South Africa and the International Criminal Court: Investigating the Link between Complementarity and Implementation

A thesis submitted in fulfilment of the requirements for the degree of

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by

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Dedication

To my truly wonderful parents

Declaration

This thesis is my own work and has not been submitted for degree purposes at any other University.

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ABSTRACT

Complementarity, the organizing principle of the International Criminal Court (ICC), is a largely untested concept in terms of its ability to instigate State compliance with the Rome Statute of the International Criminal Court. The ICC made its debut at a time when States were routinely accused of non-compliance with international law, particularly international criminal law. Due to perennial concerns over the protection of State sovereignty, an ingenious system of allocation of competencies between States and the ICC was evolved. This is embodied by the principle of complementarity.

At the heart of complementarity is an arrangement by which States Parties to the Rome Statute of the ICC are regarded as the prime *fora* for the prosecution of crimes of grave concern to the international community. In the event of inaction, however, the ICC is mandated to wrest specific cases from the jurisdiction of national courts and try them. In effect, a carrot-and-stick mechanism has been built into the Rome Statute to induce States to comply with the Statute.

This thesis examines the principle of complementarity from a theoretical perspective, bearing in mind contemporary international law structures and institutions. A better understanding of the theoretical assumptions of complementarity, it is suggested, will foster a more effective application of the tenets of the Rome Statute within the municipal system. The thesis argues that complementarity is a catalyst for implementation of the Rome Statute only to the extent to which it alters or re-defines well established and encumbering procedures and norms within the municipal system. In this regard, although South Africa's status of constitutional democracy may be reason to expect that the obligations imposed by the Rome Statute will be observed, that very fact may increase the inclination to preserve the "baseline of conduct" rather than be swayed by the Rome Statute.

An illustrative excursion into South African rules and norms is undertaken, after which the argument is advanced that not much change has been effected to the South African legal landscape through implementation of the Rome Statute. The sole exception to this is the issue of prosecutorial discretion. On this, the South African legislature has uniquely crafted a mechanism for ensuring accountability, presumably with a view to ensuring that South Africa is always able to prosecute the crimes concerned.

However, the thesis cautions against complacency, arguing that the tension between national law and international obligations may yet play itself out, owing to insufficient attention to the role of national courts in giving effect to the Rome Statute. The act of implementation may be a response to stimuli such as the perceived need to avoid civil liability for international crimes, or the general inertia of implementing human rights instruments. Therefore, the carrot-and-stick mechanism may be lacking in the compulsive qualities it is presumed to have.

Through an exploratory survey of South African law, the thesis illustrates that prosecutorial accountability is the major factor in determining whether a State has fully complied with is obligations under the Rome Statute. However, it also points out that the way courts of law apply the new norms in municipal systems in the future will be crucial.

List of Acronyms and Abbreviations

AD- Appellate Division.

AJIL- American Journal of International Law.

ALR- Australian Law Reports.

AZAPO- Azanian People's Organization.

BCLR- Butterworths Constitutional Law Reports.

BYIL- British Yearbook of International Law.

CA- Court of Appeal.

CC- Constitutional Court.

CILSA- Comparative and International Law Journal of Southern Africa.

CPD- Cape Provincial Division.

EDLD- Eastern District Local Division.

EJIL- European Journal of International Law.

GAR- General Assembly Resolution.

GATT- General Agreement on Tariffs and Trade.

HL – House of Lords.

ICC-International Criminal Court.

ICCPR- International Covenant on Civil and Political Rights.

ICJ Rep- International Court of Justice Reports.

ICLQ- International and Comparative Law Quarterly.

ICRC- International Committee of the Red Cross.

ICTR- International Criminal Tribunal for Rwanda.

ICTY- International Criminal Tribunal for the Former Yugoslavia.

ILC- International Law Commission.

ILM-International Legal Materials.

IMF- International Monetary Fund.

Int'l L. Rep- International Law Reports.

MLR- Modern Law Review.

NAFTA- North American Free Trade Agreement.

PC- Privy Council.

PCIJ- Permanent Court of International Justice.

POWs- Prisoners of War.

SA- South African Law Reports.

SADC- Southern African Development Community.

SAIA- The Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002.

SAJHR- South African Journal on Human Rights.

SALJ- South African Law Journal.

SANDF- South African National Defence Force.

SAYIL-South African Yearbook of International Law.

S.C.R.- Supreme Court Reports.

S. Ct- Supreme Court.

TPD- Transvaal Provincial Division.

T.R.C- Truth and Reconciliation Commission.

U.N.T.S.- United Nations Treaty Series.

U.S.C.- United States Congress.

WLR- Weekly Law Reports.

WTO- World Trade Organization.

YLJ- Yale Law Journal.

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Kenneth Wanyama Kulundu

Grahamstown
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Chapter One

GENERAL INTRODUCTION

"International society still lacks any of the conditions on which the rise of criminal law depends"[1]

1.1 The Evolving Idea of International Criminal Law

The establishment of the International Criminal Court[2] (ICC) marks an important milestone in the development of international law. Beginning with the end of the Second World War and the drawing up of the United Nations Charter,[3] the international community has realised the importance of preserving international peace through ensuring that flagrant abuses of human rights do not go unpunished.

The perpetrators of crimes of international concern are an obvious threat to these efforts. Safe havens, unfortunately, still exist for them. The challenge is, therefore, to ensure that States are always able and willing to exercise jurisdiction over such perpetrators.[4]

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[1] G Schwarzenberger *The Frontiers of International Law* (1962) 207.

