main frustrations African states have with the ICC, as they feel that only African situations are brought before the court.<sup>133</sup> This so-called selective justice has been a contentious issue since the inception of the first international criminal tribunals of Nuremberg and Tokyo, where only Nazi and Japanese officials were prosecuted, despite the fact that the victorious Allied Powers also committed war crimes. Eberechi argues that this paradox fuels the legacy of impunity, and lends credit to the AU’s argument that the enforcement of international criminal justice by the ICC has been selective, targeting

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<sup>132</sup> Imoedemhe O “Unpacking the tension between the African Union and the International Criminal Court” 2015, African Journal of International and Comparative Law, Volume 23, Pages 74-105, at page 78 of the article.

<sup>133</sup> Imoedemhe O “Unpacking the tension between the African Union and the International Criminal Court” 2015, African Journal of International and Comparative Law, Volume 23, Pages 74-105 / Tallgren I “The sensibility and sense of international criminal law” 2002, European Journal of International Law, Volume 13, Issue 3, Pages 561-596.



only Africans.<sup>134</sup> It has even been suggested that international criminal justice has become the new instrument of colonisation.<sup>135</sup> Currently no African country is a permanent member of the UN Security Council, and can therefore not veto a decision to refer a situation to the ICC. This is in stark contrast to the United States of America, whom, being a permanent member of the UN Security Council, can veto any potential investigation it believes would affect its national interests. One of the purported reasons given by the United States for its refusal to become a state party to the Rome Statute is that it is of the view that Article 12 of the Rome Statute threatens its sovereignty, in that the ICC would be able to exercise jurisdiction over American service personnel for human rights violations allegedly committed by them in the territory of a state party or a state that chose to refer the case to the ICC.<sup>136</sup> The United States argues that as the ICC is a treaty based court, its jurisdiction must be tied to the consent of a state expressed either by ratification of the Rome Statute or on an *ad hoc* basis in accordance with the Vienna Convention.

Du Plessis however states that selectively punishing individuals, whether they are political leaders, high ranking military officers or just ordinary soldiers transforms the ICC into an instrument through which individual accountability for mass human rights violations is internalised as part of the fabric of the international society, thereby sending out a message that no one is immune from the jurisdiction of the ICC, and that impunity will no longer be acceptable.<sup>137</sup> He argues that the ICC is a court by and for Africans, and that this is reflected in not only the composition of the ICC, but also in the contributions by African states that led to the formation of the court. Du

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<sup>134</sup> Eberochi I "Rounding up the usual suspects: Exclusion, selectivity and impunity in the enforcement of international criminal justice and the African Union's emerging resistance" 2011, African Journal of Legal Studies, Volume 4, Pages 51-84.

<sup>135</sup> Fritz N "When International Justice is feared as colonisation by law"

<https://www.pressreader.com/south-africa/sunday-times/20080525/282093452480564>

(Accessed on 11 May 2017) / Mamdani M "The New Humanitarian Order: Recent war crimes charges against the Sudanese president reveal the rights-based politics of the world's "new humanitarian order" <https://www.thenation.com/article/new-humanitarian-order/> (Accessed on 15 May 2017).

<sup>136</sup> On 2 August 2002, the U.S Congress passed the American Service-Member's Protection Act. Section 2004 [22 U.S.C 7423] expressly prohibit any cooperation with the ICC, and Section 2008 [22 U.S.C 7427] authorises the President of the U.S to use all means at his/her disposal to ensure the release of members of the armed forces and certain other persons detained or imprisoned by or on behalf of the ICC. The U.S Congress even went a step further and during December 2004, adopted the Nethercutt Amendment, which forms part of the US Foreign Appropriations Bill, allowing Congress to withhold economic funds to all countries which have signed and ratified the Rome Statute, but who have not yet concluded a bilateral immunity agreement with the USA.

<sup>137</sup> Du Plessis M "The International Criminal Court that Africa wants" 2010, Institute for Security Studies, Monograph 172.

Plessis states that through Article 14 of the Rome Statute, Uganda, The Democratic Republic of the Congo and the Central African Republic, have made use of the self-referral mechanism, allowing the ICC to establish jurisdiction in those instances. Furthermore the OTP is slow to initiate an investigation into a situation in terms of Article 15, and follows a strict guideline provided for in the Rome Statute. The pre-trial chamber also has an oversight of the prosecutor's decisions, and decisions to prosecute or not to only become final when confirmed by the chamber.<sup>138</sup>

A further concern for the AU is the double standard employed by the UN Security Council with specific regard to the council's powers to either refer or defer a situation in terms of Articles 13 and 16 of the Rome Statute. It has been pointed out that, for instance, the situation in Darfur was referred to the ICC by the council, yet human rights abuses by Israel against the Palestinians have not been referred, due to the fact that certain members of the council are well disposed towards Israel.<sup>139</sup> Du Plessis correctly states that the uneven political landscape of the UN Security Council has become a problem for the ICC. Yet despite this, a referral by the Security Council does allow the ICC the ability to ensure a measure of justice for the victims of serious crimes committed anywhere in the world.

### *3.3.2 The scuttling of peace projects implemented by the AU by the ICC and the UN Security Council: The peace versus justice debate.*

Certain scholars are of the view that reconciliation and peace efforts should be preferred instead of retributive justice meted out to perpetrators of international crimes by a prosecution in terms of the Rome Statute, whether that prosecution is in a domestic court or by the ICC.<sup>140</sup> This is especially the case in countries that have

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<sup>138</sup> Article 53(3)(b) of the Rome Statute.

<sup>139</sup> In this regard, Du Plessis also makes mention of Resolutions 1422 and 1487 that was adopted by the UN Security Council on the insistence by the United States.

<sup>140</sup> Babington-Ashaye A "Politicizing the International Criminal Court: Redefining the Role of the United Nations Security Council in the Age of Accountability" 2014, Proceedings of the Annual Meeting (American Society of International Law), Vol. 108, Pages 301-304 / Akhavan P "Are International Criminal Tribunals a Disincentive to Peace?: Reconciling Judicial Romanticism with Political Realism" 2009, Human Rights Quarterly, Vol. 31, No. 3, Pages 624-654 / Glasius M "What Is Global Justice and Who Decides? Civil Society and Victim Responses to the International Criminal Court's First Investigations" 2009, Human Rights Quarterly, Vol. 31, No. 2, Pages 496-520 / Nyabirungu M.S "Droit international penal" 2013 Kinshasa: Editions Droit et Societe / Savelsberg J.J Representing Mass

just emerged from a civil conflict or war. In this regard, peace and national reconciliation, as opposed to international justice, should be weighed up against each other. Settling conflict and establishing regional peace is a central foreign policy goal for diplomats, but can this goal be reconciled with the legal recourse victims of human rights violations are entitled to in terms of the Rome Statute? The AU maintains that certain situations are too serious and too complex to be resolved “without recourse to a harmonised approach to justice and peace, neither of which should be pursued at the expense of the other”.<sup>141</sup> From the aforementioned it is clear that the AU is of the view that African solutions should be applied to African problems, and that the ICC is undermining peace efforts in the region by proceeding with investigations regarding African situations. According to Mangu, reconciliation is not a function of a criminal tribunal, whether that tribunal is a domestic or an international one.<sup>142</sup> An ICC prosecution of African war criminals is however seen to be disturbing efforts by the AU to obtain post conflict peace and reconciliation. An example of this is Uganda, which initially referred some cases to the ICC, but at a later stage requested the court to defer the prosecutions in order to assist that country’s effort to preserve peace and national reconciliation. The UN Security Council and the OTP refused a request from the AU to defer investigations, or to withdraw charges against President Kenyatta and his vice-president William Ruto.<sup>143</sup> Another example is the Darfur crisis and the arrest warrant issued against president Al-Bashir. The goal of the Rome Statute is however not to assist in peace efforts or to reconcile former enemies, but to put a stop to impunity.<sup>144</sup>

Justice must be a precondition to lasting peace, but one should keep in mind that the two concepts are not necessarily mutually exclusive. The challenge is to facilitate both in a manner that is beneficial to everyone. Abovementioned has been termed as the “peace versus justice debate”, each with its proponents and detractors.<sup>145</sup> Du

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Violence: Conflicting responses to human rights violations in Darfur 1st Edition, (University of California Press, Oakland California, 2015).

<sup>141</sup> Press Release by the AU made on 14 July 2009 in Addis Ababa after a meeting of African state parties to the Rome Statute.

<sup>142</sup> Mangu A.M “*The International Criminal Court, justice, peace and the fight against impunity in Africa: An overview*” 2015 Africa Development, Volume 40, Number 2, Pages 7-32.

<sup>143</sup> <https://www.un.org/press/en/2013/sc11176.doc.htm> (Accessed on 27 October 2017).

<sup>144</sup> El-Masri S “The legality of the International Criminal Court’s decision against Omar Al-Bashir of Sudan” 2011 International Journal, Volume 66, Number 2, Pages 371-390.

<sup>145</sup> Magliveras K.D and Naldi G.J “The International Criminal Court’s involvement with Africa: Evaluation of a fractious relationship” 2013, Nordic Journal of International law, Volume 82, Pages

Plessis states that in Africa, post-conflict peace building is undermined by the fact that there is a widespread lack of accountability on the part of those individuals responsible for the continent's numerous violent conflicts and that this pervasive culture of impunity often threatens any attempt at a lasting peace process, mainly because the perpetrators remain free to commit further atrocities, but also because impunity fuels a desire for revenge, which leads to even more conflict and further violence, thereby starting the vicious cycle all over again.<sup>146</sup> Du Plessis goes on to state that true and lasting peace requires a commitment to justice, and that the two imperatives may, and should operate side by side.<sup>147</sup> Under the Rome Statute regime there exists a presumption in favour of prosecuting an individual, and that a deferral of a situation should only be considered when made in good faith, and if backed up with evidence that in terms of the principle of complementarity, state parties will in fact ensure that a perpetrator will be prosecuted.<sup>148</sup> In the case of Sudan and the warrant issued against president Al-Bashir, the issue is complex. If a deferral of the situation is granted, what would happen next? There is no credible evidence to support an assertion that there are any serious efforts to establish peace in Sudan, nor that the perpetrators of human rights abuses will be prosecuted, either in a domestic court in Sudan, or by an African state party to the Rome Statute.

### 3.4 Legal Challenges

Imoedemhe is of the view that the current hostility between the AU and the ICC is also a result of the evolving legal principles governing international criminal law and the interpretation of those principles and international customary law, which is

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417-446 / Ambos K and Maunganidze O.A (Editors) *Power and Prosecution: Challenges and opportunities for international criminal justice in Sub-Sahara Africa*, e-book published by the Göttingen University in 2012, <http://univerlag.uni-goettingen.de> (Accessed on 10 May 2017).

<sup>146</sup> Du Plessis M "Complementarity: a working relationship between African states and the International Criminal Court" Chapter 5 in Paper.... Issued by the Institute for Security Studies / Jalloh C.C "Regionalizing international criminal law?" 2009, *International Criminal Law Review*, Volume 9, Pages 445-499.

<sup>147</sup> Du Plessis M "The International Criminal Court that Africa wants" 2010, Institute for Security Studies, Monograph 172.

<sup>148</sup>The Prosecutor v. Germain Katanga ICC-01/04-01/07 and The Prosecutor v. Mathieu Ngudjolo Chui ICC-01/04-02/12.

sometimes very difficult to prove.<sup>149</sup> Disputes over the existence of a customary rule often features prominently in international litigation.<sup>150</sup>

For the purpose of this study the following two legal challenges have been identified, which have an influence on the implementation of the Rome Statute in Africa. They are:

- a. The ICC's jurisdiction, with specific reference to states that are not a party to the Rome Statute,
- b. Head of state immunity, and whether the ICC can in fact prosecute a sitting head of state.

### 3.4.1 *The ICC's jurisdiction, with specific reference to states that are not a party to the Rome Statute.*

#### 3.4.1.1 The ICC's jurisdiction in general.

One of the most controversial aspects of the ICC is also one of the aspects that is most critical for the proper functioning of the court: its jurisdictional range.<sup>151</sup> As already alluded to in paragraph 2.3.1 of Chapter 2, international law recognises different bases for the establishment of jurisdiction by a court. They include *ratione tertiss*, *ratione personae*, *ratione materiae* and *ratione temporis*.<sup>152</sup>

Article 5(1) of the Rome Statute defines the court's jurisdiction *ratione materiae*, by stating that the ICC shall have jurisdiction over the crime of genocide, crimes against humanity, war crimes and the crime of aggression.<sup>153</sup> Article 5 of the Rome Statute is

<sup>149</sup> Imoedemhe O, "Unpacking the tension between the African Union and the International Criminal Court: The way forward" 2015, African Journal of International and Comparative Law, Volume 23.1, Pages 74-105.

<sup>150</sup> Dugard J et al International law: A South African Perspective 4th Edition (Juta, Cape Town, 2011) / Mills K 'Bashir is dividing us: Africa and the International Criminal Court' 2012, Human Rights Quarterly, Volume 34, Pages 404-447.

<sup>151</sup> Wagner M "The ICC and its jurisdiction-Myths, Misperceptions and Realities" 2003 Max Planck Yearbook of United Nations Law, Volume 7, Pages 409-512.

<sup>152</sup> O'Keefe R "Universal Jurisdiction: Clarifying the basic concept" 2004, Journal of International Criminal Justice, Volume 2, Pages 735-760.

<sup>153</sup> Article 5(2) of the Rome Statute states that: "*The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United*

phrased specifically to limit the court's jurisdiction to only the crimes specified by the statute.

Article 25(1) of the Rome Statute states that: "*The Court shall have jurisdiction over natural persons pursuant to this Statute*". The court's jurisdiction *ratione personae* only applies to individuals. Article 25(3) of the Rome Statute then goes on to define under which circumstances such an individual shall incur criminal responsibility and be liable for punishment. Article 12(2)(b) of the Rome Statute further gives recognition to the principle of *active personality* by stating that the court may only exercise jurisdiction in a matter where the alleged perpetrator is a national of a state party, or if the state from which he is a national has consented to the jurisdiction of the ICC.

Article 12(2)(a) of the Rome Statute establishes jurisdiction *ratione tertiis* for the ICC, and states that the court shall have jurisdiction over international crimes, if those crimes were committed on the territory of a state party, or if it was committed on board an aircraft or vessel which has been registered in a state party.

The principle of non-retroactivity in international law states that a state is only bound by the provisions of a treaty after the date the treaty enters into force.<sup>154</sup> Jurisdiction *ratione temporis* by the ICC is reflected in Article 11(1) and (2) of the Rome Statute which states that

*"The court has jurisdiction only with respect to crimes committed after the entry into force of this statute" and "If a state becomes a party to this statute after its entry into force, the court may exercise its jurisdiction only with respect to crimes*

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*Nations*". During the Review Conference of the Rome Statute held in Kampala between 31 May and 11 June 2010, the Assembly of state parties adopted the following definition of the crime of aggression: "*means the planning, preparation, initiation or execution of an act of using armed force by a State against the sovereignty, territorial integrity or political independence of another State*". The ICC will be able to exercise jurisdiction over the crime of aggression, subject to a decision yet to be taken after 1 January 2017 by a majority of two-thirds of the state parties and further subject to the ratification of that amendment by at least 30 state parties. Articles 6,7 and 8 of the Rome Statute provides further details of the abovementioned crimes.

<sup>154</sup> Article 28 of the Vienna Convention on the Law of Treaties of 1969 states as follows: "*Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party*".

*committed after the entry into force of this statute for that state, unless that state has made a declaration under article 12, paragraph 3”.*<sup>155</sup>

### 3.4.1.2 The ICC’s jurisdiction over nationals of non-state parties

There are various treaties that establish universal jurisdiction over individuals accused of perpetrating international crimes of grave concern to the international community as whole.<sup>156</sup> The vast majority of states do in fact recognise the concept of universal jurisdiction and the validity thereof, because those states are themselves parties to one or more conventions that provide for it.<sup>157</sup> A contentious issue however, is the power of the ICC to establish jurisdiction over an individual who is a national of a state that is not a party to the Rome Statute. In this regard, the warrant of arrest issued by the ICC against President Al-Bashir is a good example of how the court is able to establish jurisdiction in such an event. The warrant of arrest issued by the ICC against President Al-Bashir stems from the intervention by the UN Security Council who, on 30 July 2004, declared the situation in western Sudan a threat to international peace and security under resolution 1556 calling upon Sudan to immediately fulfil all commitments made to facilitate international relief for the humanitarian disaster in that region and to disarm the Janjaweed militia and to apprehend their leaders and associates whom incited and carried out human rights violations.<sup>158</sup> The Sudanese government however failed to adhere to the abovementioned Resolution, necessitating that the UN Security Council adopt Resolution 1593 on 31 March 2005, referring the matter to the ICC for

<sup>155</sup> According to Wagner, Article 11(2) of the Rome Statute does not bar a state party from prosecuting a perpetrator through its domestic criminal justice system for crimes committed before that state party became a party to the Rome Statute.

