# South Africa and the International Criminal Court*

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## I. Introduction

Prior to the advent of the new constitutional dispensation in South Africa the domestic status of conventional humanitarian law was inconclusive, especially in view of the fact that the South African Parliament never passed legislation for the incorporation into South African law of even the four 1949 Geneva Conventions, which were ratified by the South African government as early as 1952. Attempts to invoke the 1977 Geneva Protocols as customary international law during the

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armed struggle against *apartheid* also failed.[1] This has all changed now. In view of the post-*apartheid* re-incorporation of South Africa into the international community and the government's commitment, in principle at least, to honour the country's international obligations, the ratification of not only the major multilateral human rights conventions,[2] but also the 1977 Geneva Protocols[3] became a reality in the few years following the first democratic elections in 1994. Of special significance though, is the ratification on 10 November 2000 of the Rome Statute of the International Criminal Court (ICC Statute) and the subsequent drafting of national implementation legislation, which is about to become law as the International Criminal Court Bill 2001.[4] These latter developments will form the subject-matter of this article, but before the substantive issues are further dealt with there are the broader constitutional and policy issues to take note of.

## II. The Changed Constitutional and Policy Framework

The gradual erosion of judicial control over the activities of South Africa's security forces was one of the many bones of contention under

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1 *S v Petane* 1988 (3) SA 51 (C). The previous government never ratified the Protocols in view of the fact that members of the ANC's military wing could claim prisoner of war status under the Protocols. See also J. Dugard, *International Law: A South African Perspective*, 2000, 29 et seq.

2 South Africa has ratified the following international human rights instruments: International Covenant on Civil and Political Rights (10 December 1998); International Convention on the Elimination of All Forms of Racial Discrimination (10 December 1998); Convention on the Elimination of All Forms of Discrimination Against Women (14 December 1995); Convention on the Rights of the Child (16 June 1995); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1998), and the Convention on the Prevention and Punishment of the Crime of Genocide (10 December 1998). The International Covenant on Economic, Social and Cultural Rights was signed on 3 October 1994, but not ratified yet.

3 The Protocols were ratified on 11 November 1995 and at the time of writing the Department of Defence was in the process of developing draft implementation legislation for the Geneva Conventions and Protocols.

4 The Bill has already been approved by the Cabinet and was put on Parliament's legislative agenda for 2001.

the previous system of parliamentary sovereignty.[5] That this erosion has contributed to the development of a sense of impunity and lawlessness needs no serious argument: the evidence uncovered by the Truth and Reconciliation Commission provides ample proof to that effect. Re-establishing a normative framework for the security services is therefore one of the major contributions of both the 1993 interim Constitution and the 1996 final Constitution[6] towards the creation of a rule of law state. The aim of Chapter 11 of the 1996 Constitution, which regulates the powers, functions and accountability of the security services,[7] is to bring the security services under the control of a new legal regime comprising the Constitution as well as international law. Consequently, the following principles must now be observed:

- National security must be pursued in compliance with the law, including international law;[8]
- The security services must act, and must teach and require their members to act, in accordance with the constitution and the law, including customary international law and international agreements binding on the Republic;[9]
- No member of any security service may obey a manifestly illegal order;[10] and
- The primary object of the defence force is to defend and protect the Republic, its territorial integrity and its people in accordance with the Constitution and the principles of international law regulating the use of force.[11]

From the above it is clear that international law may find application either as treaty law or as customary international law. This warrants

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5 See for instance J. Dugard, *Human Rights and the South African Legal Order*, 1978; A.S. Mathews, *Law Order and Liberty in South Africa*, 1971.

6 Constitution of the Republic of South Africa, Act 108 of 1996. For present purposes reference will only be made to the 1996 Constitution.

7 According to section 199(1) of the Constitution "the security services of the Republic of South Africa consist of a single defence force, a single police service and any intelligence services established in terms of the Constitution."

8 Section 198(c) of the Constitution.

9 Section 199(5), ibid.

10 Section 199(6), ibid.

11 Section 200(2), ibid.

some further explanation. In terms of the Constitution, customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.[12] Customary international law therefore ranks above the law of precedent and subordinate legislation. However, it must be noted that:

> "Section 232 is not a complete statement on the subject of customary international law in South Africa. It will be necessary to turn to judicial precedent to decide *which* rules of customary international law are to be applied and how they are to be proved. Since international law is not foreign law, courts may take judicial notice of it as if it were part of our common law. In practice this means that courts turn to the judicial decisions of international tribunals and domestic courts, both South African and foreign, and to international law treatises for guidance as to whether or not a particular rule is accepted as a rule of customary international law on the ground that it meets the twin qualifications of *usus* and *opinio juris*."[13]

The conclusion and binding effect of treaties is regulated in section 231 of the Constitution. The negotiation and signing of international agreements is the responsibility of the national executive and such agreements will bind the Republic on the international level only if a signed agreement has been approved by both Houses of Parliament.[14] An approved agreement will only become law in the Republic when enacted into law by national legislation.[15] Excluded from parliamentary approval are international agreements of a technical, administrative or executive nature, or agreements which do not require either ratification or accession. Agreements falling into these categories will bind the Republic without prior approval but must be tabled in both Houses of Parliament within a reasonable time.[16]

Legal principles contained in customary international law and in treaty law can also be incorporated into South African law indirectly through the interpretation function of the courts. For instance, section

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12 Section 232, ibid.