[2] See the Rome Statute of the International Criminal Court adopted at Rome in July 1998, available at http://www.un.org/law/icc/statute/99-corr/cstatute.htm (accessed 7th March 2004). The Statute came into force on July 1 2002.

[3] See the U.N. Charter, preamble, paragraphs 1 and 2: " We the peoples of the United Nations, determined:
To save successive generations from the scourge of war which twice in our lifetime has brought untold sorrow to mankind, and
To reaffirm faith in fundamental human rights, in the dignity and worth of the human person...."

[4] See generally T M Franck and B B Lockwood "Preliminary Thoughts Towards an International Convention on Terrorism" (1974) 68 AJIL 69 at 82; M C Bassiouni *Crimes against Humanity in International Law* (1992); J J Lambert *Terrorism and Hostages in International Law* (1990) 134-40; S Landau" Extraterritorial Penal Jurisdiction and Extradition" (1980) 29

The development of a body of law to combat crimes of international concern was always going to be dogged with difficulty. The main hurdle relates to the very nature of international law: a body of law designed to regulate inter-State relations, and not itself readily enforceable before municipal courts.[5]

Moreover, criminal law is concerned, in the main, with ordering human conduct. This is a process that is normally largely steeped in national traditions and values.[6] Jurisprudentially, this gives expression to what the jurist Von Savigny termed the "*volksgeist*".[7] This is, basically, the articulation of the proposition that a nation's laws are a product of its history.[8]

Given the above, the whole notion of "international criminal law" appears a contradiction in terms. The evolution of this concept has, therefore, understandably been a staggered one. As Beigbeder puts it,

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ICLQ 274 at 282; C S Thomas and M J Kirby "The Montreal Convention 1971" (1973) 22 ICLQ 163 at 171; L Gross "International Terrorism and International Criminal Jurisdiction" (1973) 67 AJIL 508 at 510; L C Green "International Crimes and the Legal Process" (1980) 29 ICLQ 567 at 577; G Gilbert " The Irish Interpretation of the Political Offence Exception" (1992) 41 ICLQ 66.

[5] See M N Shaw *International Law* 3 ed (1986) 6.

[6] See generally I Loveland "Hate Crimes and the First Amendment" (1994**)** *Public Law* 174ff; N Polat "International Law, the Inherent Instability of the International System, and International Violence" (1999) 19 *Oxford Journal of Legal Studies* 51 at 66; A Sanders "What Principles Underlie Criminal Justice Policy in the 1990s?" (1998) 18 *Oxford Journal of Legal Studies* 533 ff; I Hare "Legislating Against Hate: The Legal Response to Crimes" (1997) 17 *Oxford Journal of Legal Studies* 415 at 416, 424-38; G Schwarzenberger *The Frontiers of International Law* (1962) 207.

[7] V Savigny *The System of Modern Roman Law* (1867) 12. See also L Popsil *Anthropology of Law: a Comparative Study* (1971) 141.

[8] See also J C Barker *International Law and International Relations* (2000) 48.

"International criminal law is a law in the making, an imperfect and soft law, a law in slow evolution".[9]

The creation of the Nuremberg Tribunal in the late 1940s to try Nazi war criminals heralded a new era in the international community's efforts. With the creation of the Tribunal, a set of principles known as the "Nuremberg Principles"[10] emerged and has greatly influenced the development of international criminal law. In the wake of the Second World War, questions were being raised about the doctrinal shortcomings of international law at the time, and the specific need to ensure that individuals could be held accountable for their international crimes. This idea embodied the first Principle.

Secondly, the idea that one could evade criminal responsibility due to their official capacity within the State machinery was rejected. Criminal responsibility would attach irrespective of official capacity. This idea also finds expression in the Rome Statute.[11]

Thirdly, criminal responsibility would attach to individuals regardless of whether national law was silent on, condoned, or actually required the behaviour in question. Through this principle, for instance, superior orders became irrelevant in determining criminal responsibility.[12]

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[9] See Y Beigbeder *Judging War Criminals: The Politics of International Justice* (1999) 2.

[10] See B Broomhall *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (2003) 19-23.

[11] See Rome Statute *op cit* Article 27.

[12] Broomhall *op cit* at 21. See also F L Morrison "The Significance of Nuremberg for Modern International Law" (1995) 149 *Military Law Review* 207 at 214-215.

Fourthly, individual responsibility for international crime meant that the international community had to give serious thought to the issue of enforcement. The idea gave rise to the need for enforcement through international tribunals as well as through national courts.[13]

Finally, the link was affirmed between the fight against international crime and the maintenance of peace in the post-war world. Therefore, one sees the core prohibitions of international criminal law, such as that against genocide, as expressions of the basic foundation of the post-war international order. [14]
The Nuremberg Tribunal therefore set the standards for modern international criminal law. As Richard Overy puts it,[15] the ICC is a direct descendant of the Nuremberg Military Tribunal. The Nuremberg Principles have found expression in the Statute of the ICC.

Recently, similar Tribunals have been established under the auspices of the United Nations Security Council with respect to war crimes in Rwanda [16]and the former Yugoslavia. [17]

The ICC, a permanent international institution, is, however, the superstructure for trying crimes of international concern. The Court is seen as the culmination of

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[13] Broomhall *op cit* at 22.

[14] *Ibid.*

[15] See R Overy "The Nuremberg Trials: International Law in the Making" in P Sands (ed) *From Nuremberg to The Hague: The Future of International Criminal Justice* (2003) 1 at 28-29.

[16] SC Res. 955 (1994).