<sup>156</sup> International treaties that oblige state parties to make use of their universal jurisdiction include Geneva Conventions of 1949, the Convention against Torture of 1984, and the 2006 Convention against Enforced Disappearance. <https://www.hrw.org/news/2009/10/19/basic-facts-universal-jurisdiction> (Accessed on 10 April 2017). / Also see the case of Democratic Republic of the Congo v Belgium, where the International Court of Justice, on 14 February 2002, delivered its judgment, even though it did not pronounce on the legality of Belgium’s claim to universal jurisdiction, the case is still relevant in that regard. <http://www.icj-cij.org/docket/files/121/8126.pdf> / Also see the case of Prosecutor v. Charles Ghankay Taylor, delivered by the Trial Chamber II of the Special Court for Sierra Leone, on 26 April 2012, <http://www.rscsl.org/Documents/Decisions/Taylor/1283/SCSL-03-01-T-1283.pdf> (Accessed on 11 April 2017).

<sup>157</sup> 194 states have ratified the 1949 Geneva Conventions, likewise 161 countries are party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

<sup>158</sup> UN Security Council Resolution 1556, was adopted on 30 July 2004 with 13 votes in favour of it and 2 members who abstained: [https://www.sipri.org/sites/default/files/2016-03/UNSC\\_res1556.pdf](https://www.sipri.org/sites/default/files/2016-03/UNSC_res1556.pdf) (Accessed on 2 May 2017).



investigation.<sup>159</sup> As a general rule, the Rome Statute is not binding on a non-states party and cannot create an obligation on such a state without their consent.<sup>160</sup> Sudan is however a United Nations member state and the UN Charter is therefore applicable to Sudan.<sup>161</sup> Security Council resolutions adopted under Chapter VII of the Charter are therefore binding on Sudan.<sup>162</sup> The effect of Security Council Resolution 1593 was thus that Sudan was treated as a party to the Rome Statute even though it never gave consent to be bound.<sup>163</sup> Sudan objected to the situation, but the ICC proceeded to institute an investigation, and eventually in July 2008, the ICC prosecutor filed charges against President Al-Bashir for genocide, crimes against humanity and murder. On 4 March 2009, the Pre-Trial Chamber issued a warrant of arrest against President Al-Bashir on charges of crimes against humanity and war crimes but ruled that there was insufficient evidence to support charges of genocide. However on 12 July 2010, a second warrant of arrest was issued against President Al-Bashir for charges of genocide.<sup>164</sup>

El-Masri argues that the warrants issued against President Al-Bashir were legal in terms of international law principles.<sup>165</sup> The first argument is that the matter was referred to the ICC by the UN Security Council acting in terms of Chapter VII of the United Nations Charter, when it issued Resolution 1593, thereby negating Sudan's non-membership to the Rome Statute. Article 2(1) of the Charter states that "*the*

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<sup>159</sup> UN Security Council Resolution 1593, <https://www.icc-cpi.int/NR/rdonlyres/85FEBD1A-29F8-4EC4-9566-48EDF55CC587/283244/N0529273.pdf> (Accessed on 2 May 2017). The Security Council referral was the first situation to be referred to the ICC, and the situation in Darfur was deemed the worst humanitarian crises in the world at the time of its referral.

<sup>160</sup> Article 98 of the Rome Statute states that state parties must not act inconsistent with the state or diplomatic immunity obligations of non-state parties. Article 34 of the Vienna Convention states that "*A treaty does not create either obligations or rights for a third state without its consent*".

<sup>161</sup> Sudan was admitted as a member of the UN on 12 November 1956.

<sup>162</sup> Article 103 of the UN Charter states that: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail". Also applicable is Articles 24(1) and 25 of the UN Charter.

<sup>163</sup> This position was confirmed by the ICC's Pre-Trial Chamber 1, on 4 March 2009, in the matter of *The Prosecutor v Omar Hassan Ahmad Al-Bashir* (Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir), where the court stated at paragraph 41 of the judgement: "*Furthermore, in light of the materials presented by the Prosecution in support of the Prosecution Application, and without prejudice to a further determination of the matter pursuant to article 19 of the Statute, the Chamber considers that the current position of Omar Al Bashir as Head of a state which is not a party to the Statute, has no effect on the Court's jurisdiction over the present case*" (emphasis added).

<sup>164</sup> [https://www.icc-cpi.int/CourtRecords/CR2009\\_01514.PDF](https://www.icc-cpi.int/CourtRecords/CR2009_01514.PDF) and [https://www.icc-cpi.int/CourtRecords/CR2010\\_04825.PDF](https://www.icc-cpi.int/CourtRecords/CR2010_04825.PDF) (Accessed on 2 May 2017).

<sup>165</sup> El-Masri S "The legality of the International Criminal Court's decision against Omar Al-Bashir of Sudan" 2011 *International Journal*, Volume 66, Number 2, Pages 371-390.



*Organization is based on the principle of the sovereign equality of all its Members”* and Article 2(7)

“Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII ”.

These two provisions, when read together, ensure that guaranteeing a state’s sovereignty is subject to the UN Security Council taking a decision under Chapter VII of the Charter. The effect of Resolution 1593 is that it not only overrides Sudan’s sovereignty as a non-states party to the Rome Statute, but it also has the effect of being binding on all UN member states. The second argument is that international law requires that crimes that threaten international peace and security should be punished.<sup>166</sup> These crimes constitute an *obligatio erga omnes*, and all states are therefore obligated to act.<sup>167</sup> This duty to act by states is included in many treaties and is considered international customary law therefore binding all states, even if they are not a party to some of the mentioned treaties.<sup>168</sup> The third and last argument is that Sudan’s continued defiance and refusal to institute an independent investigation and prosecution of responsible individuals, allows the ICC, in terms of Article 17 of the Rome Statute, to exercise jurisdiction in the matter. Hence Sudan’s failure to act allowed the ICC to invoke the principle of complementarity.<sup>169</sup> Article 18 of the Rome Statute, which deals with the procedures for admissibility, only encompasses cases referred to the ICC by state parties or cases which have been

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<sup>166</sup> Mik C “Jus Cogens in Contemporary International Law” 2013, Polish Yearbook of International Law, Volume 33, Pages 27-94 / Bassiouni M.C “International Crimes: Jus Cogens and Obligatio Erga Omnes” 1996, Law and Contemporary Problems, Volume 59, Issue 4, Pages 63-74 / Colangelo A.J “Jurisdiction, Immunity, Legality and Jus Cogens” 2013, Chicago Journal of International law, Volume 14, Issue 1, Pages 53-92.

<sup>167</sup> Kornacki W.Z “Legitimizing Humanitarian Intervention Through International law breaches Invoking Erga Omnes Obligations” 2004, International Law Students Association Quarterly, Volume 13, Issue 1, Pages 8-14.

<sup>168</sup> Some of the treaties include The Hague Convention, The 1948 Convention on the Prevention and Punishment of the Crime of Genocide and the 1949 Geneva Conventions; Byers M “International Law and the Responsibility to Protect” an essay included in a book by Chinkin, C and Baetens, F (Editors) (2015). “*Sovereignty, Statehood and State Responsibility: Essays in Honour of James Crawford*” Cambridge: Cambridge University Press, <https://0-www.cambridge.org.oasis.unisa.ac.za/core/books/sovereignty-statehood-and-state-responsibility/A6AE621E4278A4802923C2419BC32FCA> (Accessed on 2 May 2017).

<sup>169</sup> Saxum E.J “The ICC versus Sudan: How does the Darfur case impact on the principle of Complementarity?” 2009-2010, Eyes on the ICC, Volume 6, Issue 1, Pages 1-12.

initiated by the Prosecutor and specifically exempts cases referred to the ICC by the Security Council. Article 19 of the Rome Statute, which governs the jurisdiction of the ICC, is silent on whether its provisions would apply to Security Council referrals. Be that as it may, the Darfur Special Criminal Court established by Sudan to prosecute individuals responsible for the atrocities, could only be described as a farce, and not a genuine effort to show that Sudan was willing and able to investigate and prosecute individuals.<sup>170</sup>

Sudan objected to the ICC's jurisdiction on the grounds that Sudan's not being a state party to the Rome Statute meant that the ICC had no jurisdiction in the matter. However Security Council referrals to the ICC do not require personal or territorial jurisdiction. The only real challenge Sudan has to the ICC's jurisdiction is that it is genuinely carrying out proceedings of its own, which has already been proven to be virtually non-existent.<sup>171</sup> Realising their predicament, the Sudanese government attempted to portray the ICC as a neo-colonial Western power targeting African leaders for prosecution, which attempt seems to have found fertile ground in the shape of the AU.

### 3.4.2 *Head of state immunity and whether the ICC can in fact prosecute a sitting head of state: The Al-Bashir challenge.*

#### 3.4.2.1 Immunity and head of state immunity.

The rules granting immunity from criminal responsibility can be classified in two broad categories, namely the rules applicable under international law and those that are provided for in a state's domestic legislation.<sup>172</sup> As discussed in paragraph 2.3.3

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<sup>170</sup> In a report dated 8 June 2006, Human Rights Watch, found that the Sudanese government failed to show a genuine commitment to national prosecution for the events in Darfur, and that there is no real political will on the part of the Sudanese government to punish those responsible for the atrocities committed, and to prevent further crimes from being perpetrated. In the report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, dated 25 January 2005, the commission stated that "*The Sudanese justice system is unable and unwilling to address the situation in Darfur...*", and recommended that the situation immediately be referred to the ICC by the UN Security Council pursuant to Article 13(b) of the Rome Statute. <https://www.hrw.org/legacy/backgrounder/ij/sudan0606/sudan0606.pdf> and <https://www.globalpolicy.org/images/pdfs/darfurcoi.pdf> (Accessed on 2 May 2017).

<sup>171</sup> The Prosecutor v. Omar Hassan Ahmad Al Bashir ICC-02/05-01/09.

<sup>172</sup> Akande D "*International law immunities and the International Criminal Court*" 2004, *The American Journal of International Law*, Volume 98, Number 3, Pages 407-433.

in Chapter 2 of the study, international law recognises two types of immunity. Immunity of state officials *ratione personae*, being immunity attached to an office or status held by an official, and secondly, immunity of state officials *ratione materiae*, being immunity attached to official acts performed by officials.

Even though Article 27 cannot remove the immunity enjoyed by a head of state under customary international law by a non-states party, the fact that the situation in Sudan was referred under Chapter VII of the UN Charter to the ICC, *ipso facto* removed the head of state immunity enjoyed by President Al-Bashir. As explained in the abovementioned paragraph, Sudan was treated as a state party to the Rome Statute.<sup>173</sup> According to Ssenyonjo, Resolution 1593 implicitly revoked President Al-Bashir's immunity when it stated that

*"...the Government of Sudan and all other parties to the conflict in Darfur, shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that states not party to the Rome Statute have no obligation under the Statute, urges all states and concerned regional and other international organizations to cooperate fully".*<sup>174</sup>

Since the ICC issued warrants for the arrest of President Al-Bashir for alleged war crimes, crimes against humanity and later for genocide committed in Darfur, in response the AU issued a number of decisions<sup>175</sup> calling on all AU member states not to cooperate with the ICC regarding the arrest and surrender of President Al-Bashir. Many academic writers<sup>176</sup> are in agreement that it was the act of issuing an

<sup>173</sup> Ssenyonjo M "The International Criminal Court arrest warrant decision for president Al-Bashir of Sudan" 2010, *The International and Comparative Law Quarterly*, Volume 59, Number 1, Pages 205-225 / El-Masri S "The legality of the International Criminal Court's decision against Omar Al-Bashir of Sudan" 2011 *International Journal*, Volume 66, Number 2, Pages 371-390.

<sup>174</sup> *Ibid* 26, / UN Security Council Resolution 1593, <https://www.icc-cpi.int/NR/rdonlyres/85FEBD1A-29F8-4EC4-9566-48EDF55CC587/283244/N0529273.pdf> (Accessed on 11 April 2017); Gaeta P "Does President Al Bashir enjoy immunity from arrest?" 2009 *Journal of International Criminal Justice*, Volume 7, Issue 2, Pages 315-332 / Wardle P "The survival of head of state immunity at the International Criminal Court" 2011 *Australian International Law Journal*, Volume 18, Pages 181-206.

<sup>175</sup> Decision on the International Criminal Court by the Assembly of the African Union, 27th Ordinary Session on 17-18 July 2016 at Kigali, Rwanda, the assembly "reiterated Its previous Decision Assembly/AU/Dec. 547(XXIV) on the progress Report of the Commission on the Implementation of Previous Decisions on the International Criminal Court (ICC) adopted by the Twenty-Fourth Ordinary Session of the Assembly held in Addis Ababa, Ethiopia, in January 2015, and in particular paragraph 17 (d) which calls for the suspension of proceedings against President Omar Al Bashir of The Sudan and URGES the United Nations Security Council to withdraw the referral case in The Sudan".

<sup>176</sup> Ssenyonjo M "The rise of the African Union opposition to the International Criminal Court's investigations and prosecutions of African leaders" 2013, *International Criminal Law Review*, Volume

arrest warrant against a sitting head of state that sparked the AU's fierce reaction. The situation was further exacerbated by the fact that the Security Council failed to respond to requests for deferral of proceedings in terms of Article 16 of the Rome Statute, as well as the contentious question of whether a head of state does in fact enjoy immunity from prosecution in terms of customary international law. Article 98 of the Rome Statute states that:

*“1. The 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.*

*2. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.”*

The AU's argument is that in terms of Article 98 the ICC cannot force any state to arrest and surrender the serving head of state of a non-state party, when that non-state party has not expressly waived the personal immunity of its head of state. In contrast to this, Article 27 of the Rome Statute states that:

*“1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, 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, nor shall it, in and of itself, constitute a ground for reduction of sentence.*

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13, Pages 385-428 / Imoedemhe O, “Unpacking the tension between the African Union and the International Criminal Court: The way forward” 2015, African Journal of International and Comparative Law, Volume 23.1, Pages 74-105 / Naldi G.J “The International Criminal Court's involvement with Africa: Evaluation of a fractious relationship” 2013, Nordic Journal of International Law, Volume 82, Pages 417-446 / Knottnerus A.S “How to reconcile the African Union and the International Criminal Court” 2012, Journal of African Union Studies, Volume 1, Issue 2 & 3, Pages 25-45 / Mills K “Bashir is dividing us: Africa and the International Criminal Court” 2012, Human Rights Quarterly, Volume 34, Pages 404-447.

2. Immunities 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.”

In terms of Article 27(2), official immunity cannot be claimed when someone is being prosecuted before an international criminal court. It is clear that there exist contradictory provisions in the Rome Statute.

#### 3.4.2.2 Can the ICC prosecute a sitting Head of State?

That President Al-Bashir enjoys legal immunity as head of state is not in dispute, what is unclear is the extent of that immunity. Unfortunately there is no international treaty to guide one on this subject, and one is reliant on jurisprudence and international custom to provide clarity.<sup>177</sup> A good example is the matter of *R v Bow Street Metropolitan Stipendiary Magistrate, Ex Parte Pinochet Ugarte*, more commonly known as the “*Pinochet case*”.<sup>178</sup> In this matter the House of Lords ruled that former Chilean president Augusto Pinochet did not enjoy immunity *ratione materiae*, and that he could be extradited from Great Britain to stand trial. However following this case, in the matter of *Case Concerning the Arrest Warrant of 11 April 2000, Democratic Republic of the Congo v Belgium*, better known as the “*Arrest Warrant case*”, the International Court of Justice ruled that an indictment for committing crimes against humanity could not be used as a basis for waiving immunity of current high ranking government officials, and that there was no exception, in customary international law, to the absolute immunity that an incumbent foreign minister enjoys.<sup>179</sup> The court did however state that immunities enjoyed under international law by an incumbent or former minister for Foreign Affairs do not represent a bar to criminal prosecution in certain circumstances, one of

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<sup>177</sup> Article 32 of the Vienna Convention on Diplomatic Relations of 1961 merely states that “*The immunity from jurisdiction of diplomatic agents and of persons enjoying immunity under article 37 may be waived by the sending State*”. The Vienna Convention on Consular Relations of 1963, provides for a similar waiving of immunity.

<sup>178</sup> *R v Bow Street Metropolitan Stipendiary Magistrate, Ex Parte Pinochet Ugarte* 3 WLR 1,456 (H.L. 1998), was followed by *R v Bow Street Metropolitan Stipendiary Magistrate, Ex Parte Pinochet Ugarte* (No 2), where the first judgment by the House of Lord’s were set aside, followed by *R v Bow Street Metropolitan Stipendiary Magistrate, Ex Parte Pinochet Ugarte* (No 3), <http://iclr.co.uk/assets/media/vote/1996-2014/ac2000-1-147.pdf> (Accessed on 3 May 2017).