13 Dugard, see note 1, 52.

14 Section 231(1) and (2) of the Constitution.

15 Section 231(4) of the Constitution. Excluded from the operation of this sub-section are the self-executing provisions of an agreement. Such agreements have legal effect in South Africa even in the absence of implementing legislation unless they are inconsistent with the Constitution or an Act of Parliament.

16 Section 231(3) of the Constitution.

233 of the Constitution obliges the courts, when interpreting any legislation, to prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative inconsistent interpretation. Moreover, if the Bill of Rights is applied and interpreted, the courts must consider international law[17] and in such matters the term, "international law" has been given a broad meaning by the Constitutional Court as referring to binding and non-binding law, which, in addition to custom and treaties, may include "decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the European Commission on Human Rights, and the European Court of Human Rights and, in appropriate cases, reports of specialised agencies such as the International Labour Organisation ...".[18]

Changes in foreign policy must also be taken note of. In its 1996 *White Paper on Defence*, the South African Government pledged adherence to the international law of armed conflict and on 24 February 1999, parliamentary approval was given to a Foreign Affairs *White Paper on South African Participation in International Peace Missions*.[19] In the latter case, the South African government undertook to prepare for active participation in peace missions and to fulfil that role as a responsible member of the United Nations, the OAU and the South African Development Community (SADC).[20] Currently, South African military personnel are fulfilling international peace-keeping duties in the Democratic Republic of the Congo[21] and in Burundi[22] under UN and OAU supervision. Engagements of this nature assume familiarity with international humanitarian law as is clear from the UN Secretary-General's *Bulletin on the Observance by United Nations Forces of International*

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17 Section 39(1)(b) of the Constitution.

18 *S v Makwanyane* 1995 (3) SA 391 (CC), at 413, 414.

19 Notice 2216/1999, *Government Gazette* 20518, of 4 October 1999.

20 Ibid., 21.

21 In the case of the Democratic Republic of the Congo, South Africa is a contributor of military personnel to the UN Mission in the Democratic Republic of the Congo (MONUC) which is also authorised by S/RES/1291 (2000) of 24 February 2000 to take the necessary action, in the areas of deployment of its infantry battalions to protect United Nations and other personnel, facilities, installations, and equipment and to ensure the security and freedom of movement of personnel. See also S/RES/1355 (2001) of 15 June 2001.

22 See Doc. S/2001/1076 of 14 November 2001, para. 16(h)-(i) and 19.

*Humanitarian Law* of 6 August 1999.[23] In section 1 of the Bulletin it is stated that:

> "The fundamental principles and rules of international humanitarian law set out in the present bulletin are applicable to United Nations forces when in situations of armed conflict they are actively engaged therein as combatants, to the extent and for the duration of their engagement. They are accordingly applicable in enforcement actions, or in peacekeeping operations when the use of force is permitted in self-defence."

The *Bulletin* also states that national laws by which armed forces remain bound are not replaced[24] and that in the case of a violation of international humanitarian law offenders are subject to prosecution in their national courts.[25]

Apart from the above legal and policy changes and the commitment of the South African government to fulfil international obligations in the interest of peace and security elsewhere in Africa, the country is certainly also a destination of choice for those fleeing the many conflict areas in Africa in search of refuge from either persecution or prosecution. It is in this context that the legislative measures taken by the South African government for the implementation of the ICC Statute assume significant importance.

## III. Overview of the Substantive Provisions of the International Criminal Court Bill (ICC Bill)

### 1. Objects of the Bill

The Bill has an implementation and an enabling function. In terms of the former, the Bill purports to make the Statute of the ICC part of South African domestic law[26] and for that purpose, and in keeping with past practice,[27] the Statute is made an integral part of the Bill in the

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23 Doc. ST/SGB/1999/13; *ILM* 38 (1999), 1656 et seq.

24 Section 2.

25 Section 4.

26 Clauses 2(1) and 3(a) of the ICC Bill.

27 Other methods used by the South African legislature are: by embodying the provisions of a treaty in the text of an Act of Parliament or by giving the executive the power to bring a treaty into effect in the domestic law of

form of a Schedule thereto. Since the Bill itself is silent on how an incongruity between the Bill and the Statute must be resolved, the assumption is that the courts will have to follow section 233 of the Constitution and apply an interpretation that is consistent with what the Statute requires.

The enabling function of the Bill purports to achieve two objectives: firstly, to enable the Republic to co-operate with the ICC in the investigation and prosecution of persons, and secondly, to enable courts in South Africa to try and punish offenders who have committed crimes or offences referred to in the Statute.[28] The courts in question are the High Courts, the Magistrates' Courts, and any other court established or recognised in terms of an Act of Parliament, including a Military Court.[29] On conviction these courts may impose a fine or imprisonment, including imprisonment for life, or both a fine and such imprisonment.[30]

The military justice system in South Africa has come under attack on two occasions since the advent of the new constitutional dispensation. Previously, military prosecutions and trials for military and civil offences were conducted in terms of the *Defence Act* 44 of 1957, and the First Schedule thereto, known as the *Military Discipline Code*, by military officers, without their necessarily having any legal training, and acting within their line of command. At the time when the system of courts martial in terms of these legislative measures was reconsidered in view of the implications of the new Constitution, the Cape High Court struck down several provisions of the Act dealing with military justice as unconstitutional in view of the fair trail guarantees in section 35(3) of the Constitution.[31] In response Parliament enacted the *Military Discipline Supplementary Measures Act* 16 of 1999 to provide for a radically different military justice system comprising a hierarchical system of courts staffed by legally trained personnel with the highest level, the

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the country by means of notice or proclamation in the Government Gazette.