[17] SC Res. 827 (1993).

long and arduous efforts to "internationalise" criminal law.[18]Earlier efforts to do so had not met with resounding success: from the 1907 Hague Peace Conference when the idea of an international criminal court was first mooted, to 1948 when the United Nations General Assembly mandated the International Law Commission to "study" the possibility of establishing an international judicial organ to try the perpetrators of genocide.[19] States simply lacked the political will to follow these efforts through, mainly due to concerns about their sovereignty.

The Rwanda and Yugoslavia Tribunals, moreover, are restricted to their specific conflicts. They are also seen as creatures of the UN Security Council, and thus amenable to political manipulation.[20] The ICC, on the other hand, is seen as more transparent given the clear laws and procedures it will apply.[21]

Regrettably, however, the authority and legitimacy of the Court are significantly undercut by the fact that some States, notably the United States of America,

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[18] See G Werle and F Jessberger "International Criminal Justice is Coming Home: The New German Code of Crimes against International Law" (2002) 13(2) *Criminal Law Forum* 191 at 193-4; H Kaul "Breakthrough in Rome: The Statute of the International Criminal Court" (1999) 59/60 *Law and State* 114 at 115. See also M Schuster "The Rome Statute and the Crime of Aggression: A Gordian Knot in Search of a Sword" (2003) 14(1) *Criminal Law Forum* 1. The writer states: "International law is quintessentially about achieving common legal ground, something that is particularly true when it comes to questions of international criminal justice. The Rome Statute of the International Criminal Court, achieved after years of negotiations, is the paradigmatic illustration for such an accumulation of concessions and compromises". (*Ibid)*

[19] GAR 260 of 9/12/1948.

[20] See, for example, M Mutua "Never Again: Questioning the Yugoslav and Rwanda Tribunals" (1997) 11 *Temple International and Comparative Law Journal* 167 at 171; D N Sharp "Prosecutions, Development, and Justice: The Trial of Hissein Habre" (2003) 16 *Harvard Human Rights Journal* 147 at 154- Available at http://www.law.harvard.edu/students/orgs,hrj/current/sharp.shtml#Heading40. (Accessed 19/4/04).

[21] G Triggs (note 76 *infra*) 3.

Russia and China, have chosen not to ratify its Statute.[22] One of the concerns expressed is the apprehension that the Court is likely to be used for "political" prosecutions, a matter about which the United States is particularly sensitive. This foreshadows one of the seemingly intractable problems that continue to dog international criminal law: lack of political will to prosecute crimes that are of serious concern to the international community.

1.2 The Nature and Jurisdiction of the ICC

The Rome Statute of the ICC establishes a permanent Court[23] to try the crimes of genocide, war crimes, crimes against humanity, and aggression.[24] With the exception of aggression, which is, as yet, to be comprehensively defined[25], the elements of these crimes are set out in detail in the Statute.[26] The Court has its seat at The Hague[27] in the Netherlands and has four (4) main organs.[28]

It has been lamented that the Court's jurisdiction "is neither universal nor direct and it does not automatically cover all international crimes [defined by the Statute]".[29] This is because the Court, being treaty-based, may exercise

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[22] *Ibid.*

[23] See Rome Statute *op cit* Article 1.

[24] *Op cit*, Article 5(1).

[25] *Op cit*, Article 5(2). See also M Schuster *loc cit* (note 18 above).

[26] See Rome Statute *op cit*, Articles 6 to 8.

[27] *Op cit*, Article 3(1).

[28] These are: The Presidency; A Pre-trial Division, a Trial Division and an Appeals Division; The Office of the Prosecutor; and the Registry. See the Rome Statute *op cit* Article 34.

[29] K Ambos "Editorial" (1998) 6(4) *European Journal of Crime, Criminal Law and Criminal Justice 320.*

jurisdiction only if a State has, in essence, "consented" to its jurisdiction, either through ratifying the Statute[30] or through an *ad hoc* stipulation.[31]

On another level, the Court's jurisdiction is only complementary to that of national jurisdictions.[32] Essentially, therefore, primacy is given to national jurisdictions in the matter of prosecuting the defined crimes. The Court will only exercise its adjudicative power if national mechanisms are found wanting. This phenomenon forms the subject of this study. The aim of this thesis is to establish how complementarity may be understood as having the effect of influencing the legislative choices that a State makes.

1.3 What is Complementarity?

In international law, all States have a duty either to prosecute or extradite those suspected of having committed certain crimes (*aut dedere, aut judicare).*[33] It has been stated that the duty is an absolute one: if extradition is not effected, prosecution must follow, and *vice versa.*[34]

Presumably in line with this general obligation, and with it in mind, States, Party to the Statute have ordained that the prosecution of Statute crimes shall be the

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[30] "A treaty does not create either obligations or rights for a third State without its consent". See Article 34 of The Vienna Convention on the Law of Treaties (1969). See also The Rome Statute *op cit* Article 12(1).

[31] *Op cit*, Article 12(3).

[32] The Rome Statute *op cit*, Articles 1, 17 and 18.

[33] Latin for "extradite or prosecute". See generally M C Bassiouni and E M Wise *Aut Dedere Aut_Judicare: The Duty to Extradite or Prosecute in International Law* (1974).

[34] See generally G Gilbert *Aspects of Extradition Law* (1991).

primary obligation of States. In terms of Article 17[35] of the Rome Statute, the Court will not entertain a case, which is being investigated or prosecuted by a state, unless it appears that the State concerned is unwilling or unable to genuinely investigate or prosecute.