<sup>179</sup> Judgment was handed down on 14 February 2002, <http://www.icj-cij.org/docket/files/121/8126.pdf>, at paragraphs 54 and 55 of the judgment. (Accessed on 3 May 2017).

which is before the ICC.<sup>180</sup> The *Arrest Warrant Case* is however distinguishable from the matter of President Al-Bashir in that it does not concern a state who wishes to exercise universal jurisdiction over another state's citizen, but rather the ICC acting on a referral by the UN Security Council. Furthermore, the *Pinochet case* dealt with a former head of state, whereas the "*Arrest Warrant Case*" related to the immunity of a Minister. In this regard the Appeals Chamber of the Special Court of Sierra Leone, in the matter of *Prosecutor v Charles Ghankay Taylor*, remarked that international criminal tribunals are not organs of state, and that they derive their mandate from the international community, and are by implication not subject to the principle of state immunity.<sup>181</sup> The court ruled unanimously that Taylor did not enjoy any immunity from prosecution by the court, even though he was the serving head of state of Liberia at the time criminal proceedings were instituted against him.<sup>182</sup> In paragraph 53 of the judgment the court stated the following

"We hold that the official position of the applicant as an incumbent head of state at the time when these criminal proceedings were initiated against him is not a bar to his prosecution by this court. The applicant was and is subject to criminal proceedings before the Special Court for Sierra Leone".<sup>183</sup>

It is the author's view that the Special Court for Sierra Leone adopted the correct approach to immunity, contrary to Sudan's argument that president Al-Bashir's status as head of state affords him immunity from prosecution by the ICC in terms of customary international law, and that Article 27 of the Rome Statute is not binding on him. It is correct that Article 27 of the Rome Statute cannot remove head of state

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<sup>180</sup> At paragraph 61 of the judgment the court mentioned four situations in which an incumbent minister may still be prosecuted. They are: i) The person may be tried in his or her own country's domestic criminal courts; ii) The person will cease to enjoy immunity from foreign jurisdiction if their state decides to waive his or her immunity; iii) After a person ceases to hold office, he or she no longer enjoys all the immunities accorded to him/her by international law, and could be tried for acts committed before, during or after his or her tenure; and iv) An incumbent or former minister may be subject to criminal proceedings before certain international criminal courts such as the ICC.

<sup>181</sup> *Prosecutor v Charles Ghankay Taylor*, Case Number SCSL-2003-01-I, date of decision 31 May 2004, at paragraph 51 of the judgment.

<sup>182</sup> *Prosecutor v Charles Ghankay Taylor*, Case Number SCSL-2003-01-I, date of decision 31 May 2004, <http://www.rscsl.org/Documents/Decisions/Taylor/Appeal/059/SCSL-03-01-I-059.pdf> (Accessed on 3 May 2017) / Jalloh C.H "Prosecutor v Charles Taylor [Decisions]" 2014, *American Journal of International Law*, Volume 108, Issue 1, Pages 58-67 / Jalloh C.H "The law and politics of the Charles Taylor case" 2015, *Denver Journal of International Law and Policy*, Volume 43, Issue 3, pages 229-276.

<sup>183</sup> The court also remarked at paragraph 45 of the above judgment that Article 27(2) of the Rome Statute similarly provides that no immunities or special procedural rules which may attach to the official capacity of a person, shall be a bar to prosecution in the ICC.



immunity from a non-state party to the Rome Statute, but as discussed above, President Al-Bashir's immunity was implicitly removed by Security Council Resolution 1593. In this regard Ssenyonjo argues that a Security Council referral to the ICC would automatically have the effect that an individual would be bound by the provisions of the Rome Statute, and more specifically by Article 27 thereof.<sup>184</sup> The Pre-Trial Chamber in the matter of *Prosecutor v. Omar Hassan Ahmad Al-Bashir*<sup>185</sup> was also of the view that as a result of UN security Council Resolution 1593,

*“...the Chamber considers that the current position of Omar Al Bashir as head of a state which is not a party to the Statute, has no effect on the court's jurisdiction over the present case...”*<sup>186</sup>

That the ICC acted legally when issuing arrest warrants against President Al-Bashir cannot be disputed, which leads to the next question: Can the ICC request state parties to act on the warrants, and to arrest and surrender President Al-Bashir, perhaps causing that state party to act contrary to its obligations under international law, with respect to its obligations towards a third state?

#### 3.4.2.3 Can the ICC request state parties to surrender President Al-Bashir?

The goal of this study is not to contribute to the debate amongst scholars whether Articles 27(2) and 98(1) of the Rome Statute are in conflict with each other, and how that apparent conflict of norms should be interpreted and applied to the Al-Bashir matter. The debate is however relevant to the study in that it is one of the main reasons given by the AU when it issued decisions calling on its member states not to cooperate with the ICC in arresting and surrendering President Al-Bashir.

Gaeta is of the view that the conflicting norms between Article 27(2) enunciating the irrelevance of head of state immunity on the one hand and Article 98(1) barring the ICC from proceeding with a request for the surrender or assistance by a state party

<sup>184</sup> Ssenyonjo M “The rise of the African Union opposition to the International Criminal Court's investigations and prosecutions of African leaders” 2013, *International Criminal Law Review*, Volume 13, Pages 385-428.

<sup>185</sup> Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, Case: ICC-02/05-01/09-3, judgment delivered on 4 March 2009,

<https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-02/05-01/09-3> (Accessed on 3 May 2017).

<sup>186</sup> At paragraph 41, of the judgment.

of an individual, should the request be inconsistent with the state party's obligations under international law towards a third state, can easily be solved by construing that the words "third state" in Article 98(1) specifically refers to non-state parties to the Rome Statute.<sup>187</sup> Accordingly, any state party would therefore be acting inconsistently with international law by arresting President Al-Bashir, as the government of Sudan has not waived Al-Bashir's immunity.<sup>188</sup> Gaeta goes on to state that UN Security Council Resolution 1593 was simply a mechanism designed to trigger the jurisdiction of the ICC, and that Article 103 of the UN Charter is not applicable, as the Resolution obliges Sudan and the other parties to the conflict, to cooperate with the ICC, and merely urges all other states to cooperate fully with the ICC.<sup>189</sup> This legal argument certainly has some merit to it, and it would seem that the Rome Statute distinguishes between immunity for the exercise of jurisdiction on the one hand and immunity for arrest and surrender of a "third state's" officials on the other. Accordingly, so the argument goes, Article 27(2) relinquishes all immunities in relation to a request by the ICC concerning nationals of a state party, whereas Article 98(1) would keep intact the immunities enjoyed under customary international law for non-state parties.<sup>190</sup>

However, on 12 December 2011, the ICC's Pre-Trial Chamber made its position on the interpretation of Article 98(1) clear when it stated that

*"...the Chamber finds that customary international law creates an exception to Head of State immunity when international courts seek a Head of State's arrest for the commission of international crimes. There is no conflict between Malawi's*

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<sup>187</sup> The principle of *pacta tertiis nec nocent nec prosunt*, states that treaties neither obligate nor benefit third parties, and that a treaty cannot create rights for a third party. Cryer R and White N.D "The Security Council and the International Criminal Court: Who's feeling threatened?" 2002, Yearbook of International Peace Operations, Number 8, Pages 143-170 / Akande D "International law immunities and the International Criminal Court" 2004, American Journal of International Law, Volume 98, Number 1, Pages 407-433.

<sup>188</sup> Gaeta P "Does president Al-Bashir enjoy immunity from arrest?" 2009, Journal of International Criminal Justice, Volume 7, Issue 2, Pages 315-332 / Wardle P "The survival of head of state immunity at the International Criminal Court" 2011, Australian International Law Journal, Volume 18, Pages 181-206 / Akande D "International law immunities and the International Criminal Court" 2004, The American Journal of International Law, Volume 98, Number 3, Pages 407-433.

<sup>189</sup> Point (2) of the Resolution states that: "*Decides that the Government of Sudan and all other parties to the conflict in Darfur, shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully*".

<sup>190</sup> Knottnerus A.S "How to reconcile the African Union and the International Criminal Court" 2012, Journal of African Union Studies, Volume 1, Issues 2 and 3, Pages 25-45.



*obligations towards the Court and its obligations under customary international law; therefore, article 98(1) of the Statute does not apply.*<sup>191</sup>

Akande is correct when stating that the purpose of Article 27(2) is to completely remove immunity from individuals and that Article 98(1) can therefore not be interpreted as allowing state parties to rely on those very same immunities to avoid arresting or surrendering an individual, even if that individual is a citizen of a non-state party.<sup>192</sup> Imoedemhe is of the view that immunity should no longer be relevant when it comes to the prosecution of international crimes, regardless of whether the alleged perpetrator is a past-, or incumbent head of state.<sup>193</sup>

### 3.5 Conclusion

African state parties are in a position to make a meaningful contribution towards the evolution of international criminal law in the 21<sup>st</sup> century. Through their participation in the creation of the ICC African states have demonstrated their intent to put a stop to impunity and their commitment to ensure that the victims of mass human rights atrocities receive justice. The blatant attack on the credibility of the ICC in recent years by some African states is unwarranted and should not be encouraged or entertained by the AU. It is the responsibility of each state party to the Rome Statute to ensure the ICC's success through the principle of complementarity.

<sup>191</sup> Paragraph 43 of the judgment in the matter of Situation in Darfur, Sudan, the Prosecutor v Omar Hassan Ahmad Al Bashir, Case Number: ICC-02/05-01/09 in the Decision Pursuant to Article 87(7) of the Rome Statute on the failure by the Republic of Malawi to comply with the cooperation requests issued by the ICC with respect to the arrest and surrender of president Al-Bashir. The judgment can be accessed at [https://www.icc-cpi.int/CourtRecords/CR2011\\_21722.PDF](https://www.icc-cpi.int/CourtRecords/CR2011_21722.PDF) and Paragraph 14 of the subsequent judgment of 13 December 2011, by the Pre Trial Chamber I, [https://www.icc-cpi.int/CourtRecords/CR2012\\_04203.PDF](https://www.icc-cpi.int/CourtRecords/CR2012_04203.PDF) (Accessed on 5 May 2017).

<sup>192</sup> Akande D "The legal nature of Security Council Referrals to the ICC and its impact on Al-Bashir's immunities" 2009, *Journal of International Criminal Justice*, Volume 7, Issue 2, Pages 333-352 / Kyle J "The "new legal reality" peace, punishment and the Security Council referrals to the ICC" 2015, *Transnational Law and Contemporary Problems*, Volume 25, Issue 1, Pages 109-152 / In this regard also see Sampson I.T "Africa in Dilemma: The implementation of the warrant of arrest against the Sudanese president on Africa's solidarity" 2011, *Africa Insight*, Volume 41, Issue 3, pages 127-141 / where the author also agrees that by virtue of UN Security Council Resolution 1593, Sudan is seen to be in an analogous position to that of a state party, and further that Article 25 of the United Nations Charter clearly states that "...the members of the United Nations agree to accept and carry out the decisions of the UNSC in accordance with the present Charter...", and seeing that Sudan is a member of the United Nations, the Sudanese government is bound by UN Security Council Resolution 1593.

<sup>193</sup> Imoedemhe O "Unpacking the tension between the African Union and the International Criminal Court: The way forward" 2015, *African Journal of International and Comparative Law*, Volume 23, Issue 1, Pages 74-105.

## Chapter 4

### Botswana, Kenya and Uganda and the Implementation of the Rome Statute

#### 4.1 Introduction

*“...I am an African. I am born of the peoples of the continent of Africa. The pain of the violent conflict that the peoples of Liberia, and of Somalia, of the Sudan, of Burundi and Algeria is a pain I also bear. The dismal shame of poverty, suffering and human degradation of my continent is a blight that we share.... The evolution of humanity says that Africa reaffirms that she is continuing her rise from the ashes. Whatever the setbacks of the moment, nothing can stop us now! Whatever the difficulties, Africa shall be at peace!”<sup>194</sup>*

The idea of an African Renaissance was first captured in a series of essays written by Cheikh Anta Diop, a Senegalese historian.<sup>195</sup> The concept of an African Renaissance entails the belief that Africa as a whole must overcome the current challenges facing the continent to achieve cultural, scientific and economic renewal. To achieve these goals, peace, stability and accountability is a must, as it will create the necessary environment for Africa to prosper.<sup>196</sup> The adoption of legislation to give effect to the commitment by African state parties to the Rome Statute must therefore receive the necessary attention and resources it requires. However, at a grassroots level, a state party generally has more specific short term goals when adopting implementation legislation. The first goal relates to criminal law, which includes punishment, deterrence and crime prevention. According to Shany, these goals are often referred to collectively as “bringing an end to impunity”.<sup>197</sup> Secondly,

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<sup>194</sup> Excerpt from the famous speech entitled “I am an African” delivered by former President Thabo Mbeki in parliament on 8 May 1996, during the adoption of the 1996 Constitution of the Republic of South Africa.

<sup>195</sup> Diop C.A *Towards the African renaissance: essays in African culture & development, 1946-1960* (Karnak House, London, 1996).

<sup>196</sup> In this regard also see article by: Nmehielle V.O “The African Union and African Renaissance: A new era for human rights protection in Africa?” 2003, Singapore Journal of International & Comparative Law, Volume 7, Pages 412-446.

<sup>197</sup> According to Shany B.Y “The Role of National Courts in Advancing the Goals of International Criminal Tribunals” 2009, Proceeding of the Annual Meeting (American Society of International Law), Volume 103, International Law as Law, Pages 2010-2015, the author speaks of the goals that

political goals, for the state to internally promote peace, stability and reconciliation as well as to achieve external political coherence with other countries, and thirdly, legal goals to develop a country's national laws and the application of international criminal law by that country. This chapter will investigate the progress made, and also the challenges faced by Botswana, Kenya and Uganda regarding the implementation of the Rome Statute of the International Criminal Court. The implementation legislation of each country will also be tested against that of South Africa, which was used as the benchmark for implementation legislation in this study.

## 4.2 Botswana

### 4.2.1 Introduction

Botswana gained independence on 30 September 1966, after the country's first general election was held with Sir Seretse Khama as its first president. The Constitution of Botswana is the supreme law of the country.<sup>198</sup> As in South Africa, Botswana is a common law country and the sources of law include customary law, legislation (Botswana makes use of a Penal Code) and judicial precedent.<sup>199</sup> Botswana has a dualist legal system,<sup>200</sup> therefore all international agreements and conventions acceded to by Botswana will only acquire force of law once it has been domesticated and incorporated into Botswana's legislation.<sup>201</sup>

Botswana signed the Rome Statute on 8 September 2000, and deposited its instrument of ratification on the same day, thereby becoming the fifth African state to do so. Botswana has always been a staunch supporter of the ICC, and in recent

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International Criminal Tribunals wish to achieve. Those categories are also applicable to states when deciding to become a States Party to the Rome Statute.

<sup>198</sup> The Constitution of the Republic of Botswana 1966, as amended.

<sup>199</sup> The Botswana Penal Code as amended.

<sup>200</sup> Sir H Lauterpacht defines a dualist legal system as follows: "*according to the dualist view, international and municipal law differ so radically in the matter of subjects of law, its sources and its substance, that a rule of international law can never per se become part of the law of the land; it must be made so by the express or implied authority of the state. Thus conceived, the dualist view is merely a manifestation of the traditional positivist attitude*".

<sup>201</sup> Part IV, Sections 86 to 89 of the Botswana Constitution of 1966 as amended.

years has clearly stated that they are committed to arrest Al Bashir or any other person charged by the ICC.<sup>202</sup>

#### 4.2.2 *The legal challenges facing Botswana in implementing the Rome Statute*

As with all states Botswana also faces some hurdles with regard to the implementation of the Rome Statute. Sixteen years after ratification, Botswana has not yet domesticated the Rome Statute by way of an Act of Parliament. The question has to be asked why? Dinokopila identified some of the most pressing issues that would require attention from the state in order for Botswana to fully domesticate the Rome Statute.<sup>203</sup> They are as follows:

##### 4.2.2.1 Dualist State

Botswana is a dualist state and all treaties signed by Botswana do not automatically become law in that country, meaning that even after signing the Rome Statute, the treaty has no real power in Botswana. The treaty may however be used to assist with the interpretation of the law of Botswana by the courts.<sup>204</sup>

##### 4.2.2.2 Penal Code

Botswana's criminal law has been codified in the Botswana Penal Code. When one looks at the penal code, it becomes clear that the law is severely underdeveloped when it comes to the prosecution of international crimes, and more specifically the crimes set out in the Rome Statute. The penal code makes no provision for the crimes of genocide, crimes against humanity, or aggression. Botswana's laws do however provide for the prosecution of war crimes, and since 1970, courts in Botswana have jurisdiction to try war crimes under the Geneva Conventions Act,<sup>205</sup> which domesticated the Geneva Conventions of 1949. A further hindrance is

<sup>202</sup> [http://www.mofaic.gov.bw/index.php?option=com\\_content&view=article&id=655:icc-lauds-botswana&catid=8:latest&Itemid=247](http://www.mofaic.gov.bw/index.php?option=com_content&view=article&id=655:icc-lauds-botswana&catid=8:latest&Itemid=247) and <https://justiceinconflict.org/2013/06/13/backing-the-icc-why-botswana-stands-alone-amongst-au-states/> (Accessed on 12 January 2018).

<sup>203</sup> Dinokopila B.R "The prosecution and punishment of international crimes in Botswana" 2009, *Journal for International Criminal Justice*, Volume 7, Pages 1077-1085.