28 Clauses 3(c) and (d) of the ICC Bill.

29 Clause 3(d) of the ICC Bill read with section 166(c) to (e) of the Constitution.

30 Clause 4(1) of the ICC Bill.

31 *Freedom of Expression Institute and Others v President, Ordinary Court Martial, and Others* 1999 (2) SA 471 (C).

Court of Military Appeals, composed of five members, three of which must be judges or retired judges of the High Court of South Africa.[32]

This new Act has recently also come under attack insofar as it assigns prosecution functions to a military prosecution counsel.[33] It was argued before the Constitutional Court that such an arrangement infringes upon the Constitution, which, in section 179(1) provides for a single prosecuting authority, namely the National Director of Public Prosecutions (NDPP). Thus, the basic contention on the part of the applicants was that the Act authorised military prosecutors to trespass on the exclusive domain of the NDPP. In rejecting this literal interpretation of the phrase, "single prosecuting authority", the Constitutional Court vindicated the counter argument of the Minster of Defence that section 179 of the Constitution must be seen against the historical intention to do away with the large number of Attorneys-General serving in the country fragmented by *apartheid*-rule and to create a single national prosecuting authority, without the intention to regulate the exercise of prosecution functions outside that authority, such as existed in terms of the military justice system.[34]

The Court further pointed out that the prosecution of crimes for which section 179 has been designed must be distinguished from the maintenance and development of military discipline which is an integral part of the military justice system, and which is not, first and foremost, about punishing crime or maintaining law and order.[35] Hence, if the legislature were to do away with this time-honoured distinction, it seems unlikely that it would be done in a veiled manner and one would rather expect an amendment to be mentioned directly or by necessary implication.[36]

The endorsement of this distinction by the Constitutional Court also has implications for the designation of a court in South Africa for the purpose of enforcing the provisions of the ICC Statute. Under the ICC Bill the NDPP is the only authority empowered to authorise a prosecution and for that purpose designate a court, including a Military Court, to hear a matter arising from the application of the Bill.[37] This

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32 See Chapter 2 of Act 16 of 1999.

33 See sections 21 and 22 of Act 16 of 1999.

34 *Minister of Defence v Potsane: Legal Soldier (Pty) Ltd v Minister of Defence* Case CCT 14/01 and CCT 29/01 of 5 October 2001, para. 26.

35 Ibid., para. 38.

36 Ibid., 30.

37 Clause 4(3) and (4) of the ICC Bill.

authority arises in the context of the commission of a "crime" which is defined in the Bill as any crime referred to in article 5, read with arts 6, 7, 8 and 9 of the ICC Statute.[38] Schedule 2 of the ICC Bill also intends to amend section 3 of the *Military Discipline Supplementary Measures Act* to the extent that offences falling under the ICC Statute must be dealt with in terms of the ICC Bill and not the *Military Discipline Supplementary Measures Act*. Since the Statute of the ICC in its Preamble makes it clear that the aim is to "punish" perpetrators for the crimes listed in the Statute and recalls the duty of states to exercise their "criminal jurisdiction" over those responsible for the crimes, the designation of a Military Court for that purpose can raise questions about the appropriateness of such a designation. However, the matter must certainly be viewed from a broader perspective and the ultimate question is which proceedings, civil or military, and taken as a whole, best approximate the standards set by the ICC Statute in the circumstances of a particular case.[39]

## 2. Jurisdiction

Article 12 of the ICC Statute grounds the jurisdiction of the ICC in the well-known criminal law factors of territoriality and nationality provided that the state in question is a party to the Statute or has accepted the Court's jurisdiction *ad hoc* with respect to the crime in question.[40] Since it is trite law that any state has an unquestionable right to exercise

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38 Clause 1 (iv) and 4(1) of the ICC Bill.

39 See also B. Broomhall, "The International Criminal Court: Overview and Co-operation with States", in: Association International De Droit Pénal (ed.), *ICC Ratification and National Implementing Legislation*, 1999, 45 et seq., (84).

40 See also J.D. van der Vyver, "Personal and Territorial Jurisdiction of the International Criminal Court", *Emory International Law Review* 14 (2000), 1et seq.; G.M. Danilenko, "The Statute of the International Criminal Court and Third States", *Mich. J. Int'l L.* 21 (2000), 445 et seq., (458); F. Lattanzi, "The Rome Statute and State Sovereignty", in: F. Lattanzi/ W. Schabas (eds), *Essays on the Rome Statute of the International Criminal Court*, Vol. 1, 1999, 51 et seq.; W. Schabas, *An Introduction to the International Criminal Court*, 2001, 54 et seq.; K. Dörmann, "War Crimes in the Elements of Crimes", in: H. Fischer/ C. Kreß/ S.R. Lüder, *Bochumer Schriften zur Friedensicherung und zum Humanitären Völkerrecht*, Bd. 44, 2001, 95 et seq.