The determination as to whether a State is unwilling or unable to expedite a case lies with the Court.[36] The Statute sets out certain *desiderata* to guide the Court in making this determination. It seems to the author, however, quite extraordinary that the Court is granted such a power in an arrangement intended to be "complementary". It has, thus, been cautioned that this power to make such a determination against a State is an "exceptionally invasive" one.[37] On the other hand, it ought to be remembered that State Parties have effectively bound themselves to respect the Court's exercise of such powers.

What is important for present purposes is whether this dilemma influences States in the kind of provisions they make in their implementing legislation. It has been

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[35]Article 17 (1) reads in part: "...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 allowed under Article 20,paragraph 3;
d) The case is not of sufficient gravity to justify further action by the Court".

[36] Rome Statute *op cit* Article 17(2)

[37] See T C Steele " The Contribution of the Statute of the International Criminal Court to the Enforcement of International Law in the Light of the Experiences of the ICTY" (2002) 27 *SAYIL* 1 at 59.

asserted that complementarity is a catalyst for implementation.[38] This thesis will be concerned with closely scrutinising this claim with regard to the provisions of South African legislation.

It is clear from the foregoing that the Court will exercise a supervisory role in enforcing the basic tenets of complementarity. By retaining the power to pronounce on the adequacy of national criminal justice systems, the Court will ensure that prosecutions for core crimes occur more readily than would otherwise be the case. The obligation may therefore be expressed in the form of a double imperative: prosecute or have the Court intrude upon your sovereignty. This "carrot and stick" mechanism is the cornerstone of the principle of complementarity.[39]

This principle is, it will be argued, a novelty in international law.[40] The obvious difficulty with which the drafters of the Rome Statute were faced was that States were keen to protect their sovereignty. They were, thus, not likely to agree to an

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[38] See Werle and Jessberger *op cit* (note 18 above) at 214.

[39] See J K Kleffner "The Impact of Complementarity on National Implementation of Substantive Criminal Law" (2003) 1 *Journal of International Criminal Justice* 86 at 94. See also Steele *op cit* (note 37 above) at 21: "The principle of Complementarity can only be effective in inducing prosecutions at the national level to the extent that the threat of prosecution by the [ICC] in article-17 circumstances is real". See also J T Holmes "The Principle of Complementarity" in R S Lee(ed) *The International Criminal Court: Issues, Negotiation, Results* (1999); Broomhall *op cit* (note 10 above) at 1.

[40] For the view that complementarity is a compromise, see Steele *op cit* (note 37 above) at 10. It is a novelty in the sense that, unlike other international criminal law treaties, it does not expressly oblige State parties to enact the substantive criminal law of the Statute as part of their national law (the exception to this is Article 70 which relates to offences against the administration of justice). An example of a treaty which obliges State parties to enact at least part of its substantive law is The (Geneva) Convention Relative to the Protection of Civilian Persons in Time of War (1950) 75 U.N.T.S. 287, Article 146 of which states: "...Parties undertake to enact any legislation necessary to provide effective penal sanctions". See also Steele *op cit* (note 36 above) at 9.

arrangement such as obtains in the cases of the International Tribunals for Rwanda and Yugoslavia, where these Tribunals have primacy over States. [41] Yet the urgent need was felt to crystallize international consensus in order to ensure that the core crimes are punished. Striking a balance between these two considerations seems a tall order indeed.

It is, perhaps, in this light that one ought to view the inclusion of this principle in the Rome Statute. It is apparent that the principle did not evoke a lot of controversy when it was first included in the International Law Commission's (ILC) Draft Statute.[42] This, in the author's humble view, does not necessarily point to a consensus in terms of the content of the principle of complementarity.[43] It was rather a pragmatic approach to a complex and divisive issue.[44] This approach produced the much-vaunted idea of complementarity whose contours were, however, not fully defined.

There is, thus, a need to more carefully define this principle given its supposed impact on the national implementation of international criminal law. An attempt will be made later in this study to cast the principle in a theoretical framework which accords with international law jurisprudence.[45]

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[41] See H A Strydom & S Du Toit "Transnational Crime: The South African Response" (1998) 23 SAYIL 116 at 121.

[42] Steele *op cit* (note 37 above) at 9; Broomhall *op cit* (note 10 above) at 86.

[43] Steele *loc cit* (note 42 above).

[44] An *ad hoc* committee was tasked with reviewing the Draft Report produced by the International Law Commission (ILC). Its report reveals the divergent views of delegates, ranging from the caution that complementarity should not create a presumption in favour of national courts, to the fear that the ICC would be allowed to pass judgment on national courts. To access the report, see note 55 (*infra*).

[45] See chapter two (*infra).*

It is worth mentioning at the outset that complementarity is conceived as notionally distinct from the obligation to co-operate with the Court. Thus, Article 86 of the Statute obliges State Parties to 'cooperate fully with the Court in its investigation and prosecution' of the crimes within its jurisdiction. However, it is submitted that the two notions have an obvious link insofar as the Statute provides that "effective prosecution" of international crimes "must be ensured by taking measures at the national level and by enhancing international cooperation".[46] We will therefore treat the subject of complementarity as entailing the duty to cooperate, thus discussing provisions under Part 9 of the Statute[47]. It is the author's considered view that a State Party to the Statute cannot ensure the effective prosecution of the core crimes without first putting mechanisms in place that would ensure full cooperation with the Court.

1.4 Complementarity and Challenges for an Implementing State-Protecting State Sovereignty.

The challenge of the complementarity regime is the actual response of the State Parties, which will be through the legislative choices they make.[48] Given that, traditionally, States have always been viewed as the main actors on the international plane, it stands to reason that they would be relied upon to enforce the Statute.[49] The problem, however, is that such expectations must take cognizance of the fact that States differ in their political, social, economic and

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[46] Rome Statute, preamble, paragraph 4 (emphasis added). See also Werle & Jessberger *op cit* (note 18 above) at 194.