<sup>204</sup> Dinokopila B.R "The prosecution and punishment of international crimes in Botswana" 2009, *Journal for International Criminal Justice*, Volume 7, Pages 1077-1085.

<sup>205</sup> Volume VI, Chapter 39.03.

*Punishment of offenders against Conventions*

Section 10(8) of the Constitution of Botswana that states: *“No person shall be convicted of a criminal offence unless that offence is defined and the penalty therefor is prescribed in a written law...”*. Although this section of the Constitution ensures legal certainty, it does however prevent the prosecution of international crimes in Botswana that have not been provided for in their penal code. It also prevents the prosecution of international crimes that may have been committed prior to the domestication of the Rome Statute in Botswana.

A further problem will occur when a fugitive accused of committing international crimes is arrested in Botswana on request of another state party. Currently the extradition process in Botswana is governed by their Extradition Act<sup>206</sup> as well as various extradition agreements with other countries, for instance South Africa. Section 8(1)(h) of the Botswana Extradition Act provides for double criminality. According to Dugard *“the principle of double criminality requires that the conduct claimed to constitute an extraditable crime should constitute a crime in both the requesting and the requested state”*.<sup>207</sup> Where no provision is made in Botswana’s law for crimes of genocide, crimes against humanity, or aggression, a perpetrator

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(1) Any person, whatever his nationality, who, whether in or outside Botswana, commits, or aids, abets or procures the commission by any other person of, any such grave breach of any of the scheduled conventions as is referred to in the following articles respectively of those conventions, that is to say-

- (a) article 50 of the convention set out in the First Schedule;
  - (b) article 51 of the convention set out in the Second Schedule;
  - (c) article 130 of the convention set out in the Third Schedule; or
  - (d) article 147 of the convention set out in the Fourth Schedule,
- shall be guilty of an offence and-

(i) in the case of such a grave breach as aforesaid involving the wilful killing of a person protected by the convention in question, shall be sentenced to death or to imprisonment;

(ii) in the case of any other such grave breach as aforesaid, shall be liable to imprisonment for a term not exceeding 14 years.

(2) In the case of an offence under this section committed outside Botswana, a person may be proceeded against, indicted, tried and punished therefor in any place in Botswana as if the offence had been committed in that place.

(3) A magistrate’s court shall have no jurisdiction to try an offence under this section, and criminal proceedings for such an offence shall not be instituted except by or on behalf of the Director of Public Prosecutions.

(4) If in proceedings under this section in respect of a grave breach of any of the scheduled conventions any question arises under article 2 of such convention (which relates to the circumstances in which the convention applies) that question shall be determined by the President and a certificate purporting to set out any such determination and to be signed by or on behalf of the President shall be received in evidence and be deemed to be so signed without further proof, unless the contrary is shown.

(5) Charges of offences under this section shall not be triable by court-martial.

<sup>206</sup> Chapter: 09:03 of the Penal Code.

<sup>207</sup> Dugard J et al International law: A South African Perspective 4th Edition (Juta, Cape Town, 2011).

arrested in Botswana cannot be extradited to another state party that does have implementation legislation in place.<sup>208</sup>

In order to overcome some of the anticipated problems certain pieces of legislation will have to be amended, they include the Penal Code, The Criminal Procedure and Evidence Act and The Extradition Act.

#### 4.2.2.3 Immunity from prosecution.

Section 41(1) of the Constitution states as follows:

*“Protection of President in respect of legal proceedings*

*(1) Whilst any person holds or performs the functions of the office of President no criminal proceedings shall be instituted or continued against him in respect of anything done or omitted to be done by him either in his official capacity or in his private capacity and no civil proceedings shall be instituted or continued in respect of which relief is claimed against him in respect of anything done or omitted to be done in his private capacity.*

*(2) Where provision is made by law limiting the time within which proceedings of any description may be brought against any person, the term of any person in the office of President shall not be taken into account in calculating any period of time prescribed by that law which determines whether any such proceedings as are mentioned in subsection (1) of this section may be brought against that person.”*

This section of the Constitution may contradict Article 27 of the Rome Statute,<sup>209</sup> and the domestication of the Rome Statute may therefore involve amending the Constitution of Botswana.

#### 4.2.2.4 Jurisdiction of Botswana’s Courts.

Chapter 08:01 Section 4 of the Penal Code states that *“The jurisdiction of the courts of Botswana for the purposes of this Code extends to every place within Botswana”*.

<sup>208</sup> Extradition Treaty Between the Republic of South Africa and the Republic of Botswana, signed on 2 May 1969, as amended. Home Affairs and others v Tsebe and others and Ex Parte Minister of Justice and Constitutional Development and another v Tsebe 2012 (5) SA 467 (CC). Further relevant is the SADC Protocol on Extradition to which Botswana is also a signatory.

<sup>209</sup> Article 27(2) of the Rome Statute that states *“Immunities 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”*

It would therefore seem that courts in Botswana do not exercise extraterritorial jurisdiction. There are however some exceptions to this rule, for instance, crimes committed outside the territory of Botswana that are punishable offences under the National Security Act and the Geneva Conventions Act.<sup>210</sup>

#### 4.2.2.5 Lack of Experience

Lack of experience with regard to the prosecution in Botswana of international crimes is another challenge. According to Dinokopila and Stone, there has never been a prosecution in Botswana of a perpetrator accused of committing an international crime, nor has Botswana ever arrested a suspect, upon request by the ICC.<sup>211</sup> Botswana will therefore have to embark on a massive capacity building exercise in order to train prosecutors and judges, to enable them to prosecute international crimes.

#### 4.2.2.6 Bilateral Immunity Agreements

Botswana signed a bilateral immunity agreement with the United States, which prevents Botswana from extraditing American citizens. The treaty has however not yet been domesticated in Botswana.

#### 4.2.2.7 Lack of Infrastructure and Financial Resources

Lack of infrastructure and financial resources to domesticate the Rome Statute is the biggest stumbling block for Botswana.

#### 4.2.2.8 Capital Punishment in Botswana.

In terms of Section 26(1) of the Botswana Penal Code, *“When any person is sentenced to death, the sentence shall direct that he shall be hanged by the neck until he is dead...”*. Section 4(1) of the Constitution states *“No person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of an offence under the law in force in Botswana of which he has been convicted”*. The death penalty in Botswana is therefore constitutionally mandated and protected. Currently a convicted person can be sentenced to death for any of the

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<sup>210</sup> Chapter 23:01 of the Penal Code of Botswana, The National Security Act, Section 16, and The Geneva Conventions Act, 28 of 1970, Section 3.

<sup>211</sup> <https://www.icc-cpi.int/legalAidConsultations?name=pr1164> (Accessed on 30 October 2017).

following crimes, namely premeditated murder, treason, espionage, military offences and piracy.<sup>212</sup> The Rome Statute of the International Criminal Court Bill states that any person in Botswana or elsewhere who has been convicted of crimes against humanity, is liable to receive the death penalty, unless extenuating circumstances have been proved by the convicted person. This may place Botswana in a difficult position, as it is unforeseeable that a state party would willingly surrender a person to Botswana knowing that he or she might receive the death penalty if convicted. The only way around this problem would be for the Botswana government to provide said state party with an assurance that the death penalty will not be sought, or, if convicted, that the death penalty will not be imposed.

As far as South Africa is concerned, in the Constitutional Court judgement of *Minister of Home Affairs and others v Tsebe and others and Ex Parte Minister of Justice and Constitutional Development and another v Tsebe 2012 (5) SA 467 (CC)*<sup>213</sup> delivered on 27 July 2012, it was held that in accordance with section 7(2) of the Constitution, the Government is under an obligation not to deport, extradite or in any way transfer a person to a country where the death penalty is a possible sentence unless sufficient assurances are given that the death penalty will not be imposed, or if imposed not carried out.<sup>214</sup>

#### 4.2.2.9 Proliferation of Treaty Obligations

In recent years there have also been a proliferation of treaty obligations, which further strain the available resources of the government.

#### 4.2.3 *The Rome Statute of the International Criminal Court Bill, Bill No. 22 of 2014*

On 16 July 2014, the Minister of Defence Justice and Security tabled the Rome Statute of the International Criminal Court Bill, Bill No. 22 of 2014, in Botswana's

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<sup>212</sup> Section 26 of the Botswana Penal Code, Chapter 08:01 provide or certain instances where capital punishment may be imposed on an individual. Those include, murder [Section 202], treason [Section 34], Piracy [Section 62], espionage and certain military offences in terms of the Botswana Defence Force Act [Sections 27,28,29,34 and 35].  
<https://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Botswana> (Accessed on 18 October 2016).

<sup>213</sup> Zondo AJ, writing the majority judgment noted that the South African government is required to not only seek an assurance, but also obtain that assurance, failing which extradition could not be granted.

<sup>214</sup> At paragraphs 28,40, 43-46 and 97 of the judgment.



National Assembly. Currently the Bill's technical details are being refined in order to present the Bill to Botswana's Parliament. The aim of the Bill is to provide for the domestication of the Rome Statute and to give effect to Botswana's obligations as a State Party.

The Bill sets out crimes for which Botswana's courts will have jurisdiction, such as genocide, crimes against humanity and war crimes. The Bill also clearly states in which instances national courts will have jurisdiction to try offences committed outside the borders of Botswana. These three instances include: where the perpetrator is a citizen or permanent resident of Botswana, where the offence has been committed against a citizen or permanent resident of Botswana, or, where the perpetrator is present in Botswana after the commission of the alleged offence.

Part III of the Bill deals with cooperation and assistance to the ICC with regard to the investigation and prosecution of persons alleged to have committed international crimes.

Part IV of the Bill deals with the arrest and surrender of persons alleged to have committed international crimes, and also includes provisions dealing with the consensual surrender of an accused person, as well as the rights of such a person.

Part VI of the Bill deals with the enforcement of sentences and also includes a provision for the transfer of a prisoner to the ICC or to another state party to complete his or her sentence, or for the enforcement of a sentence.

Part VII of the Bill deals with investigations by the ICC and the sitting of the ICC in Botswana.

#### 4.2.4 How does Botswana's legislation compare with that of South Africa?

As mentioned above, Botswana and South Africa's legal systems have a common source, namely Roman-Dutch law as influenced by English law. These sources of law are applied in conjunction with legislation and judicial decisions. Although a divergence of the two countries' legal systems have taken place over the years, Botswana's legal system is still influenced and shaped by South African legal practice.<sup>215</sup> South African judicial decisions and academic works are regarded as authoritative in Botswana.<sup>216</sup> For this reason it is suggested that any judicial decision pronounced in South Africa relating to the interpretation of the Rome Statute and its implementation legislation could be used by Botswana as authority, and vice versa. Comparing Botswana's Rome Statute of the International Criminal Court Bill with South Africa's ICC Act to evaluate Botswana's Bill, the author found the Bill to be comprehensive and detailed, providing for domestic prosecution as well as cooperation with the ICC. The legal history shared by both countries should be seen as an advantage as there is still a measure of coherence between the two systems which could prove very useful when working together to stop impunity in Africa.

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<sup>215</sup> Van Niekerk G.J "The application of South African law in the courts of Botswana" 2004, Comparative and International Law Journal of Southern Africa, Volume 37, Issue 3, Pages 312-326 / and Jonas O "Human rights, extradition and the death penalty: Reflections on the stand-off between Botswana and South Africa" 2013, International Journal on Human Rights, Volume 18, Pages 181-204. South Africa and Botswana not only shares a common legal history but are currently both Common Wealth and SADC member countries.

<sup>216</sup> According to Van Niekerk *supra*, even in cases dealing with constitutional law, human rights law and international law, Botswana courts have made reference to South African judicial decisions in particular Attorney-General v Moagi 1982 (2) BLR 124 (CA) and Attorney-General v Dow 1992 BLR 119 (CA). In State v Moitumelo Molefe 1968-1970 BLR 100 (HC), Judge Young CJ, mentions that "...South African law has for long been followed in Botswana, and the practitioners who appear before it's tribunals are trained in South African law. South African law has therefore become a part of our law...", however the judge goes on to state that "...In this connection I may mention that the decisions of the South African courts, ...are not binding on the courts in Botswana; but such decisions may have very substantial persuasive value, especially those of South Africa where the common law is also Roman-Dutch law...".

#### 4.2.5 Conclusion

Abovementioned Bill was passed by the Botswana Parliament during 2017, enabling the country to fulfil its obligations in terms of the Rome Statute.<sup>217</sup>

### 4.3 Kenya

#### 4.3.1 Introduction

Kenya's legal system consists of both statutory and English common law, mixed with elements of tribal and Islamic law.<sup>218</sup> Kenya's first constitution was enacted on 12 December 1963, and the third and latest constitution was promulgated on 27 August 2010<sup>219</sup>. Section 2(6) of the Constitution states that "...*Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution...*", therefore in effect making Kenya a monist legal state. This is a radical departure from Kenya's previous constitution which required that all treaties or conventions first had to be translated into national law through the enactment of domestic legislation.<sup>220</sup>

Kenya became a signatory to the Rome Statute on 11 August 1999, and deposited its instrument of ratification on 15 March 2005, becoming the 98<sup>th</sup> States Party.

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<sup>217</sup> The Act could however not yet be accessed at the time of submission of the dissertation.

<sup>218</sup> The sources of law in Kenya are set out in Section 3 of the Judicature Act (Chapter 8, Laws of Kenya, Revised Edition 2016 [2012]), which states:

*"(1) The jurisdiction of the High Court, the Court of Appeal and of all subordinate courts shall be exercised in conformity with—*

*(a) the Constitution;*

*(b) subject thereto, all other written laws, including the Acts of Parliament of the United Kingdom cited in Part I of the Schedule to this Act, modified in accordance with Part II of that Schedule;*

*(c) subject thereto and so far as those written laws do not extend or apply, the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th August, 1897, and the procedure and practice observed in courts of justice in England at that date: Provided that the said common law, doctrines of equity and statutes of general application shall apply so far only as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary...".* The hierarchy of laws in Kenya therefore starts with the Constitution as the supreme law, followed by Acts of Parliament, specific Acts of the United Kingdom, certain Acts of India, English statutes of general application in force in England on the 12<sup>th</sup> of August 1897, common law and the doctrine of equality, African customary law, Islamic law and lastly, International Instruments.

<sup>219</sup> The Constitution of Kenya, 27 August 2010, <http://www.refworld.org/docid/4c8508822.html> (Accessed 20 October 2016).

<sup>220</sup> Section 46 of the Constitution of Kenya, Act 5 of 1969.

Kenya adopted the International Crimes Act 2008,<sup>221</sup> which came into force on 1 January 2009, thereby domesticating the Rome Statute. However, during October 2015, the government of Kenya gazetted the International Crimes Repeal Bill, to repeal the abovementioned piece of legislation in its entirety. President Kenyatta claimed in the media that the reason for this was to enable Kenya to deal with international crimes at a domestic level.<sup>222</sup> The Bill has been read in Kenya's National Assembly and was thereafter referred to the Justice and Legal Affairs Committee, who was tasked with preparing a report, before the Bill is debated.

On 27 December 2007, a general election took place in Kenya, and on 30 December 2007, the Electoral Board announced Mwai Kibaki as the winner. Immediately after the announcement, supporters of his opponent, Raila Odinga, claimed that there had been electoral manipulation leading to protests and riots throughout Kenya. The government's response was swift and severe, resulting in the killing and wounding of hundreds of people and gross human rights violations.<sup>223</sup> This was followed by with even more ethnic violence in the Rift Valley. According to estimates by the Waki Commission, 1 133 people were killed and more than 600 000 people were internally displaced due to the violence that took place in the period between 27 December 2007 and the end of February 2008.<sup>224</sup> The violence also led to the OTP investigating cases.<sup>225</sup> These cases were referred to the ICC by the Prosecutor who opened an investigation *proprio motu* with the authorization of Pre-Trial Chamber II on 11 March 2010, after it became clear that the government of Kenya would not fulfil its mandate as a state party to the Rome Statute by investigating and prosecuting individuals responsible for the perpetration of gross human rights

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<sup>221</sup> The International Crimes Act 2008, Act No. 16 of 2008.

<sup>222</sup> Njagi J "Kenya moves closer to pulling out of ICC" <http://www.nation.co.ke/news/politics/Kenya-moves-closer-to-pulling-out-of-ICC/1064-3240412-4n5a8vz/index.html> (Accessed on 20 October 2016).

<sup>223</sup> See footnote hereunder, Waki Commission Report page 304 relating to the extent and consequences of the post-election violence in Kenya.

<sup>224</sup> The Commission of Inquiry on Post-Election Violence (Also known as the Waki Commission, due to the fact that Justice Philip Waki Chaired the commission), was an international commission of inquiry established by the Government of Kenya to investigate the post-election violence in Kenya during 2007-2008. The main recommendation of the commission was that a Special Tribunal be created to investigate and prosecute individuals responsible for human rights abuses that were perpetrated. The commission's report is available at: [http://www.kenyalaw.org/Downloads/Reports/Commission\\_of\\_Inquiry\\_into\\_Post\\_Election\\_Violence.pdf](http://www.kenyalaw.org/Downloads/Reports/Commission_of_Inquiry_into_Post_Election_Violence.pdf), (Accessed on 21 August 2017).