criminal jurisdiction with respect to all persons within its territory, the South African ICC Bill applies the factors of nationality and territoriality to persons who committed crimes outside the territory of South Africa. As a result, such crimes are deemed to have been committed in South Africa and a designated court in the Republic will assume jurisdiction if:

- The offender is a South African citizen;
- The offender is not a citizen but is ordinarily resident in the Republic;
- The offender is present in the Republic after the commission of the crime;
- The victim of the crime is a South African citizen or ordinarily resident in the Republic.[41]

As regards subject-matter jurisdiction[42] it has already been pointed out that the crimes specified in the ICC Statute are wholly incorporated into South African law by means of the Bill. Essentially an instrument for the facilitation of co-operation with the ICC, the Bill makes no attempt to provide clarity on the Elements of Crimes. How the Elements of Crimes drafted by the Preparatory Commission for the ICC[43] will, once adopted,[44] tie in with the ICC Bill and the Schedule containing the ICC Statute, is not altogether clear. Reference to the Statute in the ICC Bill means the "Rome Statute of the International Criminal Court, adopted by the United Nations Diplomatic Conference of Plenipotentiaries ... on 17 July 1998 and ratified by the Republic on 10 November 2000 as set out in Schedule 1".[45] This formulation as it stands does not seem to aim even indirectly at an incorporation of the Elements of

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41 Clause 4(2) of the ICC Bill. Cf article 12(2) of the ICC Statute.

42 As regards this issue in the ICC Statute see A. Zimmermann, "The Creation of a Permanent International Criminal Court", *Max Planck UNYB* 2 (1998), 169 et seq.

43 Doc. PCNICC/2000/1/Add.2 of 2 November 2000.

44 Article 9 of the ICC Statute.

45 Clause 1(xv) of the ICC Bill. The Bill (s 1(xiv)) further mentions the Rules of Procedure and Evidence referred to in article 51 of the ICC Statute but remains silent on the Elements of Crimes. See also S.S. Maqungo, "Implementing the ICC Statute in South Africa", in: C. Kreß/ F. Latanzi (eds), *The Rome Statute and Domestic Legal Orders,* Vol. 1, 2000, 183 et seq., (186, 187).

Crimes as well. In terms of clause 2(2) of the Bill, the Minister for Justice and Constitutional Development may from time to time amend the Statute by notice in the *Government Gazette* to reflect any changes "that are binding on the Republic in terms of section 231 of the Constitution of the Republic of South Africa".This qualification limits the amendment power of the Minister to instruments that qualify as "international agreements" in terms of section 231.[46]

Consequently, the applicability of this amendment procedure to the incorporation of the Elements of Crimes will therefore depend on the form in which the Elements of Crimes will eventually be cast. However, the Minister also has another mechanism at his or her disposal. For instance, the Bill provides for the making of regulations by the Minister to provide for the prescription of any matter which may be necessary or expedient for achieving the objects of the Bill or to give effect to any provision of the Statute.[47] A third way would possibly be to effect changes of the Bill by means of amending legislation through the ordinary parliamentary procedures. Whatever method appears to be appropriate in the circumstances, the principle of legality requires that the status and role of the Elements of Crimes be clear in terms of national law.[48] Although article 9 of the Rome Statute intends the Elements of Crimes to assist the ICC (and presumably also the national courts) in the interpretation and application of the crimes elaborated on in arts 6, 7 and 8 of the Rome Statute, they are also fundamental to the evidentiary question of proof. This with the result, that from a procedural rights point of view an accused person would be entitled to be fully in-

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46 In the Constitutional Court case of *Harksen v President of the Republic of South Africa* 2000 (2) SA 825 (CC) it was decided that section 231 of the Constitution had in mind instruments that are intended to create international legal rights and obligations between the parties.

47 Clause 37 of the ICC Bill.

48 In the case of *Pharmaceutical Manufacturers Assn of South Africa: In re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC), at 687 the Constitutional Court stated in unequivocal terms that the doctrine of legality is an incident of the rule of law which is one of the foundational values of the South African Constitution, and that it requires that all public power must comply with that principle. See also I. Caracciolo, "Applicable Law", in: F. Latanzi/ W. Schabas, (eds), *Essays on the Rome Statute of the International Criminal Court,* Vol. 1, 1999, 211 et seq., (230, 231); C. Kreß, *Vom Nutzen eines deutschen Völkerstrafgesetzbuchs*, 2000, 2 et seq. and the German *Entwurf eines Gesetzes zur Einführung des Völkerstrafgesetzbuchs* of 19 April 2001.

formed about the nature and scope of the crime he or she is indicted with. Of relevance here is the provision in section 35(3)(a) of the South African Constitution which guarantees every accused person the right to a fair trial which "includes the right to be informed of the charge with sufficient detail to answer it".

Clarification in the Rome Statute on the relationship between the Statute and the Elements of Crimes is somewhat limited. In terms of article 21(1) they rank on the same level as the Statute in the hierarchy of sources and according to article 9(3) they must be consistent with the Statute. Hence, if the assessment is correct that "the Elements of Crimes must integrate and complete the provisions of the Statute, creating complex legal rules",[49] then national law can be expected to provide clarity on the status and role of the Elements in the national criminal justice system, especially in view of the fact that under the principle of complementarity[50] national courts have a central role to play in the development of international criminal law.[51] Moreover, in the final analysis the question is also whether national law is able to impose criminal responsibility within the scope contemplated by the ICC Statute.