[47] This Part of the Statute is entitled "International Cooperation and Judicial Assistance".

[48] See Kleffner *op cit* (note 10 above) at 88.

[49] See Broomhall *op cit* (note 10 above) at 13.

cultural make-up. This fact, in turn, tends to influence the kind of legislative choices that they make. Savigny's *volksgeist*[50], therefore, must be reckoned with in such matters.

As has been seen above, the basic premise of the complementarity principle is the Statute's "threat" to involve the Court should a State's national justice system be found wanting.[51] Underlying this threat, it is submitted, is the assumption that States treasure their sovereignty and that they would go to great lengths to ensure that it shall not be interfered with. This is the challenge facing every State Party to the Statute.

A noteworthy trend in the creation of international institutions, especially after the Second World War, is that these are generally meant to chip away at traditional notions of State sovereignty.[52] Thus, there is the emergence of international institutions such as the European Union, which are termed "supranational". These institutions operate on the basis of the presumed willingness of States to give up some of their sovereignty.[53] On the other hand, the principle of complementarity is an assurance, albeit conditional, that States'

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[50] Note 7 above.

[51] See pages 6-7 above.

[52] See Broomhall *op cit* at 42-43.

[53] See generally N D White *The Law of International Organisations* (1996) at 46-43; H G Schermers, *International Institutional Law* (1980) at 27-33; P Taylor *International Organization in the Modern World* (1993) at 191-192; T M Franck *Fairness in the International Legal and Institutional System* (1993) 57-61. However, it has been pointed out that, at present, there are no "pure" supranational organizations, and that one can therefore only speak of "relative" supranationality. See White *op cit* at 46. On the essential characteristics of supranational organizations, see Schermers *op cit* at 28-29.

sovereignty will be respected. In this way, the Statute creates a unique international institution in the ICC.[54]

For an implementing State under the ICC Statute, the choice is between prosecuting the core crimes, on the one hand, and being adjudged unable to do so, on the other, thus losing curial power over a specific case. In making its choice at the legislative level, a State would be guided by considerations such as the following:

1. Whether the State, when acting in the framework of cooperation with the Court, acts within the ambit of the Court's authority as its organ or whether this is done on its authority and subject to national law.
2. Traditional considerations of essential interest (*ordre public).*
3. Compliance with other conventions.[55]

For African States, issues of sovereignty are particularly important given these States' history of colonialism and the immediate task of nation building.[56] South Africa, in particular, has quite peculiar aspects of its return to the international community, which could influence or explain its legislative choices. An example

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[54]That is, when viewed against the backdrop of such recent developments as the establishment of ICTR and ICTY, which seek to attenuate State sovereignty. In apparent reference to the ICC model, Broomhall *op cit* at 43 asserts that this rapprochement between the rule of law and State sovereignty is coherent in principle, but not realizable in practice. He states: "This tension has characterized the development of international criminal law from its origins to the present day...and there is no reason to expect that it will not continue to characterize it after the entry into force of the Rome Statute...."

[55] See Report of the *Ad Hoc* Committee on the Establishment of an International Criminal Court- Review of the Major Substantive and Administrative Issues Arising out of the Draft Statute for an International Criminal Court Prepared by the International Criminal Commission- Annex 1 thereto, available at http:// www.radicalparty.org/icc/adhoc (accessed 27/2/04).

[56] A J G M Sanders *International Jurisprudence in African Context* (1979) 122.

is the use of amnesties and Truth and Reconciliation Commissions (TRCs) as a means of redressing past abuses of human rights has had a major impact on the reconstruction process.[57] It is significant to mention that the ICC Statute is silent on such processes, a matter which has resulted in considerable debate regarding their austerity.[58] The essential inquiry is whether any future resort to such processes in respect of crimes falling within the jurisdiction of the Court would be in line with South Africa's obligations under the Statute. These issues will be discussed in this study.

South Africa has enacted The Implementation of the Rome Statute of the International Criminal Court Act[59] to give effect to the Rome Statute. This piece of legislation forms the basis of South Africa's observance of its obligations under the Statute[60]. How far has the legislation re-shaped South Africa's legal

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[57] For an extensive discussion of the merits of the TRC process, see S Garkawe "The South African Truth and Reconciliation Commission: A Suitable Model to Enhance the Role and Rights of the Victims of Gross Violations of Human Rights?" available at: http://www.austlii.edu.au/au/journals/MULR/2003/14.html (accessed 7/4/04).

[58] See, for example, Beigbeder *op cit* (note 8 above) at 125. For his part, Professor John Dugard argues that amnesty and Truth and Reconciliation Commissions (TRC's) are an integral part of national healing and reconstruction, and are consistent with the Rome Statute's policy of accountability for the commission of international crimes. See J Dugard "Possible Conflict of Jurisdiction with Truth Commissions" in A Cassese et al (eds) *The Rome Statute of the International Criminal Court: A Commentary* (2002) 693 at 702-703.

[59] Act 27of 2002.

[60] The Preamble to the Act reads:
" To provide for a framework to ensure the effective implementation of the Rome Statute of the International Criminal Court in South Africa; to ensure that South Africa conforms with its obligations set out in the statute; to provide for the crime of genocide, crimes against humanity and war crimes; to provide for the prosecution in South African courts of persons accused of having committed the said crimes in South Africa and beyond the borders of South Africa in certain circumstances; to provide for the arrest of persons accused of having committed the said crimes and their surrender to the said Court in certain circumstances; to

landscape as regards the prosecution of international crimes? The answer to this question is the key to understanding the link between the principle of complementarity and the implementation of the Rome Statute. The relevance of this question becomes apparent when one considers the old debate about how international law is enforced: does the "threat" of loss of sovereignty over the judicial process amount to a sufficient stimulus for State compliance with international law?