<sup>225</sup> In this regard also see the Waki Commission report, and the recommendations made therein. The report can be accessed at: [http://www.knchr.org/Portals/0/Reports/Waki\\_Report.pdf](http://www.knchr.org/Portals/0/Reports/Waki_Report.pdf)

violations.<sup>226 227</sup> The then prosecutor of the ICC, Luis Moreno Ocampo, proceeded to seek indictments for six suspects accused of crimes against humanity, and on 8 March 2011, the Pre-Trial Chamber II issued summonses.<sup>228</sup> The six individuals that were indicted became colloquially known as the “Ocampo six”.<sup>229</sup> In December 2014, ICC Prosecutor withdrew charges of crimes against humanity against President Kenyatta, citing a lack of evidence.<sup>230</sup> Kenya is however in a position to practice positive complementarity and to prosecute the individuals responsible, although there is no political will to do so.

#### 4.3.2 *The International Crimes Act 2008*

As previously stated, the International Crimes Act came into force on 1 January 2009, by a Notice published in the Kenya Government Gazette.<sup>231</sup> The Act makes provision for all aspects covered by the Rome Statute, which includes the criminalisation of the relevant international crimes, jurisdiction for the prosecution of those crimes, admissibility as well as co-operation and judicial assistance. So for instance Section 4 of the Act states that certain provisions of the Rome Statute shall have “*force of law*” in Kenya, and are therefore incorporated verbatim into the law of Kenya.<sup>232</sup> The Act can be seen as a powerful tool to ensure complementarity.

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<sup>226</sup> Sriram C.L and Brown S “Kenya in the shadow of the ICC: Complementarity, Gravity and Impact” 2012, *International Criminal Law Review*, Volume 12, Pages 219-244.

<sup>227</sup> The Kenyan parliament failed to adopt the Special Tribunal Bill aimed at establishing a tribunal for the prosecution of post-election violence.

<sup>228</sup> Asaala E.O “The International Criminal Court factor on transitional justice in Kenya” [http://www.academia.edu/7344543/The\\_International\\_Criminal\\_Court\\_Factor\\_on\\_Transitional\\_Justice\\_in\\_Kenya](http://www.academia.edu/7344543/The_International_Criminal_Court_Factor_on_Transitional_Justice_in_Kenya), (Accessed on 28 August 2017).

<sup>229</sup> The six individuals that were indicted included Deputy Prime Minister Uhuru Kenyatta, Henry Kosgey, William Ruto, Francis Muthaura, Joshua Arap Sang and Mohammed Hussein Ali, the Police Commissioner in Kenya.

<sup>230</sup> Mangu A.M “The International Criminal Court, justice, peace and the fight against impunity in Africa: An overview” 2015 *Africa Development*, Volume 40, Number 2, Pages 7-32. The Pre-Trial Chamber II confirmed the charges against Kenyatta, Ruto and Sang, but declined to confirm the charges against Muthaura, Kosgey and Ali. The trial of Sang and Ruto began on 10 September 2013, and has not yet been finalised.

<sup>231</sup> Gazette Notice: 181, January 2009. The preamble to the Act clearly states the intentions of the legislative drafters thereof, namely that it is “...an Act of Parliament to make provision for the punishment of certain international crimes, namely genocide, crimes against humanity and war crimes, and to enable Kenya to co-operate with the International Criminal Court established by the Rome Statute in the performance of its functions...”.

<sup>232</sup> Section 4(2)(a-i) of the Act.

#### 4.3.2.1 Part II of the Act: International crimes and offences against the administration of justice

Section 6 of the Act criminalises genocide, crimes against humanity and war crimes.<sup>233</sup> Section 6 is a very important part of the Act, as it seeks to align Kenyan criminal law with that of international law, and allows the Kenyan courts to make use of international jurisprudence when interpreting the Act.<sup>234</sup> Subsection 2 of Section 6(2), also provides for conspiracy or attempting to commit the abovementioned crimes by an individual or individuals. The crime of conspiracy is therefore an independent offence separate and distinct from the commission of any other specific substantive crimes provided for in Section 6.<sup>235</sup> The section also prescribes the relevant punishment if convicted, which may include the death penalty or life imprisonment.<sup>236</sup> Section 7 of the Act, which relates to general principles of criminal law further directly, incorporates for instance Articles 28, 29 and 33 of the Rome Statute into Kenyan law. According to Okuta this is very important, as the Kenyan Penal Code does not make provision for the notion of command responsibility or superior orders.<sup>237</sup> Another very important aspect of the Rome Statute that has been incorporated into the Act is that of Article 29, which excludes any statute of limitations for crimes committed.<sup>238</sup> Section 8 of the Act deals with the jurisdiction of the High Court of Kenya to try offences in terms of Section 6. Under normal circumstances, the courts in Kenya only have jurisdiction over crimes committed within the territory of Kenya. Section 8 of the Act however provides for a limited universal jurisdiction in the event that at the time of the offence

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<sup>233</sup> Section 6(4) states that genocide, crimes against humanity and war crimes shall be ascribed the same meaning as per the Rome Statute.

<sup>234</sup> Okuta A “National Legislation for Prosecution of International Crimes in Kenya” 2009, Journal of International Criminal Justice, Volume 7, Pages 1063-1076.

<sup>235</sup> In terms of South African Law the offence of conspiracy is also a statutory offence. Section 18(2)(a) of the Riotous Assemblies Act, 1956 (Act No. 17 of 1956) provides that “*any person who...conspires with any other person to aid or procure the commission of or to commit...any offence, whether at common law or against a statute or statutory regulation, shall be guilty of an offence and liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable*”.

<sup>236</sup> Section 6(3)(a-b) of the Act. In terms of Article 80 of the Rome Statute, a state party may not be prohibited from applying their own prescribed penalties. In the case of Kenya, the death penalty is prescribed by Section 204 of the Penal Code.

<sup>237</sup> Okuta A “National Legislation for Prosecution of International Crimes in Kenya” 2009, Journal of International Criminal Justice, Volume 7, Pages 1063-1076 at page 1066.

<sup>238</sup> Article 29 of the Rome Statute states that “*The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations*”.

*“...the person was a Kenyan citizen or was employed by the Government of Kenya in a civilian or military capacity; the person was a citizen of a state that was engaged in an armed conflict against Kenya, or was employed in a civilian or military capacity by such a state; the victim of the alleged offence was a Kenyan citizen; or the victim of the alleged offence was a citizen of a state that was allied with Kenya in an armed conflict...”*<sup>239</sup>

The Act therefore provides for both active personality jurisdiction as well as passive personality jurisdiction. The courts will also have jurisdiction should a suspect, after the commission of an offence, be present in the territory of Kenya.<sup>240</sup> This however entails that the courts will not be able to establish jurisdiction for crimes committed outside the territory of Kenya. Despite Section 8 of the Act providing for universal jurisdiction, no suspect has to date been indicted on the basis of universal jurisdiction in Kenya. This Part of the Act also makes provision for offences against the administration of justice and the necessary jurisdiction to try those offences.<sup>241</sup>

#### 4.3.2.2 Part III of the Act: General provisions relating to requests for assistance

Part III of the Act makes provision for assistance to the ICC in relation to Part 9 of the Rome Statute which deals with international cooperation and judicial assistance by state parties. A positive aspect of Part III of the Act is that Section 23(2) makes provision for assistance by the Kenyan authorities in a more informal manner, as long as the procedure is not prohibited by Kenyan law.<sup>242</sup> Section 27(1) of the Act provides that immunity or official capacity of an individual shall not constitute a bar for the execution of a request, nor the surrender, transfer or removal of that individual. The wording of Section 27(1) is however problematic in that it only relates to requests for purposes of transfer or surrender of an individual to the ICC. For the purpose of prosecuting an individual in Kenya, immunity provided to the president

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<sup>239</sup> Section 8(b)(i-iv) of the Act.

<sup>240</sup> Section 8(c) of the Act.

<sup>241</sup> Sections 9 to 17 provides for offences relating to the Bribery of judges and officials, Obstruction of justice, the Obstruction of ICC officials, Perjury, Witness giving contradictory evidence, Fabrication of evidence, Offences relating to affidavits, Intimidation and the Retaliation against witnesses.

<sup>242</sup> Section 23(2) of the Act states as follows: *“If the request for assistance specifies that it should be executed in a particular manner that is not prohibited by Kenyan law or by using a particular procedure that is not prohibited by Kenyan law, the Attorney-General or the Minister, as the case may be, shall use his best endeavours to ensure that the request is executed in that manner or using that procedure, as the case may require.”*

under the Constitution of Kenya will prevail. Section 27(2) states that “*Subsection (1) shall have effect subject to sections 62 and 115, but notwithstanding any other enactment or rule of law...*”. This implies that Section 143 of the Constitution of Kenya, which provides the president with protection from legal proceedings, would trump Section 27 of the Act.<sup>243</sup> Section 143(4) of the Constitution however states that “*...The immunity of the President under this Article shall not extend to a crime for which the President may be prosecuted under any treaty to which Kenya is party and which prohibits such immunity...*”. This provision however only relates to the president, and by failing to incorporate Article 27(1) of the Rome Statute into the Act, other important government officials may be free from domestic prosecution.<sup>244 245</sup>

#### 4.3.2.3 Part IV of the Act: Arrest and surrender of persons to the ICC

Part IV of the Act sets out the provisions for requesting the arrest and surrender of an individual remand and bail as well as the restrictions on the surrender of such individual. Upon closer inspection, the powers given to the Minister responsible for National Security is disconcerting. Section 31 determines that the Minister may at any time, apply to the courts for the cancellation of a warrant of arrest, and that if granted, the individual shall be released immediately.<sup>246</sup> Section 43 goes on to state that once a warrant has been issued by the court, the Minister should then determine whether to surrender the individual to the ICC.<sup>247</sup> The power entrusted to the Minister is however not unique, so, for instance, in South African law, the Minister of Justice, in terms of Section 11 of the Extradition Act, 1962 may also order that a perpetrator not be surrendered to foreign authorities.<sup>248</sup> Article 59(4) of the Rome Statute

<sup>243</sup> Section 143(1) of the Constitution of Kenya states as follows: “*Criminal proceedings shall not be instituted or continued in any court against the President or a person performing the functions of that office, during their tenure of office*”.

<sup>244</sup> <https://www.opensocietyfoundations.org/sites/default/files/putting-complementarity-into-practice-20110120.pdf> (Accessed on 28 August 2017).

<sup>245</sup> Gevers C “Immunity and implementation legislation in South Africa, Kenya and Uganda” published on 22 December 2011, available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1975788](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1975788) (Accessed on 28 August 2017).

<sup>246</sup> As per Section 31(2) of the Act.

<sup>247</sup> The Minister is however obliged to furnish reasons, should he decide to refuse the surrender of an individual.

<sup>248</sup> Section 11 of the Extradition Act 1962 (Act No. 67 of 1962) states as follows:

*The Minister may-*

*(a) order any person committed to prison under section 10 to be surrendered to any person authorized by the foreign State to receive him or her; or*



nonetheless states that once a warrant has been issued by the ICC, the states party where the individual is in custody may not consider whether the warrant of arrest was properly issued in accordance with Article 58(1)(a) and (b) of the Rome Statute. Sections 51 and 52 of the Act further provides the Minister with far ranging powers to refuse the surrender of an individual or to postpone the execution of the request for surrender.

#### 4.3.2.4 Other related Parts of the Act

Part V of the Act relates to the local procedures to be followed when receiving a request for cooperation, in the location of persons or the provision of items and/or obtaining of evidence.<sup>249</sup> It also details the procedures for the questioning of persons, the serving of documentation, the appearance of witnesses before the court and the temporary transfer of prisoners.<sup>250</sup> It also prescribes how evidence should be collected and preserved, and how property associated with the commission of international crimes should be identified, frozen and seized.<sup>251</sup> Restrictions on the provision of assistance are dealt with in Sections 109 to 115 of the Act.

Part VI deals with the enforcement of penalties, while Part VII determines the procedures for the transit of an individual to the ICC, or how a sentence that has been imposed by the ICC upon an individual should be served. The protection of national security or third party information is dealt with in Part VIII of the Act, which once again closely follows the procedures set out in Article 72 of the Rome Statute. Part IX deals with investigations or sittings of the ICC in Kenya, and in the last

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*(b) order that a person shall not be surrendered-*

*(i) where criminal proceedings against such person are pending in the Republic, until such proceedings are concluded and where such proceedings result in a sentence of a term of imprisonment, until such sentence has been served;*

*(ii) where such person is serving, or is about to serve a sentence of a term of imprisonment, until such sentence has been completed;*

*(iii) at all, or before the expiration of a period fixed by the Minister, if he or she is satisfied that by reason of the trivial nature of the offence or by reason of the surrender not being required in good faith or in the interests of justice, or that for any other reason it would, having regard to the distance, the facilities for communication and to all the circumstances of the case, be unjust or unreasonable or too severe a punishment to surrender the person concerned; or*

*(iv) if he or she is satisfied that the person concerned will be prosecuted or punished or prejudiced at his or her trial in the foreign State by reason of his or her gender, race, religion, nationality or political opinion.*

<sup>249</sup> Sections 76 to 83 of the Act.

<sup>250</sup> Sections 84 to 94 of the Act.

<sup>251</sup> Sections 95 to 107 of the Act.

instance, Part X relates to how Kenya should address requests for assistance to the ICC.<sup>252</sup>

#### 4.3.3 *The Proposed International Crimes Division of the High Court of Kenya*

In an effort to give effect to the principle of complementarity, the Judicial Service Commission appointed a committee on 9 May 2012, with a mandate to investigate the modalities for the establishment of an International Crimes Division of the High Court (ICD), and furthermore to address all issues relating to the capacity such a division would require to operate.<sup>253</sup> On 30 October 2012, the committee published its report.<sup>254</sup> In general the committee made two important findings. Firstly, it rightly concluded that in terms of the Rome Statute, each state party should primarily be responsible for the prosecution of individuals accused of committing international crimes.<sup>255</sup> Secondly, in light of the failure by the Kenyan government to establish a special tribunal to try perpetrators of post-election violence, the committee recommended that the ICD be established.

The committee recommended that the ICD should have jurisdiction not only to prosecute post-election violence cases, but also to prosecute international and transnational crimes. The ICD would in theory try core international crimes as per Section 6 of the International Crimes Act, and transnational crimes, as well as any other international crimes that might be prescribed.<sup>256</sup> The ICD would be created through a notice in the Government Gazette and would make use of special rules of

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<sup>252</sup> Sections 468 to 170 of the Act.

<sup>253</sup> The terms of reference for the report also included research into the expansion of the jurisdiction of the ICD to also prosecute other international and transnational crimes not proscribed in the International Crimes Act. The committee conducted a literature review and carried out comparative studies with the legal frameworks of Uganda and Rwanda.

<sup>254</sup> The report can be accessed at: <https://www.scribd.com/document/236202990/JSC-Committee-Report-on-the-ICD-of-the-High-Court-30th-OCT-2012> (Accessed on 12 January 2018).

<sup>255</sup> The committee found that Kenya is under an obligation as a state party to cooperate with the ICC in the performance of its work through either of the three following means: i) By making use of the current criminal laws in Kenya as the current Penal Code makes adequate provision for covering most of the crimes committed, ii) By adopting legislation that refers to the relevant provisions of international law, treaties and a range of penalties, or iii) The specific criminalisation of the offences concerned, where the specific crimes are independently defined in the Criminal Code of Kenya.

<sup>256</sup> Some of the transnational crimes include, drug trafficking, human trafficking, cybercrimes, money laundering and even terrorism. The ICD would also have jurisdiction to try any other crimes under an international instrument to which Kenya is a party, for instance the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), or piracy which is a crime under customary international law.

procedure and evidence when conducting trials.<sup>257</sup> The committee recommended that the ICD should be modelled on the ICC, and that rules and procedures similar to those used by the ICC should be adopted. The ICD would consist of seven judges of the High Court, with three judges sitting as a court. The judges would receive special training in international criminal law. The committee also recommended that the ICD be housed in a separate facility due to the sensitive nature of the cases.

The committee recommended that an independent prosecution unit within the Office of the Director of Public Prosecutions be established to exclusively deal with international crimes. The committee however then went on to recommend that legislation be enacted for the appointment of a special prosecutor, who should be responsible for the prosecution of all cases which falls within the jurisdiction of the ICD.<sup>258</sup> The recommendations seem to be contradictory, but as the ICD has not yet been established, the author is of the view that this contradiction will be resolved beforehand.

There is a long road ahead before the ICD can finally be established, and various important questions first have to be answered.<sup>259</sup> Once established, the ICD will also face some challenges that need to be resolved in order to ensure that the court will function properly. Some of these challenges will be addressed in paragraph 3.5 hereunder.