As regards jurisdiction *ratione temporis*, the prospective operation of the ICC Statute by virtue of article 11 requires reflection on section 35(3)(l) of the South African Constitution, which determines that no one shall be convicted for an act or omission that was not an offence under "either national or international law at the time it was committed or omitted".[52] Since the reference to "international law" is unqualified, it is susceptible to an interpretation allowing for customary international law to be invoked as the basis of an offence, such as a war crime or crime against humanity, and committed prior to the entry into force of the ICC Statute. The opportunity to provide guidance on the relevance of customary international law in these circumstances arose in the

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49 Caracciolo, see note 48, 226.

50 Article 17 of the ICC Statute. Also Zimmermann, see note 42, 219 et seq.

51 See also R. Wedgwood, "National Courts and the Prosecution of War Crimes", in: G.K. McDonald/ S. Swaak-Goldman, *Substantive and Procedural Aspects of International Criminal Law*, Vol. 1, 2000, 389 et seq., (407 et seq.).

52 See also article 15(1) of the International Covenant on Civil and Political Rights.

*AZAPO* case[53] under the interim Constitution when applicants sought to set aside certain provisions of the *Promotion of National Unity and Reconciliation Act* 34 of 1995, which provided for amnesty from criminal and civil proceedings of gross human rights violations by government forces in the apartheid era. This challenge was based on section 22 of the interim Constitution which guaranteed the right to have disputes settled by a court of law as well as on the international law obligation of states to prosecute those responsible for gross human rights violations. Unfortunately, the international law aspect of the case was inadequately addressed by the Constitutional Court which, in dismissing the application, chose to concentrate on what the interim Constitution allowed or disallowed.[54]

What should be noted is that the national prosecution of persons for war crimes or crimes against humanity with reference to customary international law has relevance beyond the question of *apartheid* crimes. War time atrocities on the African continent did not begin or end with the *apartheid* regime or the Rwanda genocide, and it seems valid to consider the future role of customary international law in this regard, especially in view of the low rate of ratifications of the ICC Statute by African countries[55] and the tendency amongst certain governing elites on the continent to see political solidarity as a greater virtue than justice. Courage could be drawn from the few examples where, at the national level, efforts have been made to put an end to impunity. The Special Court planned for Sierra Leone is a case in point. The jurisdiction of this Court relates to offences which are considered international crimes under customary international law in recognition of the principle of legality and the prohibition on retroactive criminal legislation.[56] Another example is the proceedings in Senegal against the obscure former dictator of Chad, H. Habré, which is the only example to date of

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53 *Azanian Peoples Organisation (AZAPO) v President of the Republic of South Africa* 1996 (4) SA 671 (CC).

54 Also Dugard, see note 1, 63; J. Dugard, "Retrospective Justice: International Law and the South African Model", in: A.J. McAdams (ed.), *Transitional Justice and the Rule of Law in New Democracies*, 1997, 269 et seq., (279 et seq.).

55 Apart from South Africa only Botswana (8 September 2000); Benin (22 January 2002); Central African Republic (3 October 2001); Ghana (20 December 1999); Gabon (20 September 2000); Lesotho (6 September 2000); Mali (16 August 2000); Nigeria (27 September 2001); Senegal (2 February 1999) and Sierra Leone (15 September 2000) have ratified the Statute.

56 See Doc. S/2000/915 of 4 October 2000, para. 12.

private charges being brought against an African leader in the courts of another African country for involvement in acts of torture and crimes against humanity and partly based on obligations under customary international law to prosecute persons accused of crimes against humanity.[57] However, this case also offers a good illustration of how tenuous such efforts are in the face of political interference in the judicial system and incongruity between national law and international law. After a Dakar regional court indicted Habré on torture charges and placed him under house arrest, the judge responsible for the indictment was removed from the investigation of the case by decision of a hastily convened meeting of the Superior Council of the Magistry in June 2000. A month later a three member Indictment Chamber dismissed the charges against Habré, ruling that Senegalese courts have no jurisdiction to pursue charges of torture committed outside the country. In March 2001 this ruling was confirmed by Senegal's highest court.[58] Needless to say the approach taken by the Senegalese Court is out of touch with current developments in international law on jurisdiction over matters of this nature.[59]

## 3. Cooperation with the Court

Under Part IX of the ICC Statute, States parties are obliged to "cooperate fully with the Court"[60] and to ensure that there are "procedures available under their national law for all the forms of cooperation" which are specified in Part IX.[61] Broadly speaking the South African ICC Bill aims at setting out the required national procedures for facilitating co-operation with the ICC in the two specified categories of judicial assistance with the arrest and surrender of persons in terms of article 89 and the areas of assistance in relation to investigations or prosecutions covered by article 93 of the ICC Statute.

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57 See R. Brody/ H. Duffy, "Prosecuting Torture Universally: Hissène Habré, Africa's Pinochet?", in: Fischer/ Kreß/ Lüder, see note 40, 817 et seq.