1.5 The Working Hypotheses

We will approach the present study with two main assumptions to guide us in achieving our goal. These hypotheses are, however, provisional and may need re-adjustment at a later stage, especially as regards the theoretical understanding of the principle of complementarity. The hypotheses are as follows:

Firstly, the regime of complementarity is, in effect, a system designed for the notional "perfect" criminal justice system where prosecutions are assured in every case. To enforce the regime of complementarity to the letter would mean that the ICC ceases to exist, as an institution, for no cases will come before it.[61] This, it will be argued, was hardly the intention of the Rome Statute's drafters.

Secondly, most prosecutions will occur at the national level. Thus, such prosecutions will be dogged by the usual problems associated with national justice systems, such as the lack of political will to prosecute, diplomatic

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provide for cooperation by South Africa with the said Court; and to provide for matters connected therewith".

[61] See J T Holmes "Complementarity: National Courts *versus* the ICC" in A Cassese *et al* (eds) *The Rome Statute of the International Criminal Court: A Commentary* (2002) 667. See specifically note 3 (*ibid)* for the following view quoted from Ambassador Phillippe Kirsch: "It is the essence of the principle of complementarity that if a national judicial system functions properly, there is no need for the ICC to assume jurisdiction".

considerations and fragile judicial systems. Each State Party, it will be argued, will therefore need to totally restructure its justice system and reconfigure its laws in a manner not envisaged by the Rome Statute.

1.6 Context of the Study

The study will be carried out within the wider context of the problem of harmonizing international criminal law and national criminal justice systems in order to ensure that the culture of impunity for offenders is eliminated.[62] The study will proceed on the premise that complementarity is an innovation and a product of compromise.[63] This thesis will therefore seek to isolate the various competing interests that led to this compromise in order to see whether, and to what extent, these concerns have been addressed in South Africa's implementing legislation.

The choice of South Africa as the subject of this study is justified by the fact that, as a prosperous African country, its implementation mechanisms are likely to be viewed as a benchmark for other countries within the region and the continent.[64]At present, very few African countries have actually ratified the Rome Statute[65], let alone enacted legislation to implement it. South Africa's

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[62] See paragraph 4 of the preamble to the Statute of the International Criminal Court.

[63] See generally Kleffner *op cit* (note 39 above) at 87-89. See also Steele *op cit* (note 37 above) at 9.

[64] This is typified, *inter alia,* by the fact that in March 2003 the Kingdom of Lesotho conducted a follow-up workshop on efforts to enact a law implementing the ICC statute, at which a lot of the discussion was centred on the South African legislation. The author represented the Law Society of Lesotho at the workshop.

[65] As at 5th March 2006, the African countries that had ratified the Statute were Benin, Botswana, Burkina Faso, Burundi, Congo, The Central African Republic, The Democratic Republic of Congo, Djibouti, Gabon, Gambia, Ghana, Guinea, Kenya, Lesotho, Liberia, Malawi, Mali,

efforts to implement the Statute may therefore provide a reference point for other countries wishing to follow suit.

Moreover, as a new emerging democracy, South Africa needs to strengthen her criminal justice system in such a way that crime in general and international crime in particular, is effectively controlled. Emerging democracies often present unique problems in this regard, in that as they become more receptive to external influences and therefore more cosmopolitan, a strain is placed on their capacity to detect and prosecute crime. The perception that South Africa is a safe haven for those being sought after for their crimes abroad would no doubt lead to a situation where South Africa is unable to fulfil her international obligations.

A case in point is that of former Ethiopian ruler Mengistu Haile Mariam, who came into the country for medical treatment. Subsequently, there were calls for his extradition to Ethiopia for gross violations of human rights he allegedly presided over.[66] A strong criminal justice system helps to avoid such episodes.

Mauritius, Namibia, Niger, Nigeria, Senegal, Sierra Leone, South Africa, Tanzania and Uganda and Zambia. South Africa is the only African State that has enacted legislation to implement the Rome Statute. Source: http://www.iccnow.org/countryinfo/worldsigsandratifications.html . (accessed 5/3/06).

[66] The former leader of Ethiopia arrived in South Africa in 1999, from Zimbabwe where he had been living in exile. Amnesty International, the human rights organization, was at the forefront of calling on the South African Government to ensure that Mengistu did not leave the country while investigations into his alleged abuses were continuing. Nevertheless, on 7 December 1999 the South African Government announced that Mengistu had returned to Zimbabwe. See Amnesty International's response at http://www.amnesty.org/library/index/ENGAFR530131999?open&of=ENG-ZAF (accessed 17/5/04). Human Rights Watch, another rights group, called on the South African Government to try Mengistu in South African courts. See http://www.hrw.org/press/1999/nov/eth1124.htm (accessed 17/5/04).

1.7 Scope of the Study

The study looks at South Africa's implementing legislation from the complementarity viewpoint. Thus, an analysis of the legislation's provisions will be attempted only insofar as they relate to the issue of complementarity. Where pieces of legislation from other jurisdictions are discussed, this is for the limited purpose of illustrating their complementarity aspects. Points of difference and similarity between the provisions of the legislation and those of the Rome Statute will be discussed with reference to complementarity.