#### *4.3.4 How does Kenya's implementation legislation compare to that of South Africa's?*

The International Crimes Act does not provide for complete universal jurisdiction as the South African ICC Act does. Section 4(3) of the ICC Act endows South African courts with universal jurisdiction to prosecute a person who commits a core crime

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<sup>257</sup> The legislative framework for the creation of the ICD would include the Constitution in which Section 165 establishes the structure and jurisdiction of the High Court, the International Crimes Act, and Section 5 of the Judicial Service Act, which empowers the Chief Justice to create a division.

<sup>258</sup> Recommendation B(2) of the Commission, page 149 of the Report.

<sup>259</sup> Some of the questions include how to guarantee the independence of the ICD and the special prosecutor, how to prosecute individuals in terms of the International Crimes Act, if the Act cannot be retroactively applied to post-election violence cases, and whether the ICD should be created by a statute of parliament or by way of an administrative act by the Chief Justice in terms of the Judicial Service Act.

outside the territory of South Africa when that individual is present in South Africa at any stage after the commission of those crimes.<sup>260</sup> To fully give effect to the complementarity regime, implementation legislation should allow for the prosecution of core international crimes regardless of the territory in which they have been committed. In this regard, Section 8 of the International Crimes Act is lacking, and consideration should be given to amending this section.

#### 4.3.5 *The challenges identified with the implementation of ICC legislation in Kenya*

##### 4.3.5.1 Non-retroactivity of the International Crimes Act

One of the general principles of criminal law throughout the world is that of *nullum crimen, nulla poena sine lege praevia*, which basically states that the criminalisation of an action and its punishment must pre-exist the actual crime. This is to ensure legal certainty. Kenya ratified the Rome Statute on 15 March 2005, and the International Crimes Act came into force on 1 January 2009. It therefore means that all cases relating to the post-election violence that occurred during the period of 2007-2008, would not be eligible to be prosecuted under the Act. The JSC committee report is of the view that since Kenya ratified the Rome Statute during 2005, the crimes perpetrated during the post-election violence can be regarded as pre-existing crimes, and that the perpetrators should be liable for prosecution under the Act.<sup>261</sup> The problem with this argument is that at the time of ratification of the Rome Statute, Kenya was still a dualist state, which would necessitate that a state not only ratifies an international treaty, but also domesticates it through the adoption of legislation before it becomes law in that country. A solution would be for the International Crimes Act to be amended to allow for the retroactive application of the Act to the specific period covering the post-election violence in Kenya. In the matter of *Pienaar Brothers (Pty) Ltd v Commissioner for the South African Revenue Service and Another* the court had to decide whether the enactment of retrospective legislation, which *ex post facto* deems the law at a particular time to be what it was

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<sup>260</sup> National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and Another [2014] ZACC 30.

<sup>261</sup> Paragraphs 5.5.1 and 5.5.2 of the Commission's Report.

not, offends against the principle of legality and the rule of law.<sup>262</sup> Fabricius J found that retrospective laws are permissible, and stated that the test to determine whether the retroactive law would be constitutional is the test of whether the legislation was reasonable or proportional, when that legislation limits a fundamental right afforded to an individual in the Bill of Rights. Section 36(1) of the Constitution provides that such a limitation is valid only if it is “*reasonable and justifiable in an open and democratic society*”. The court found that

*“The amendment adopted by parliament was not arbitrary and therefore not in breach of Section 25 (1) of the Constitution. Further, and in any event, the amendment was reasonable and justifiable in terms of Section 36 (1) of the Constitution”.*<sup>263</sup>

#### 4.3.5.2 Lack of political will, capacity shortfalls and funding

The absence of political willpower to ensure that perpetrators are prosecuted is a major stumbling block in ensuring positive complementarity.<sup>264</sup> This problem however does not directly relate to the application of the International Crimes Act, as a lack of investigation by the Police and Director of Public Prosecutions ensures that there is no justice. The prosecution of international crimes is a specialised field, and requires training in the prosecution and adjudication of these matters, and the government will have to secure funds for this training, and the operation of the staff and court.

#### 4.3.5.3 Proposed ICD should only deal with core international crimes

As mentioned above, it is envisioned that the proposed ICD of the High Court should also deal with transnational and organised crime. This will however overburden the ICD, while the High Court of Kenya is perfectly equipped to fully prosecute these crimes at present. The ICD should rather be used to focus on the prosecution of core international crimes, and even more specifically, the extensive human rights abuses

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<sup>262</sup> Pienaar Brothers (Pty) Ltd v Commissioner for the South African Revenue and Another, unreported case no 87760/2014, from the High Court of South Africa, Gauteng Division, Pretoria. Available at: <http://www.saflii.org/za/cases/ZAGPPHC/2017/231.html>, (Accessed on 29 August 2017). The principle is also discussed in the matter of Oriani-Ambrosini v Sisulu MP, Speaker of the National Assembly 2012 (6) SA 588 (CC).

<sup>263</sup> At paragraph 110 of the judgment.

<sup>264</sup> A real option for justice? The International Crimes Division of the High Court of Kenya. KPTJ Report, 14 July 2014. Available at: <http://kptj.africog.org/> (Accessed on 29 August 2017).

that occurred in the post-election period. Only thereafter should consideration be given to expanding the jurisdiction of the ICD to other related crimes.

#### *4.3.6 Conclusion*

The political willpower of a government largely determines whether that country will be able to effect positive complementarity. In the case of Kenya, although the International Crimes Act seems to provide an adequate legislative framework for the prosecution of international crimes, the necessary political drive to do so is severely lacking. On 25 October 2015, the International Crimes Repeal Bill was published and introduced in parliament. The principal object of the Bill was to repeal the International Crimes Act in its entirety as part of a move on the part of Kenyan government to withdraw as a state party to the Rome Statute. The bill went through the first reading, and then a formal introduction in the House during June 2016. The bill however did not pass the second reading, and was left to lapse on a technicality. As at September 2017, the government of Kenya has not provided the Secretary-General of the UN with a written notification in terms of Article 127 of the Rome Statute of its intention to withdraw as a state party. It can be argued that the current rhetoric is little more than a political ploy to influence the ICC. Nevertheless it is the ordinary citizen that will pay the price, should Kenya proceed with their threats to withdraw.

## **4.4 Uganda**

### *4.4.1 Introduction*

After many years as a British protectorate, Uganda gained independence from Britain on 9 October 1962, and became a republic in 1963. Uganda's legal system is that of English Common Law, complimented by customary law. As in South Africa, the Constitution is the supreme law in Uganda, and any legislation that is in conflict with the Constitution is null and void.<sup>265</sup> Uganda signed the Rome Statute on 17

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<sup>265</sup> The Ugandan Constitution refers to the 1995 Constitution of Uganda as promulgated on October 8, 1995.

March 1999, and ratified the Statute on 14 June 2002. Since becoming the 68<sup>th</sup> state party, Uganda has enacted legislation to give effect to their commitment to the Rome Statute in the form of the International Criminal Court Act 2010, which will be discussed in more detail hereunder.<sup>266</sup> In 2003, Uganda became the first state party since the establishment of the ICC, to refer a situation to the Court, when it asked the ICC to investigate crimes allegedly committed by the Lord's Resistance Army (LRA) in Northern Uganda during 2002.<sup>267</sup> Uganda is also unique in that it established the International Crimes Division (ICD), a special division of the High Court of Uganda during 2008, as part of the Juba Agreement. The purpose of the ICD is to prosecute individuals accused of committing crimes noted in The International Criminal Court Act 2010, as well as certain other serious crimes such as human trafficking, piracy and other international crimes. Uganda also faces some obstacles and challenges with regard to the implementation of the Rome Statute, which will also be discussed hereunder.

After the National Resistance Army toppled the government of Milton Obote in 1986, President Museveni came to power in Uganda, heralding a fairly peaceful period in the country's history. However, due to ethnic strife and social inequality between the Northern and Southern regions of the country, the Lord's Resistance Army, a rebel group led by the self-proclaimed prophet and leader Joseph Kony strengthened by military support from the government of Sudan started a military offensive leading to numerous human rights abuses by both the LRA and the Ugandan military.<sup>268</sup>

#### 4.4.2 *The International Criminal Court Act 2010*

In 2006, the International Criminal Court Bill was introduced in the Ugandan Parliament, and on 10 March 2010, the International Criminal Court Act was

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<sup>266</sup> The Ugandan International Criminal Court Act 2010, was adopted by the Ugandan Parliament on 10 March 2010, and entered into force during June of the same year.

<sup>267</sup> The referral took place in terms of Article 14 of the Rome Statute which states that "A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes".

<sup>268</sup> For a more detailed history of the LRA see, <http://www.smallarmssurveysudan.org/fileadmin/docs/working-papers/HSBA-WP-08-LRA.pdf> , (Accessed on 19 July 2017).

unanimously adopted.<sup>269</sup> The Act came into force on 25 June 2010. The Act makes detailed provision for both cooperation and complementarity as stipulated in the Rome Statute.<sup>270</sup>

#### 4.4.2.1 Part II of the Act: International crimes and offences against the administration of justice

Sections 7, 8 and 9 of the Act criminalise genocide, crimes against humanity and war crimes.<sup>271</sup> Section 7(1)(b) of the Act also provides for criminalisation of the crime of conspiracy to commit genocide, thereby establishing individual accountability and providing for the punishment thereof by imprisonment for life or any lesser term as the court may deem appropriate.<sup>272</sup> The Act goes further and also includes the

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<sup>269</sup> The first Bill that was introduced to Parliament was in June 2004, however the Bill did not pass, therefore necessitating a reintroduction in December 2006 of the International Criminal Court Bill 18 of 2006. The Committee on Legal and Parliamentary Affairs then took a further three and a half years to file a report on the Bill, which was presented on 10 March 2010, and after the second and third reading of the Bill, the Ugandan Parliament enacted the statute, which was assented to by the Ugandan President on 25 May 2010.

<sup>270</sup> Section 2 of the Ugandan ICC Act states as follows: "*The purpose of this Act is-*

- (a) to give the force of law in Uganda, to the Statute;
- (b) to implement obligations assumed by Uganda under the Statute;
- (c) to make further provision in Uganda's law for the punishment of the international crimes of genocide, crimes against humanity and war crimes;
- (d) to enable Uganda to co-operate with the ICC in the performance of its functions, including the investigation and prosecution of persons accused of having committed crimes referred to in the Statute;
- (e) to provide for the arrest and surrender to the ICC of persons alleged to have committed crimes referred to in the Statute;
- (f) to provide for various forms of requests for assistance to the ICC;
- (g) to enable Ugandan courts to try, convict and sentence persons who have committed crimes referred to in the Statute;
- (h) to enable the ICC to conduct proceedings in Uganda; and
- (i) to enforce any sentence imposed or order made by the ICC".

<sup>271</sup> Section 9 of the Act refers to war crimes as they are defined in the 4 Geneva Conventions. Before the International Crimes Act came into force, the Geneva Conventions Act that was passed in 1964 provided for the punishment of grave breaches of the 4 Geneva Conventions.

<sup>272</sup> Section 7 of the Act reads as follows:

- "(1) A person is liable on conviction on indictment to the penalty specified in subsection (3) who, in Uganda or elsewhere—
- (a) commits genocide; or
  - (b) conspires or agrees with any person to commit genocide, whether that genocide is to take place in Uganda or elsewhere.
- (2) For the purposes of this section, "genocide" is an act referred to in article 6 of the Statute.
- (3) The penalty for genocide, or conspiring with, or agreeing with any person to commit genocide is imprisonment for life or a lesser term."



criminalisation of offences against the administration of justice.<sup>273</sup> The Act however does not criminalise the crime of aggression, although the Rome Statute as a whole is included as a schedule to the Act, wherein Article 5(1)(d) does make provision for this. Before the introduction of the Act, Ugandan law did not make provision for any crimes against humanity, although some of the acts that constitute crimes against humanity could be punished under the Penal Code.<sup>274</sup> As with the South African ICC Act, section 17 also stipulates that the Director of Public Prosecutions must consent before any proceedings may be instituted. The jurisdiction of the courts in Uganda to try matters is regulated by Section 18 of the Act.<sup>275</sup> The principle of universal jurisdiction is therefore incorporated into the Act, providing that the courts have jurisdiction to hear a matter, even if the entire crime was committed outside the territory of Uganda, as long as the perpetrator is present in Uganda any time after the commission of the alleged crime. Previously the Geneva Conventions Act of 1964 also provided the courts with universal jurisdiction.<sup>276</sup>

#### 4.4.2.2 Parts III to X of the Act: General provisions relating to requests for assistance, arrest and surrender of persons to the ICC, cooperation with the ICC and other general provisions

Part III of the Act deals with provisions relating to requests for assistance by the ICC relating to the provisional arrest, and arrest and surrender of suspects to the ICC, as well as the taking of evidence and all other related assistance that can be rendered by the Ugandan authorities to the ICC. Part V of the Act deal with complementarity in that it sets out the procedures for a domestic prosecution of individuals accused of

<sup>273</sup> Sections 10, 11, 12 13, 14, 15 and 16 provides for offences relating to corruption by a judge, bribery of a judge, corruption and bribery of an ICC official, provision of false evidence, fabrication of evidence before the ICC, conspiracy to defeat justice and interference with witnesses or officials.

<sup>274</sup> In this regard see Sections 123, 124, 188 and 189 of the Penal Code.

<sup>275</sup> Section 18 of the Act states as follows: *“For the purpose of jurisdiction where an alleged offence against sections 7 to 16 was committed outside the territory of Uganda, proceedings may be brought against a person, if—*

*(a) the person is a citizen or permanent resident of Uganda;*

*(b) the person is employed by Uganda in a civilian or military capacity;*

*(c) the person has committed the offence against a citizen or permanent resident of Uganda; or*

*(d) the person is, after the commission of the offence, present in Uganda”.*

<sup>276</sup> Section 2 of the Geneva Conventions Act 1964, states that *“...Where an offence under this section is committed without Uganda, a person may be proceeded against, indicted, tried and punished for that offence in any place in Uganda as if the offence had been committed in that place, and the offence shall, for all purposes incidental to or consequential on the trial or punishment of the person, be deemed to have been committed in that place”.*

international crimes. Implementation of the Act goes a long way to address the current situation. Additional legislation may however be required to enable the government to act against the perpetrators of crimes committed before the Act commenced, as the Act does not have retroactive working.<sup>277</sup>

#### 4.4.3 *The International Crimes Division of the High Court*

In terms of Article 141 of the Constitution of Uganda, and in putting the Juba peace agreement into practice, the International Crimes Division (ICD) was created. The ICD is a special division of the High Court,<sup>278</sup> created to specifically deal with crimes mentioned in the International Criminal Court Act 2010, as well as certain other serious crimes that require specialist knowledge to successfully prosecute, including terrorism, human trafficking, piracy and other international crimes.<sup>279</sup> Although the ICD was originally created to give effect to the Juba peace agreement, the ICD is seen as a court of complementarity with respect to Uganda's obligations as a state party to the Rome Statute. According to the ICD's mission statement, the ICD was created to fight impunity and to promote human rights, peace and justice.<sup>280</sup> A further important aspect of the ICD's work is to promote an image of a strong, independent and impartial judiciary. The ICD consists of 5 High Court judges. Appeal against an ICD decision can be lodged with the Court of Appeal and with the Supreme Court of Uganda.

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<sup>277</sup> In general, there is a presumption that legislation does not have retroactive working, unless specifically mentioned in the particular act or by implication. *Transnet Ltd v Ngcezulu* 1995 (3) SA 538 (A) / *Curtis v Johannesburg Municipality* 1906 TS 311 / *S v Mhlungu* 1995 (3) SA 867 (CC) and *National Director of Public Prosecutions v Carolus and Others* 2000 (1) SA 1127 (SCA).

<sup>278</sup> The ICD was created in terms of Section 6 of the High Court Practice Directions, by Legal Notice 10 of 2011.

<sup>279</sup> Legislation over which the ICD has jurisdiction includes the International Criminal Court Act 2010; The Geneva Conventions Act, Chapter 363 and the Penal Code Act, Chapter 120. Other laws applicable to the functioning of the ICD include the Constitution of Uganda 1995; The Trial on Indictment Act, Chapter 23, and The Evidence Act, Chapter 6.

<sup>280</sup> <http://www.judiciary.go.ug/data/smenu/18/International%20Crimes%20Division.html>, (Accessed on 21 July 2017).

#### *4.4.4 How does Uganda's legislation compare to that of South Africa?*

The International Criminal Court Act is a comprehensive and detailed piece of legislation signalling Uganda's willingness to put a stop to impunity. The Act is comparable to that of Kenya, and like South Africa's International Criminal Court Act, it incorporates the Rome Statute crimes into its national legislation.