58 See www.hrw.org/press/2001/03/habre0320.htm

59 Cf. also *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)*, ICJ Case No. 121 of 14 February 2002.

60 Article 86 of the ICC Statute.

61 Article 88 ibid.

As regards arrest and surrender, the appropriate channel[62] for requesting assistance from the national authorities is the Director-General of Justice and Constitutional Development, referred to as the Central Authority in the ICC Bill.[63] A request for arrest and surrender must be accompanied by supporting evidence[64] that would satisfy a national court that there are "sufficient grounds for the surrender of a person to the Court."[65] In terms of article 58 of the ICC Statute the threshold for a warrant of arrest or summons to appear is whether there are "reasonable grounds to believe" that the person in question has committed a crime, terminology which is also used in the *South African International Co-operation in Criminal Matters Act* 75 of 1996.[66] The ICC Statute further requires that the national requirement for the surrender process should not be more burdensome than those applicable to requests for extradition pursuant to a treaty or other arrangements between states. On the contrary, the Statute would prefer a less burdensome requirement, where possible, in view of the distinct nature of the Court.[67] The "sufficient grounds" requirement of the ICC Bill corresponds with the requirement for the extradition of persons to foreign states in terms of section 10 of the *Extradition Act* 67 of 1962. This requirement is based on a 1996 amendment to the *Extradition Act* replacing the Anglo-American common law requirement of *prima facie* proof, which is unknown to civil law systems, with a view to avoiding difficulties in satisfying the requirements of the stricter *prima facie* standard of proof.

On compliance with the above requirements, the Central Authority "must immediately" forward the request for surrender and the accompanying documents to a magistrate for endorsement of the warrant of arrest and its execution in the Republic.[68] This involves a preliminary enquiry — which can be dispensed with if the person agrees in writing

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62 See article 87(1)(a) ibid.

63 See clause 8 read with clause 1(i) if the ICC Bill.

64 See article 91(2) and (3) of the ICC Statute.

65 Clause 8(1) of the ICC Bill.

66 See especially section 7 of this Act. The purpose of this Act is to facilitate the provision of evidence and the execution of sentences in criminal cases and the confiscation and transfer of the proceeds of crime between the Republic and foreign states.

67 See article 91(2)(c) of the ICC Statute.

68 Clause 8(2) of the ICC Bill.

to his or her surrender to the ICC[69] — with a view to establishing whether the warrant applies to the person in question, whether the person has been arrested in accordance with prescribed procedures, and whether the rights of the person have been respected. One such right is that the person must appear before the magistrate holding the enquiry within 48 hours after his or her arrest or detention.[70] Although not specified by the Bill, the reference to "rights" in this context, will include the constitutional guarantees on fair trial procedures in section 35 of the Constitution, even if the preliminary enquiry is not a trial in the true sense of the word.

A speedy conclusion of the surrender proceedings, which is obviously intended by the Bill, may run aground when disputes evolve on the jurisdiction of the ICC or on the question of admissibility in terms of article 19 of the Statute in the course of the preliminary enquiry. In such instances, the ICC Bill authorises the magistrate to postpone the proceedings pending the decision of the ICC on the question of jurisdiction or admissibility.[71] The power to postpone is discretionary but the Bill gives no indication of the grounds a magistrate could take into consideration in making a decision in this regard. Moreover, an order by the magistrate committing a person to be surrendered to the ICC is appealable within 15 days and no order for the surrender of a person may be executed before the expiry of this period, or in the case of an appeal, before the final disposal of the appeal.[72]

The ICC Bill also adequately acknowledges the responsibility of the South African authorities to cooperate with the ICC with regard to the multi faceted matters covered by article 93[73] of the ICC Statute. Consequently procedures are spelled out for the obtaining of evidence,[74] the examination of witnesses,[75] the transfer of prisoners,[76] the registration and execution of restraint and confiscation orders,[77] searches and sei-

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69 Clause 10(8) ibid.

70 Clause 10(1) ibid.

71 Clause 10(4) ibid.

72 Clause 10(9) ibid.

73 See also D. Rinoldi/ N. Parisi, "International Co-operation and Judicial Assistance between the International Criminal Court and States Parties", in: Lattanzi/ Schabas, see note 48, 339 et seq.

74 Clause 15 of the ICC Bill.

75 Clause 16 ibid.

76 Clause 20 ibid.

77 Clauses 22–29 ibid.

zures[78] and the enforcement of sentences of imprisonment.[79] Some of these matters warrant further comment.

Witnesses summoned to appear before a court for the purpose of obtaining evidence are entitled to the ordinary privileges that apply in proceedings of this nature, but a refusal by a witness to answer questions satisfactorily or to produce documentary evidence in his or her control is a criminal offence which renders the offender liable to a fine or imprisonment not exceeding 12 months.[80]

The obtaining of evidence through entry, search and seizure is dealt with fairly extensively in the ICC Bill,[81] obviously with a view to address constitutional concerns arising in the context of unreasonable, arbitrary or unlawful searches and seizures, respect for privacy and human dignity and the sanctuary and inviolability of the home, unfettered discretion and the purpose and scope of searches and seizures.[82] In the recent past the Constitutional Court has also not hesitated to declare unconstitutional powers of entry, search and seizure which were shown to have a wide and unrestricted reach and lacking proportionality between desired ends and the means used.[83] Consequently, the ICC Bill in clause 30 requires: "sufficient information" showing "reasonable grounds for believing" that the document or object in question is "necessary" to determine whether an offence has been committed; clear specification in the authorising warrant of the acts which may be performed by the police officer; provision of information on the content of the warrant and its purpose and the authority of the police official to execute the warrant to the person mentioned in the warrant, and respect for the person's dignity, freedom, security and privacy in the execution of the warrant. Compliance with these norms is subject to the usual exceptions. For instance, prior identification and explanation will not be required if there are reasonable grounds to believe that the evidence sought may have been destroyed, disposed of or tampered with, and in

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78 Clause 30 ibid.