A theoretical discussion of the principle of complementarity necessitates a discussion of the various theories of international law and its enforcement. However, the study will not venture into a determination of which particular theory is plausible. Rather, the discussion should lead to a better understanding of the origins of the principle of complementarity and how it is meant to function.

A comparative survey of similar legislation from different jurisdictions will also be made in the course of the study. This is for purposes of understanding the different legal settings within which these laws are passed, and making suggestions for reform at the end of the study.

1.8 Goals of the Study

Broadly, the study aims to answer the question whether the principle of complementarity is a viable one in terms of instigating a robust regime of international criminal law. A case study of the South African legislation will be used for these purposes. Equally important is the issue of whether South Africa's implementation regime accords with its obligations at international law.

It will therefore be important to first answer the subsidiary question of what the content of a State party's obligations under the Statute of the International Criminal Court is. Is it merely to put in place the co-operative machinery set forth in the Statute, or are States further obligated to adopt the substantive law embodied in the Statute?[67] This is closely related to the question whether discretion is accorded to States, party to the Rome Statute, in the actual implementation of the Statute.[68]

It is hoped that the study will critically analyse the complementarity concept, a glue of uncertain content that has been entrusted with the task of holding together States whose professed goal is to fight the culture of impunity for offenders. The study is of an illustrative genre, aimed at depicting the broad concerns of a State implementing the Rome Statute, as well as the difficulty of transposing international obligations onto the municipal plane. By investigating the manner of implementation by South Africa, the study aims to show that the concept of complementarity answers specifically to the "unwillingness" strand of the problem of impunity, rather than "inability". This means that, in order for complementarity to be an effective catalyst for implementation, it must, in some manner, interfere with prosecutorial discretion.

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[67] Kleffner *op cit* (note 39 above) at 91-94. Cf Werle and Jessberger *op cit* (note 18 above) at 194.

[68] For example, the Ratification Manual, developed by the International Centre for Human Rights and Democratic Development, leaves the matter of rules of evidence largely to the State Party's discretion, but with the guideline that crimes under the statute should be "effectively investigated and prosecuted". See Rights & Democracy and The International Centre for Criminal Law Reform and Criminal Justice Policy *International Criminal Court: Manual for the Ratification and Implementation of the Rome Statute* (May 2000) 13. Also see, in the context of Human Rights treaties, A Orakhelashriu "The Position of the Individual in International Law" (2001) 31(2) *California Western International Law Journal* 241 at 265.

1.9 Literature Review

The literature consulted indicates the classical view that there is a perennial discord between international law and national law, and a discussion of the characteristics of, and differences between, the two systems. However, as Heiskanen suggests it,[69] the monist versus dualist debate does not reflect the real issue, namely, how the two systems of law can be made to co-exist. He further propounds the "pragmatic" view that the issue is one of the applicability of international law within the municipal sphere.[70]

That complementarity can act as a catalyst for national implementation is evinced clearly by the literature. As Kleffner points out, "the defects of domestic laws, which render a national judicial system totally or substantially unavailable, can make a case admissible before the Court".[71] However, the learned writer does not look into the provisions of any specific legislation in an attempt to demonstrate any possible link between complementarity and national implementation.

An *ad hoc* Committee on the Establishment of an International Criminal Court reviewed the draft statute prepared by the International Law Commission. The

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[69] V Heiskanen *International Legal Topics* (1992) 4. See also Fitzmaurice, *The General Principles of International Law* (1957) 68-94. At 79-80, the learned author asserts: "Formally...international and municipal law as systems can never come into conflict. What may occur is... a conflict of obligations, or an inability for the State on the domestic plane to act in the manner required by international law". See also T Maluwa "The Incorporation of International law and its Interpretational Role in Municipal Legal Systems in Africa: An Exploratory Survey" (1998) 23 SAYIL 45 at 49-50.

[70] Heiskanen *op cit* at 20.

[71] Kleffner *op cit* (note 39 above) at 89.

committee's report[72] reveals the divergent views of delegates on the issue of complementarity, ranging from the fear that complementarity would create a presumption in favour of national courts, to the caution that the ICC should not be allowed to pass judgement over national courts.[73] Concerns have also been raised about whether States, in co-operating with the ICC, are to be organs of the Court or are to do so by virtue of their own authority and subject to national law.

The learned authors Werle and Jessberger, in their article "International Criminal Justice is Coming Home: The New German Code of Crimes against International Law", [74] analyse the German Law implementing the Statute of the ICC. However, the ultimate goal of their article is to assess the likely impact of the legislation on the development of international law. By contrast, what the author will seek to reflect upon is the corollary: how the principle of complementarity as understood in international law may influence the legislative decisions of a State.

It is apparent that some writers do not regard the South African legislation as being problem-free. One, for instance, encounters the view that the legislation "purports" to bring South Africa's domestic obligations in line with its

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[72] Available at http://www.radicalparty.org/icc/adhoc (accessed 24/2/04).

[73] For the view that the ICC should be competent only to review decisions taken by national courts, see B Graefrath "Universal Jurisdiction and an International Criminal Court" available at http://www.lib.uchicago.edu (accessed 21/2/04).