#### *4.4.5 Legal challenges facing Uganda with regard to the implementation of the Rome Statute*

##### *4.4.5.1 Head of State Immunity*

Section 98(4) of the Constitution of Uganda states that while holding the office of President, an individual shall not be liable to proceedings in any court whether they be civil or criminal. When one considers that Article 27 of the Rome Statute has not been incorporated into the International Crimes Act, and the fact that the Constitution takes precedence over any law inconsistent with it, it becomes clear that whilst being President, an individual cannot be prosecuted for any crimes provided for in the Act.<sup>281</sup> Section 25 of the Act does provide that official capacity of a person is no bar for either refusing or postponing the execution of a request for surrender or assistance made by the ICC. It therefore seems that whilst the head of state cannot be prosecuted inside Uganda during his tenure as president, his or her official capacity should be no restriction for the Ugandan authorities to cooperate with the ICC in surrendering him or her for prosecution in The Hague. This scenario seems unlikely though. This lacuna in the Act does however not apply to another country's head of state, and theoretically the authorities in Uganda should be able to arrest and surrender any other head of state that finds him- or herself in their territory at the time of a request made by the ICC.

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<sup>281</sup> Article 2(2) of the Ugandan Constitution of 1995.

#### 4.4.5.2 The Amnesty Act of 2000

During 2000, the government of Uganda published The Amnesty Act, providing a blanket amnesty from prosecution for all individuals who had, since 26 January 1986, participated in the war or armed rebellion against the government.<sup>282</sup> The Act initially provided for an amnesty period of six months, which, upon expiry, could be extended.<sup>283</sup> It is estimated that since its enactment, 13 000 former LRA fighters have received pardons.<sup>284</sup> Although the amnesty aided in facilitating peace in Uganda, it undermines the successful implementation of the International Crimes Act, thereby fuelling impunity.<sup>285</sup> Many of the crimes perpetrated during the conflict in Uganda were war crimes and crimes against humanity. By also granting amnesty to senior LRA commanders in an effort to bring an end to the conflict, the government failed the victims of the conflict.<sup>286</sup> In the matter of *Uganda v Thomas Kwoyelo*,<sup>287</sup> the Supreme Court of Uganda, however ruled that the former LRA commander must be tried before the ICD, and that his actions were still punishable under Section 147 of the Geneva Conventions Act, and Article 8(2)(e) of the Rome Statute.<sup>288</sup> This is an important judgment, in that to some extent it clarifies the position of individuals that

<sup>282</sup> Section 3 of the Amnesty Act, 2000 provides as follows:

*“(1) An Amnesty is declared in respect of any Ugandan who has at any time since the 26th day of January, 1986 engaged in or is engaging in war or armed rebellion against the government of the Republic of Uganda by –*

*(a) actual participation in combat;*

*(b) collaborating with the perpetrators of the war or armed rebellion;*

*(c) committing any other crime in the furtherance of the war or armed rebellion; or*

*(d) assisting or aiding the conduct or prosecution of the war or armed rebellion.*

*(2) A person referred to under subsection (1) shall not be prosecuted or subjected to any form of punishment for the participation in the war or rebellion for any crime committed in the cause of the war or armed rebellion.”*

<sup>283</sup> Section 17 of the Amnesty Act, 2000. Amnesty was extended, but ceased on 25 May 2012.

<sup>284</sup> [www.redress.org/downloads/Amnesty-law---Uganda.docx](http://www.redress.org/downloads/Amnesty-law---Uganda.docx) (Accessed on 5 September 2017).

<sup>285</sup> Every person issued an amnesty certificate is immune from prosecution in terms of Article 28(5)(f) of the Constitution of Uganda. In this regard also see Ryngaert C and Gould L “International criminal justice and *jus post bellum*: The challenge of ICC complementarity: A case study of the situation in Uganda” 2011, *Revue Belge De Droit International*, Volume 1-2, Pages 91-121.

<sup>286</sup> Uganda is a party to the Genocide convention and has also ratified all the core international human rights treaties. By granting a blanket amnesty to all LRA combatants, the government is in effect violating their treaty obligations. The Amnesty Act also stipulates that no form of punishment can be meted out against an individual that has been granted amnesty.

<sup>287</sup> *Uganda v Thomas Kwoyelo*, Constitutional Appeal Number 1 of 2012

<http://www.right2info.org/resources/publications/uganda-v.-kwoyelo-judgment> (Accessed on 6 September 2017).

<sup>288</sup> The court stated at paragraph 15, page 65 of the judgment that “...As to the issue of whether the Amnesty Act is inconsistent with Uganda’s international law obligations, it is also my considered opinion that it is not as it does not grant blanket amnesty for all crimes. The Geneva Conventions Act still applies, and the indictment of the respondent under Article 147 thereof does not violate the Constitution of Uganda...”.

have not been granted amnesty, but who could not be tried for crimes as stipulated in the International Crimes Act.<sup>289</sup>

#### 4.4.5.3 Non-retroactive application of the International Crimes Act

As is the case with Kenya's International Crimes Act, Uganda's International Crimes Act also does not make provision for the retroactive application of the Act. Article 15(2) of The International Covenant on Civil and Political Rights, which Uganda acceded to on 21 June 1995, without making any reservations, states that

*“Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations”.*

It can therefore be argued that the International Crimes Act could be amended to include the retroactive application of the Act to the conflict, and that such an amendment would not be unconstitutional. Article 28(7) of the Constitution however states that

*“No person shall be charged with or convicted of a criminal offence which is founded on an act or omission that did not at the time it took place constitute a criminal offence”.*

It is the author's view that it could be argued that the core international crimes which the International Crimes Act seeks to punish were in fact already part of the Ugandan law, as the Geneva Conventions Act came into force on 16 October 1964. For the time being, perpetrators can be tried by the ICD under the Geneva Conventions Act.

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<sup>289</sup> It is interesting to note that no individual from the Ugandan Army has ever been indicted or tried for any crimes committed during the conflict, although it is certain that they too have in fact committed human rights violations.

#### *4.4.6 Conclusion*

The African continent has the potential to be prosperous and peaceful. Domesticating the Rome Statute should be given priority and the necessary allocation of human and capital resources in order for the ICC to succeed, as the primary responsibility to ensure that perpetrators are brought to book lies with the state parties to the Rome Statute. In the next and final chapter of the dissertation, the main aim of the study will be answered, and recommendations will be made to enable African state parties to implement the Rome Statute in a way that would be meaningful.

## Chapter 5

### Conclusion and Recommendations

#### 5.1 Introduction

*“I firmly believe the international community needs to change the narrative about Africa and to establish a higher platform of cooperation that recognizes Africa’s enormous potential and promise. In the area of peace and security, the African Union and United Nations have a shared interest in strengthening mechanisms to defuse conflicts before they escalate, and to manage them effectively when they occur. Enhancing African capacities is essentially both in the context of our collective response to international peace and security challenges as well as for the self-reliance of the African continent.”<sup>290</sup>*

The aim of this study is to identify the legal challenges faced by Botswana, Kenya and Uganda with regard to the implementation of the Rome Statute, and after identifying the difficulties faced by these countries to suggest actions that may be implemented in order to give effect to complementarity and cooperation by these state parties. In the previous two chapters, various implementation issues were identified which hinder effective complementarity and cooperation. In some cases it is the implementation legislation itself which is lacking in certain areas, therefore allowing impunity to continue. In some countries the judicial and prosecutorial structures created, which are supposed to be the custodians of the implementation legislation, are hampered from giving full effect to the legislation by certain legal factors in those countries’ legal systems. All the critical challenges have been identified. In some instances the solutions suggested in this chapter will entail that a country’s constitution be amended. In other cases, a less intrusive solution is possible to ensure effective implementation. Lastly, although the study seeks to address the legal challenges, it also includes some important subjective factors hampering the implementation of the Rome Statute in Africa. In this regard, politics plays a major role, and because legislation can, to some extent, be used to exert

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<sup>290</sup> Remarks to the Security Council on enhancing African capacities in the areas of Peace and Security by the Secretary General of the United Nations, Mr António Guterres on 19 July 2017.

political will, it was deemed necessary to include this important factor that has an influence on the implementation legislation, or, where legislation has already been domesticated the effective application thereof.<sup>291</sup>

## 5.2 Answering the main aim of the study

In the following paragraphs the most critical legal challenges that have been identified which are hampering the effective implementation of the Rome Statute will be discussed, and solutions proposed.<sup>292</sup> The idea is that African state parties who have not yet domesticated the Rome Statute may be made aware of certain issues and may make use of the knowledge when drafting national legislation or when negotiating a cooperation protocol.

### 5.2.1 Head of state immunity, pardons and amnesty as well as conflicting or competing Acts and/or instruments.

A major challenge identified in the study is that of head of state immunity. A state's domestic legislation should ensure that their law enforcement authorities and courts are able to investigate and prosecute any individual accused of committing international human rights abuses, irrespective of their official capacity during or after the alleged commitment of those crimes. As previously discussed in the study, immunities in international law have a legitimate and necessary purpose, albeit limited.<sup>293</sup> The challenge is that customary head of state immunity is used as an excuse to bar the prosecution of a sitting head of state of a non-state party for core international crimes, as is currently the case with President Al-Bashir.<sup>294</sup> It is however almost universally accepted that immunity *ratione materiae* can never be invoked when being prosecuted before an international criminal tribunal, or even at a

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<sup>291</sup> The establishment of jurisdiction by the ICC over a non-state party as is the case in the Darfur crisis and the indictment of President Al-Bashir. Cole R.J.V "Africa's relationship with the International Criminal Court: More political than legal" 2013, Melbourne Journal of International Law, Volume 14, Pages 670-698.

<sup>292</sup> Throughout the study various legal challenges have been identified which hamper the effective implementation of the Rome Statute. Only the most important challenges faced by all three African countries researched in the study will be discussed hereunder.

<sup>293</sup> Chapter 3, paragraph 4.2.1.

<sup>294</sup> Gevers C "Immunity and the implementation legislation in South Africa, Kenya and Uganda" 2011, which can be accessed at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1975788](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1975788) (Accessed on 16 October 2017).



domestic level.<sup>295</sup> Similarly, immunity *ratione personae* should automatically be removed before an international criminal tribunal, although Akande states that when it comes to a domestic prosecution, state practice unanimously dictates that a state official possessing immunity *ratione personae* will not be subject to the criminal jurisdiction of a foreign state when being accused of committing international crimes.<sup>296</sup> As mentioned below, the drafters of the Rome Statute opted for a compromise when drafting the statute to accommodate as many state parties as possible to ensure that the text is adopted. It therefore appears as if the Rome Statute has conflicting provisions regarding immunity. Article 27(1) states that “*This Statute shall apply equally to all persons without any distinction based on official capacity*”, making functional immunity inapplicable to any individual appearing before the ICC. Article 27(2) states that “*Immunities 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*”, therefore ensuring that personal immunity is redundant before the ICC. Article 98(1) of the Rome Statute however states that the ICC cannot proceed with requesting from a state party the surrender of an individual or assistance which would require said 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....*”. A “*third state*” in this context basically refers to a non-state party to the Rome Statute. The challenge is for a state party to construct provisions in their domestic legislation to ensure that immunity cannot influence their complementarity or cooperation regime. A good example on how to construct such a provision is that of Article 6(2) of the Statute of the Special Court for Sierra Leone which states “*The official position of any accused persons, whether as Head of State or Government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment*”.

Pardons and amnesty legislation should not be an impediment to the exercise of jurisdiction by domestic courts. Many states, including South Africa, make provision

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<sup>295</sup> The Arrest Warrant Case as well as Article 27 of the Rome Statute and Article 7 of the ICTY Statute to mention but a few.

<sup>296</sup> Akande D “International law immunities and the International Criminal Court” 2003 American Journal of International Law, Volume 98, Number 3, Pages 407-433.

for the president of that country to pardon an individual.<sup>297</sup> As head of the executive, a president issues a pardon on a purely discretionary basis, taking into account individual considerations and therefore circumventing judicial proceedings.<sup>298</sup> However, in the matter of *President of the Republic of South Africa and Another v Hugo*, the Constitutional Court held that the act of a presidential pardon would be subject to review by courts of appropriate jurisdiction, in the same way as the exercise of any other powers granted to the President by the Constitution would be subject to review.<sup>299</sup> Granting a pardon to a perpetrator of international crimes is not consistent with a state's complementarity obligations, and should be discouraged. It is suggested that national legislation should specifically make provision that no pardons should be given to an individual convicted of international crimes.<sup>300</sup>

O'Shea defines amnesty as "*immunity in law from criminal or civil legal consequences for wrongs committed in the past in a political context*".<sup>301</sup> The granting of amnesty is usually done through an Act of Parliament and is meant to prevent any criminal prosecution against an individual as stipulated, in the legislation of that country. The rationale behind amnesty is to foster reconciliation between previous enemies and to promote the transition to peace in that country. Amnesty legislation will always be controversial. In the matter of *Azanian Peoples Organisation (AZAPO) and Others v President of the Republic of South Africa and Others*, the court held that "*...the Constitution authorised and contemplated an "amnesty" in its most comprehensive and generous meaning so as to enhance and optimise the prospects of facilitating the constitutional journey from the shame of the past to the promise of the future...*".<sup>302</sup> It is however important to note that the amnesty granted to individuals should not be couched in terms that allow for a blanket amnesty, and that strict criteria should be met before amnesty is granted. Uganda's Amnesty Act of 2000 provided a blanket amnesty to all individuals whom

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<sup>297</sup> Section 84(2)(j) of the Constitution states that "*The President is responsible for pardoning or relieving offenders and remitting any fines, penalties or forfeitures...*".

<sup>298</sup> Zgonec-Rožej M *International Criminal Law Manual* 2010, [file:///C:/Users/EBotes/Downloads/International\\_Criminal\\_Law\\_Manual.pdf](file:///C:/Users/EBotes/Downloads/International_Criminal_Law_Manual.pdf), (Accessed on 17 October 2017).

<sup>299</sup> *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC), at paragraph 28 of the judgment.

<sup>300</sup> Such an individual will still have the normal legal recourse to review or appeal any conviction and or sentence handed down by the court.

<sup>301</sup> O'Shea A *Amnesty for Crime in International Law and Practice* (Brill/Nijhoff 2002).

<sup>302</sup> *Azanian Peoples Organisation (AZAPO) and Others v President of the Republic of South Africa and others* 1996 (4) SA 672, at paragraph 50 of the majority judgment by Mahomed DP.

participated in the civil conflict in that country, from the conflict's inception in January 1986. This is contrary to the spirit of amnesty legislation and allows for impunity on a large scale. Amnesty should not be granted to the perpetrators of gross human rights violations.<sup>303</sup> In the matter of *Julio Simón et al. v. Public Prosecutor*, the Supreme Court in Argentina had to decide whether Argentina's amnesty laws were unconstitutional and contrary to the country's international obligations.<sup>304</sup> The court found that the amnesty laws were in fact unconstitutional and that a state should not put in place any legislation that would halt the investigation and/or prosecution of serious human rights abuses. Domestic legislation should provide that a state party's courts are able to exercise universal jurisdiction even where the perpetrator has been granted amnesty by another state. This is entirely consistent with the principles of international law as well as Article 17(2)(a) of the Rome Statute, which states that when a determination has to be made on whether a state is unwilling to prosecute an individual due to a decision that was made by a state "*...for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in Article 5*", the ICC may then proceed with such a prosecution. States should therefore endeavour to avoid granting amnesty to the perpetrators of international crimes committed within their territory, or risk intervention in the prosecution of such individuals by the ICC or a state party to the Rome Statute who is in a position to assert jurisdiction.

In the last instance, a state should ensure that it is not in a situation where the provisions of two Acts or an Act and a Treaty are in direct conflict with each other. An example of this situation would be a bilateral immunity agreement between a state party and the United States, as is the case with Botswana and Uganda, who both have bilateral immunity agreements with the US.<sup>305</sup> A state party incurs obligations in terms of the Rome Statute, and it is in direct conflict with a state's obligations and the intention of the Rome Statute to sign a bilateral immunity agreement. The conclusion of such an agreement is also in breach of a state's obligations under the Vienna Convention on the Law of Treaties and might even be in conflict with a state's own

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<sup>303</sup> The Geneva Conventions of 1949 specifically place a duty on states to prosecute international crimes as provided for in the convention. Any domestic amnesty legislation promulgated would be inconsistent with such a duty.

<sup>304</sup> Causa No. 17.768 c. Simón, Julio Héctor y otros / privación ilegítima de la libertad, etc., No 17.768, Argentina: Corte Suprema de Justicia, 14 June 2005, which can be accessed at: <http://www.internationalcrimesdatabase.org/Case/49> (Accessed on 17 October 2017).

<sup>305</sup> Also known as "Article 98 Agreements".

extradition laws. A state party which concluded a bilateral immunity agreement still has to honour their obligations under the Rome Statute, and the agreement merely creates a conflict of obligations for that state.<sup>306</sup>

### 5.2.2 *Jurisdiction of Domestic Courts*

The Rome Statute is a multilateral treaty established to put an end to impunity. As is the case in most multilateral treaties, the Rome Statute is built on compromise to ensure acceptance of the Statute by as many states as possible. The result is that it is up to the domestic implementation legislation of a state party to define and formulate legal principles that will ensure the effective prosecution of perpetrators of gross human rights abuses. To achieve this, it is of cardinal importance that the implementation legislation provides for the full and correct definition of the crimes, and for the domestic courts to exercise criminal jurisdiction over the perpetrators of those crimes.