79 Clause 31 ibid.

80 Clause 17 ibid.

81 Clause 30 ibid.

82 See also G.E. Edwards, "International Human Rights Law Challenges to the New International Criminal Court: The Search and Seizure Right to Privacy", *Yale J. Int'l L.* 26 (2001), 323 et seq.

83 *Mistry v Interim Medical and Dental Council of South Africa* 1998 (4) SA 1127 (CC).

the case of resistance, the force that is reasonably necessary to overcome the resistance may be used when executing the warrant.

In this context the issue of the admissibility of evidence unconstitutionally obtained requires attention. In terms of article 69 para. 7 of the ICC Statute, evidence obtained in violation of the Statute or "internationally recognised human rights" is inadmissible if the violation is such that reliability of the evidence is compromised, or if the admission of the evidence would seriously damage the integrity of the proceedings. That this provision allows for a discretionary admission of "tainted" evidence, is certainly not in question. Moreover, para. 8 of the same article acknowledges that different states may apply different admissibility criteria on which the ICC is not to rule. In terms of the South African Constitution evidence obtained in violation of a human rights guarantee must be excluded if the admission of the evidence would render the trial unfair, or otherwise be detrimental to the administration of justice.[84] The discretionary approach to the admissibility of evidence obtained in violation of human rights guarantees has been considered by the South African Constitutional Court in the case of *Key v Attorney-General, Cape Provincial Division.*[85] There it was stated that evidence obtained from a constitutionally invalid search and seizure provision does not mean that "the evidence obtained directly or derivatively as a result of such searches and seizures would necessarily be inadmissible in criminal proceedings ...".[86] In further explaining this approach the Court pointed out that what the Constitution demands is that the proceedings be fair and the trial Judge is the best person to make an assessment of fairness. Consequently, depending on the circumstances and the facts of each case, fairness could require at times that evidence be excluded and at other times be admitted.[87]

Finally, reference must be made to the resolving of disputes arising from the non-execution of requests for assistance by the ICC in view of the existence of a "fundamental legal principle of general application" in the national legal order.[88] Although article 93 para. 3 of the ICC Statute obliges parties to resolve such disputes by way of consultation with the ICC, certain matters obstructing the execution of a request for assistance may be better addressed by way of legislation. The issue of im-

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84 Section 35(5) of the Constitution.

85 1996 (4) SA 187 (CC).

86 Ibid., 195A.

87 Ibid., 196A-B.

88 Article 93 (3) of the ICC Statute.

munity falls into this category and its regulation in a more uniform way by states will prevent circumvention of or unevenhandedness in the application of the Statute and enforcement legislation in relation to crimes involving heads of state or other dignitaries entitled to immunity against criminal proceedings in national courts. Where such immunity is regulated by the constitution of a country, compatibility with the suspension of immunity in article 27 of the ICC Statute can become problematic, depending on what the constitutional rule allows or disallows and how suspension or waiver of immunity is regulated procedurally.[89] In South Africa the Constitution provides no refuge for immunity seekers. On the contrary indemnification of the state or any person in respect of unlawful acts performed in times of public emergencies is specifically excluded.[90] As far as foreign heads of state and other dignitaries are concerned immunity for official acts is regulated by the *Foreign States Immunities Act* 87 of 1981. However, the immunity envisaged by this Act is unlikely to find application in cases involving crimes under international law and committed by foreign government officials with the result that an amendment to the *Immunities Act* to reflect current developments in international criminal law[91] is something the South African authorities ought to consider. In 2002 some new amendments to the ICC Bill were still considered at the time of writing, including a formulation seeking to suspend any official capacity or the manifestly illegal order of a superior as defences to the crimes listed in the Statute.

## 4. The Conclusion of Agreements with the ICC

Assistance to the ICC may be effected by the conclusion of agreements with the ICC. This power falls within the executive authority of the President[92] and is subject to the provisions of section 231 of the Constitution which was dealt with earlier on. By making specific reference

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89 See also H. Duffy/ J. Huston, "Implementation of the ICC Statute: International Obligations and Constitutional Considerations", in: C. Kreß/ F. Lattanzi (eds), *The Rome Statute and Domestic Legal Orders*, Vol. 1, 2000, 29 et seq., (35 et seq.).

90 Section 37(5) of the Constitution.

91 See also *R v Bow Street Metropolitan Stipendiary Magistrate: Ex Parte Pinochet Ugarte (No. 3)* [1999] 2 All ER 577 (HL).

92 Clause 32(1) of the ICC Bill.

to the applicability of section 231 of the Constitution to agreements of this nature, the ICC Bill[93] avoids the legal issues which have emerged with regard to the presidential power in terms of section 3(2) of the *Extradition Act* 67 of 1962. This section empowers the President, in the absence of an extradition agreement with a requesting state, to effect the surrender of a fugitive to such a state by means of a written consent to extradition. In the case of *Harksen v President of the Republic of South Africa*[94] it was argued that an international agreement for extradition concluded in consequence of the presidential consent in terms of section 3(2) must comply with the provisions of section 231 of the Constitution with the result that approval by both Houses of Parliament is a prerequisite for the legal enforcement of the extradition; such approval was not sought in Harksen's case. This interpretation of section 3(2) was rejected by the Constitutional Court on the basis of the argument that the presidential consent had domestic relevance only, which rendered section 231 of the Constitution inapplicable in the matter under consideration.

In setting an agreement with the ICC apart from the type of arrangement provided for in section 3(2) of the *Extradition Act*, the ICC Bill raises the question of the legal nature of such agreements, especially in view of the fact that section 231 of the Constitution deals with different types of agreements to which different ratification procedures apply, without defining any of them. For instance, international agreements of a technical, administrative or executive nature, or agreements entered into by the executive and which do not require ratification or accession, are exempted from approval by the two Houses of Parliament, but must be tabled in the two Houses within a reasonable time.[95] Apparently, the official attitude is that treaties or agreements falling into these categories "refer to department-specific agreements; agreements without major political or other significance; and agreements which have no financial consequences and do not affect domestic law" and as such flow from the "everyday activities of government departments and are drafted in simplified form".[96]

The Constitution is silent on what should happen to a matter tabled in terms of section 231(3) of the Constitution. However, in practice it

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93 Clause 32(2) ibid.

94 2000 (2) SA 825 (CC).

95 Section 231(3) of the Constitution.

96 N. Botha, "Treaty-making in South Africa: A reassessment", *South African Yearbook of International Law* 25 (2000), 69 et seq., (76, 77).

involves no more than allowing for an opportunity of parliamentary debate and criticism leaving the question open of the extent to which such an opportunity can be used to effect amendments to the agreement. What is clear, though, is that this procedure is intended to be different from the proper parliamentary control over treaties that require democratic approval in terms of section 231(2) of the Constitution. The ICC Bill does not unequivocally narrow down agreements with the ICC to the type referred to as technical, administrative or executive agreements, but simply requires that any agreement with the ICC or an amendment or a revocation thereof must be published in the *Government Gazette*.[97] Whether the specific reference to the executive power of the President in relation to agreements with the ICC can be interpreted to mean that agreements with the ICC should fall into the category of executive agreements to which the less stringent parliamentary oversight procedures of the Constitution apply, is not altogether clear. The executive power in this regard derives from sections 84(1) and 85(2)(e) of the Constitution which entitle the President to perform any function entrusted to him or her by legislation or the Constitution. This raises two important matters. Firstly, it is doubtful whether agreements with the ICC can, without any problem, be classified as executive agreements having no major political, juridical, financial or other implications and not affecting domestic law. This will certainly depend on the nature and purpose of the agreement and the way in which it must be executed. Secondly, the Constitution is silent on who should decide whether an agreement falls into one or the other category. Government practice follows the rule that the minister within whose portfolio the subject-matter of the agreement falls makes the decision in conjunction with the state law advisors, which is then followed by a reasoned request for executive approval of the categorisation.[98] The unhealthy part of this procedure is that the same authority (executive) responsible for the negotiation and signing of agreements also decides on their categorisation. With no parliamentary control over this decision-making power, the question remains as to the extent such decisions will be reviewable by a court of law.

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97 Clause 32(3) of the ICC Bill.

98 Botha, see note 96, 77, 78.

## IV. Conclusion

The ratification of the ICC Statute by the South African government and the steps that have been taken to implement the Statute domestically are commendable. However, the future success of these steps in creating an effective legal framework for the enforcement of international criminal justice and for co-operation with the ICC is very much dependable on the effectiveness with which states in the region can overcome obstacles at the national as well as the regional level. One of the greatest obstacles remains the general lack of a minimum level of uniformity in responses to the need for compliance with and enforcement of international norms and standards. Whether this situation will be remedied in the case of the ICC remains to be seen. Differences in legal tradition,[99] disparate levels of legal and administrative sophistication and varying degrees of "international law openness" of national legal systems are all matters in need of attention. Efforts to address some of the problems at the regional level could offer hopeful signs of a greater collective willingness to make things work. At the level of cross-border police cooperation mention must be made of the establishment in 1995 of the Southern African Regional Police Chiefs Cooperation Organisation (SARPCCO) with a view to improving functional cooperation with regard to the exchange of crime-related information, border control, law enforcement, crime prevention, and technical assistance.[100] More specific to the implementation of the ICC Statute, the SADC has urged member states to ratify the Statute and give priority to national implementing legislation.[101] To assist states in this regard SADC has even taken the initiative to draft a model enabling law covering all the major aspects of the ICC Statute which states could adapt to their national situations.[102] However, whether action will follow words on a wide enough front to demonstrate regional recognition of the triumph of international criminal justice over political expediency is perhaps not so self-evident.

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99 See also D.N. Nsereko, "Implementing the ICC Statute within the South African Region", in: Kreß/ Lattanzi, see note 89, 169.

100 See also H.A. Strydom/ S. du Toit, "Transnational Crime: The Southern African Response", *South African Yearbook of International Law* 23 (1998), 116 et seq., (128).

101 www.irinnews.org/reports

102 Nsereko, see note 99, 181.