#### 5.2.2.1 Jurisdiction in terms of the crimes covered by the Implementation Legislation

It is important to note that crimes under international law are not confined to the crimes mentioned in Articles 6, 7, 8 and 8*bis* of the Rome Statute.<sup>307</sup> Domestic implementation legislation should also make provision for international crimes listed, for instance, under Protocol 1 of the Geneva Conventions relating to the methods and means of warfare, the status of combatants and prisoners-of-war, as well as the protection of the civilian population during a conflict.<sup>308</sup> It should also include the crimes of torture, enforced disappearances and extrajudicial executions.<sup>309</sup> It is

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<sup>306</sup> [http://eradicatingecocide.com/wp-content/uploads/2012/06/CICC-BLAs\\_QA\\_current.pdf](http://eradicatingecocide.com/wp-content/uploads/2012/06/CICC-BLAs_QA_current.pdf) (Accessed on 18 October 2017).

<sup>307</sup> Schedule 1 to the South African ICC Act makes detailed provision for specific unlawful acts during a conflict for instance violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture, committing outrages upon personal dignity, in particular humiliating and degrading treatment (Part 3, paragraph c(i) of the Schedule) and the use of asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices (Part 3, Paragraph b (xviii) of the Schedule).

<sup>308</sup> Part iii and Part iv of the Protocols additional to the Geneva Conventions of 12 August 1949.

<sup>309</sup> Domestic legislation could make provision for crimes omitted from the Rome Statute, but which are provided for in other treaties such as the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological and Toxin Weapons and on their Destruction of 1972, which entered into force on 26 March 1975, and the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, also known as the "Ottawa Treaty" which entered into force on 1 March 1999.

important that the definitions of the crimes listed in the implementation legislation should be consistent with their definitions in customary international law to ensure legal consistency across all state parties. Kenya and Uganda have comprehensive implementation legislation that does define the core international crimes as provided for in the Rome Statute. So, for instance, Uganda's International Criminal Court Act incorporates the Rome Statute in its entirety as schedule 1 to the Act, which, as a logical consequence, includes the definitions of the crimes listed in Articles 6, 7, 8 and 8*bis* of the Rome Statute as well as the Elements of the Crimes Document as per Article 9 thereof. Kenya's International Crimes Act likewise incorporates the Rome Statute as the first schedule to the Act. It however does not make provision for any other international crimes, which could have been included in the Act during the drafting thereof. Care should however be taken to not merely copy the Rome Statute directly into domestic legislation as is currently the tendency amongst state parties, as it might cause a conflict with existing national legislation.<sup>310</sup>

#### 5.2.2.2 Universal / Extraterritorial Jurisdiction

The preamble to the Rome Statute notes that the “*most serious crimes of concern to the international community as a whole*” must be punished by the state parties on a domestic level and that it is the duty of each State to “*exercise its criminal jurisdiction*” over the perpetrators of those crimes. The jurisdiction of a state party should therefore not be limited to its territory, but should extend over crimes wherever they may have been committed, and without reference to the nationality of the perpetrator or the victims.<sup>311</sup> Extraterritorial jurisdiction is a very important principle that must be included in the domestic legislation of a state party. Article 12 of the Rome Statute limits the ICC's jurisdiction,<sup>312</sup> and it is up to the national

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<sup>310</sup> Bekou O and Shah S “Realising the potential of the International Criminal Court: The African experience” 2006, Human Rights Law Review, Volume 6, Issue 3, Pages 499-544.

<sup>311</sup> Amnesty International's 14 Principles on the Effective Exercise of Universal Jurisdiction can be accessed at: [https://www.amnestyusa.org/files/pdfs/ij\\_14principles.pdf](https://www.amnestyusa.org/files/pdfs/ij_14principles.pdf) , (Accessed on 16 October 2017).

<sup>312</sup> Article 12(2) reads as follows:

*“In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:*

*(a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;*

legislation to ensure that there are no safe havens created for the perpetrators of these crimes. Although universal jurisdiction is not a novel concept, most states even after they became state parties to the Rome Statute only opted for a limited application of universal jurisdiction, in that the presence of the perpetrator in the state carrying out the investigation and prosecution is required.<sup>313</sup> Most countries however now accept that universal jurisdiction in absentia, where there is no link between the state prosecuting the perpetrator and the individual accused of committing the international crimes, is acceptable.<sup>314</sup>

If a state party is not able to prosecute a perpetrator when located within their territory or jurisdiction that state should at the very least extradite the individual to the ICC or a state party that can exercise universal jurisdiction.<sup>315</sup> The best solution is to ensure that a state's domestic legislation comprehensively provides for the application of universal jurisdiction, not only for the investigation of atrocities, but also for the effective prosecution thereof.

### 5.2.3 *Non-retroactivity of the Implementation Legislation*

The principle of *nullum crimen sine lege, nulla poena sine lege* guards against the retroactivity of criminal laws and ensures legal certainty.<sup>316</sup> However, crimes such as war crimes, genocide and crimes against humanity were recognised as core international crimes even before they were codified in instruments such as the Rome Statute or the Geneva Conventions. The rationale behind this is that

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(b) *The State of which the person accused of the crime is a national.*"

<sup>313</sup> Zappala S "The German Federal Prosecutor's decision not to prosecute a former Uzbek minister: Missed opportunity or prosecutorial wisdom?" 2006, *Journal of International Criminal Justice*, Volume 4, Issue 3, Pages 602-622.

<sup>314</sup> In this regard the Spanish Supreme Court, in the decision concerning the Guatemala Genocide Case 42 ILM 686 (2003) confirmed the principle. El Zeidy M "Universal Jurisdiction in Absentia: Is it a legal valid option for repressing heinous crimes?" 2003 *The International Lawyer*, Volume 37, Number 3, Pages 835-861 / Bergsmo M *Complementarity and the exercise of universal jurisdiction for core international crimes* (Torkel Opsahl Academic Publisher, Oslo 2010) at pages 70-71.

<sup>315</sup> Some crimes by their very nature would require a state to assert universal jurisdiction over that crime. Piracy is one example of such a crime. Where piracy occurs in international waters outside the normal territorial jurisdiction of a country it would make sense for the country where the ship is registered to exercise universal jurisdiction over the crime. / Langer M "The diplomacy of universal jurisdiction: The political branches and the transnational prosecution of international crimes" 2010, *The American Journal of International Law*, Volume 105, Number 1, Pages 1-49 / Kontorovich E and Art S "An empirical examination of universal jurisdiction for piracy" 2010, *The American Journal of International Law*, Volume 104, Number 3, Pages 436-453.

<sup>316</sup> The principle is also known as the "principle of legality".

abovementioned crimes are considered crimes under the general principles of law recognised by the international community.<sup>317</sup> As such these *ius cogens* crimes should be punishable even though domestic legislation might not have been enacted when the crimes were being perpetrated. As discussed in Chapter 4 of this paper, neither Kenya nor Uganda's legislation provides for this scenario, which is regrettable, as, once again it allows for impunity.<sup>318</sup> Kenya's International Crimes Act can however be amended to include conduct constituting international crimes that took place during the post-election violence in 2007/2008, at the time when the Act was not yet adopted. This would not be unconstitutional.<sup>319</sup> Furthermore Article 15(2) of the International Covenant on Civil and Political Rights clearly states that the principle of the prohibition of retroactivity should not "...prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations". A state should therefore ensure that detailed provisos are made in an implementation act to allow for the investigation and prosecution of crimes constituting international crimes at the time they were committed, even when no national legislation was in place prohibiting such conduct.<sup>320</sup>

#### 5.2.4 *The ICC's jurisdiction over a state that is not a party to the Rome Statute, and the political fallout*

In Chapter 3 of the study, certain political challenges hindering the effective implementation of the Rome Statute amongst African states were identified and discussed. The crux of the discontent seems to be the exercise of jurisdiction by the ICC over a national, and for that matter a sitting head of state, of a country which is not a state party to the Rome Statute. The only way in which the ICC is able to do so, is when the UN Security Council refers a situation to the Court. As mentioned

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<sup>317</sup> Amnesty International's 14 Principles on the Effective Exercise of Universal Jurisdiction.

<sup>318</sup> Uganda does however provide for the limited prosecution of these types of crimes by the ICD under their Geneva Conventions Act of 1964.

<sup>319</sup> Article 50(2)(n)(ii) of the Kenya Constitution of 2010 states as follows:

"(2) Every accused person has the right to a fair trial, which includes the right—

(n) not to be convicted for an act or omission that at the time it was committed or omitted was not—

(ii) a crime under international law..." It can be argued that the crimes committed during the post-election violence were at that stage already classified as international crimes.

<sup>320</sup> Neha J "Conceptualising Internationalisation in Hybrid Criminal Courts" 2008, Singapore Yearbook of International Law, Volume 12, Pages 82-95.

previously, all resolutions taken by the Security Council are binding on all member states, irrespective of whether they are state parties or not. Due to the political nature of the composition of the Security Council, the AU is of the view that the decision taken in Resolution 1593, combined with the Security Council's refusal to defer the situation in Darfur in terms of Article 16 of the Rome Statute, has resulted in the Security Council unfairly targeting African leaders for prosecution by the ICC. This situation can be avoided if African state parties practice proactive complementarity by investigating and prosecuting the perpetrators of international crimes irrespective of their status. The ICC is a court of last resort, and a referral of a situation to the ICC by the UN Security Council should alert state parties to the fact that there is something amiss with regards to the complementarity regime, whether that is due to the inability of a state party to prosecute the individual, or due to their unwillingness to do so on account of political reasons.

### **5.3 Standardising implementation legislation as a solution, and the creation of a multilateral cooperation protocol between African state parties**

As mentioned in Chapters 1 and 2 of the study, very early on the SADC member states created a so-called "Model Enabling Act" and "Ratification Kit" for the Rome Statute, which could be used by the SADC states in the ratification of the Rome Statute and in the adoption of implementation legislation into their domestic legal systems.<sup>321</sup> In Europe there are also multilateral initiatives aimed at enhancing a state party's capacity to exercise jurisdiction over international crimes by creating a convention on mutual legal assistance in this regard.<sup>322</sup> Most implementation legislation by African state parties is currently still in the form of draft legislation.<sup>323</sup> In cases where there is no formal domestic legislation in place, a state party will have to cooperate with the ICC on an *ad hoc* basis, which is not always ideal.

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<sup>321</sup> Maqungo S "The establishment of the International Criminal Court: SADC's participation in the negotiations" 2000 African Security Review Volume 9 Number 1.

<sup>322</sup> [http://www.iap-association.org/getattachment/Conferences/Annual-Conferences/Annual-Conference-2015/Wednesday-16-September-2015/20AC\\_SIGM\\_SB\\_Annex5-\(1\).pdf.aspx](http://www.iap-association.org/getattachment/Conferences/Annual-Conferences/Annual-Conference-2015/Wednesday-16-September-2015/20AC_SIGM_SB_Annex5-(1).pdf.aspx) and [https://asp.icc-cpi.int/en\\_menus/asp/complementarity/List-of-Actors/Lists/Actorslist/DispForm.aspx?ID=19](https://asp.icc-cpi.int/en_menus/asp/complementarity/List-of-Actors/Lists/Actorslist/DispForm.aspx?ID=19) (Accessed on 15 January 2018).

<sup>323</sup> Bekou O and Shah S "Realising the potential of the International Criminal Court: The African experience" 2006, Human Rights Law Review, Volume 6, Issue 3, Pages 499-544.



A Model Implementation Act will have many advantages for state parties, and will definitely aid interstate cooperation between them. A wide range of crimes can be included in such an Act. This will ensure that states all have the same definitions of crimes which in turn will be consistent with the definitions of those crimes found in international instruments such as the Hague conventions and various other conventions. This will also ensure that domestic courts are in a position to exercise universal jurisdiction over the crimes as well as avoid the principle of *non bis in idem*, where a perpetrator might, on a technicality, claim that he has already been either convicted or acquitted of the charges by another court. A challenge in this regard is the differences between the domestic legal systems of countries, and also the way in which countries give effect to their international legal obligations.<sup>324</sup> A model implementation act will to some extent also be a compromise in order to accommodate all the state parties. A Model Implementation Act's benefits will outweigh the difficulties faced by the state parties in creating such an Act.

In many African state parties the death penalty can still be imposed. Each domestic criminal tribunal or court also has a large discretion when it comes to the sentencing of an individual. It is generally accepted in international law that it is inappropriate for a domestic court to impose a sentence which is more severe for an international crime, than one chosen by the international community itself.<sup>325</sup> In most countries around the world the death penalty has long since been abolished.<sup>326</sup> Article 77(1)(a) and (b) of the Rome Statute states that subject to Article 110, the ICC may either impose a sentence for a specific number of years, not exceeding 30 years, or, in the case of grave crimes, and taking into account the individual circumstances of the perpetrator, life imprisonment.<sup>327</sup> Article 5 of the Universal Declaration of Human

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<sup>324</sup> It depends on whether a country is a monist or dualist legal state as discussed in the previous chapter.

<sup>325</sup> Amnesty International's 14 Principles on the Effective Exercise of Universal Jurisdiction

<sup>326</sup> Article 3 of the Universal Declaration of Human Rights states that "*Everyone has the right to life, liberty and security of person*".

<sup>327</sup> Article 77 of the Rome Statute reads as follows:

"1. Subject to article 110, the Court may impose one of the following penalties on a person convicted of a crime referred to in article 5 of this Statute:

(a) Imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or  
 (b) A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.

2. In addition to imprisonment, the Court may order:

(a) A fine under the criteria provided for in the Rules of Procedure and Evidence;  
 (b) A forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties".

Rights further prohibits any form of cruel, inhuman and degrading punishment. A Model Implementation Act should include appropriate sentences in line with international practices, which must be imposed by all parties, taking into consideration the individual circumstances of each perpetrator. Once again this will ensure uniformity in the application of justice.

Most states rely on treaties to regulate interstate cooperation for the provision of mutual legal assistance in criminal matters, or the extradition of a fugitive. In this regard the SADC member states have adopted protocols to facilitate cooperation.<sup>328</sup> This allows for fast and efficient interstate cooperation, even though the domestic legal systems and legislation of the member states may differ from each other. The SADC protocols can serve as an example of how states cooperate with each other on a multilateral level regarding their obligations as state parties. The AU has a very important role to play in this regard, and a treaty binding all AU state parties to provide mutual legal assistance to each other regarding international crimes will go a long way to stem the current tide of impunity on the continent. This will encourage proactive complementarity among AU member states and will eliminate most of the practical difficulties experienced by states when it comes to interstate cooperation. It will also ensure that a case is not compromised should it eventually be prosecuted by the ICC.<sup>329</sup> It will also assist member states to assert jurisdiction in the instance where another member state is not able to prosecute a perpetrator due to civil war, the collapse of local law enforcement authorities and courts, or simply due to a lack of local expertise in the field of prosecuting international crimes.

On the Third of December 1973, the United Nations General Assembly adopted Resolution 3074 (XXVII). Clause 3 of the Resolution provides for interstate cooperation on a bilateral and multilateral basis to stop and prevent war crimes and crimes against humanity.<sup>330</sup> The clauses of this resolution can be incorporated into a

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<sup>328</sup> The SADC Protocol on Extradition was signed on 3 October 2002, and entered into force on 1 September 2006. It is aimed at reducing crime levels across the SADC region by enabling member states to extradite any fugitive within its jurisdiction. The SADC Protocol on Mutual Legal Assistance was signed on 3 October 2002, and entered into force on 1 March 2007, and is aimed at providing member states with the widest possible mutual legal assistance in the fight against crime.

<sup>329</sup> Burke-White W.W "Proactive Complementarity: The International Criminal Court and national courts in the Rome system of international justice" 2008, Harvard International Law Journal, Volume 49, Issue 1, Pages 53-108.

<sup>330</sup> Clause 3 of the Resolution on the Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity state: "States

protocol to form the basis of cooperation between states. It would also facilitate the exchange of legal expertise and enhance technical competency as well as strengthening the rule of law.<sup>331</sup>

#### 5.4 Conclusion

In conclusion, state parties to the Rome Statute are in a powerful position to promote peace and to end impunity, not only in Africa, but across the world. This can only be achieved through a strict complementarity regime where national authorities and their judicial counterparts through the use of implementation legislation and protocols on interstate cooperation investigate and prosecute the perpetrators of these heinous crimes. African state parties should work together closely to formulate a plan for the drafting of a Model Implementation Act and an interstate cooperation protocol aimed at providing fast and efficient assistance to each other when dealing with the perpetrators of international crimes.

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*shall co-operate with each other on a bilateral and multilateral basis with a view to halting and preventing war crimes and crimes against humanity, and shall take the domestic and international measures necessary for that purpose*". Resolutions by the General Assembly of the United Nations are however not binding on member states as per Articles 10 and 14 of the United Nations Charter.

<sup>331</sup> Du Plessis M "Complementarity: a working relationship between African states and the International Criminal Court" ISS's African Guide to International Criminal Justice, which can be accessed at: <https://issafrica.s3.amazonaws.com/site/uploads/AGCHAP5.PDF>, (Accessed on 19 October 2017).

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