[74] See Werle and Jessberger *loc cit.*

obligations under the Rome Statute.[75] The writers concerned do not, however, delve into any analysis of the legislation's provisions.[76]

Writers also seem to differ on the whole question of the effect of complementarity. For example, the learned authors De Wet and Strydom,[77] in analysing section 5(5) of South Africa's Act 27 of 2002 legislation,[78] point out that the provision is a manifestation of the complementarity principle. They then assert that complementarity creates a presumption in favour of national prosecutions. Kleffner, however, does not seem to view the principle as having such an effect.[79]

On the issue of States' compliance with international law, much has been written. Some of the literature ventures, perhaps not surprisingly, into the realm of political theory, thus emphasizing the affinity between international law and politics. John Rawls, for instance, is essentially of the view that a State's observance of international law is explicable on the basis of what benefits it

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[75] G Erasmus *et al* "The Application of International Criminal Law before Domestic Courts in the Light of Recent Developments in International and Constitutional Law" (2002) 27 SAYIL 64 at 79.

[76] For a detailed overview of the Australian implementing legislation, see G Triggs "Implementation of the Rome Statute for the International Criminal Court: A Quiet Revolution in Australian Law?" available at: http://www.austlii.edu.au/journals/SydLRev/2003/23.html (accessed 7/4/04). In his article, however, the learned author does not consider the issue purely from a complementarity standpoint.

[77] E De wet and H Strydom "Implementing International Humanitarian Law: Developments in South Africa and Other Jurisdictions with Special Reference to International War Crimes Tribunals" (2000) 25 SAYIL 42 at 51.

[78] It effectively provides that the National Director's refusal to prosecute is not a bar to prosecution.

[79] See Kleffner (note 39 above).

hopes to derive from observance.[80] Thus, argues the author, "when an institution creates benefits through the voluntary cooperation of its members, those who share in the benefits have an obligation to support the institution through cooperation".[81]

However, argues Henkin,[82] there is a distinction between the reasons for a state accepting new law and those which motivate it to observe existing law. Refusal to accept new law does not usually attract sanctions.[83] This assertion is an interesting one to discuss in the context of complementarity.

1.10 Chapter Arrangement

The study is divided into five (5) chapters. The first chapter is a general introduction to the topic under discussion. In it a brief historical account of the development of international criminal law to the present day is given. This account alludes to the establishment of the ICC. An attempt is also made to explain the meaning of the principle of complementarity.

The second chapter briefly traces the origin of the principle of complementarity. This is done with a view to ultimately placing the principle within some theoretical framework. The chapter is therefore quite wide-ranging in its discussion. The aim is to grasp how States are likely to understand the principle and apply it in the actual implementation of the Rome Statute. The aim is

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[80] See J Rawls "Legal Obligation and the Duty of Fair Play" in S Hook(ed) *Law and Philosophy* (1964) 73.

[81] *Ibid.*

[82] L Henkin *How Nations Behave* 2 ed (1979) 31.

[83] *Ibid.*

therefore to illustrate that complementarity may be understood in terms of contemporary concepts of international law.

The third chapter considers South Africa's position in the scheme of the implementation of the Rome Statute. South Africa's laws will be considered with regard to international humanitarian law issues, especially as they applied prior to the enactment of the implementing legislation. The chapter then considers in detail the provisions of the implementing legislation. This provides a basis for comparing the position, as it existed prior to the enactment of the legislation with the position as it now obtains. The author also "disaggregates"[84] the State into its three components[85] for purposes of illustrating how each one's handling of international law issues affects compliance within the municipal system. The chapter therefore provides a general overview of South Africa's handling of cooperation in international criminal matters.

The fourth chapter then carries the discussion in chapter three forward by attempting to rationalize any divergence in the position prior to and after the ICC legislation. The discussion in chapter two is also picked up here, as one would have considered both theory and State practice in the previous chapters. This should enable the author to better explain any divergence. In particular, the chapter will discuss other factors, apart from complementarity, that might have influenced the decision to implement and the manner of implementation, in the case of South Africa.

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[84] See B Kingsbury "The Concept of Compliance as a Function of Competing Conceptions of International Law" (1998) 19 *Michigan Journal of International Law* 345 at 356. The rationalist theory of international law tends to regard the State as a single entity. However, through "disaggregation", it is argued in this thesis that the Judiciary is pivotal to any effort at compliance with international law norms.

[85] That is, the Legislature, the Judiciary and the Executive.

Finally, the fifth chapter assesses the impact of the implementing legislation on the South African legal landscape and draws some conclusions. Recommendations will be made on how States might better ensure that they are able to prosecute the crimes falling under the Court's jurisdiction. The issue whether complementarity, as a means of enforcement, may be utilised in other spheres of international law apart from criminal law, will also be addressed.

Chapter Two

SEARCHING FOR A THEORETICAL FRAMEWORK FOR THE PRINCIPLE OF COMPLEMENTARITY

"Where… there is a dernier cri, such as suggestions for the development of an international criminal law, it is advisable not to follow uncritically in the train of the enthusiastic protagonists of such an idea, but to pause and reflect on the meaning and value of it all".[1]

2.1 Introduction

The old debate over the true nature of international law, and whether it really is law, rages on.[2] What is clear, however, is that international law is, in important respects, different from municipal law. Thus, for instance, it does not have a centralised enforcement agency to ensure compliance with its rules.[3]

It is within this context that the thesis discusses the principle of complementarity and its place in international law. As has been seen, complementarity has been posited as a "catalyst" for the implementation of the Rome Statute.[4] What this means is that the principle is seen by some as having the potential to induce States to observe their obligations under the Rome Statute. It is, therefore, particularly important that one understands the theoretical context within which the principle might have been conceived.

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[1] G Schwarzenberger "The Problem of an International Criminal Law" (1950) 3 *Current Legal Problems* 263.

[2] See, for example, JG Starke *Introduction to International Law* 10 ed (1989) 18.

[3] Starke *op cit* at 27-31.

[4] See chapter one, note 71 above.

This theoretical discussion is crucial to the present study.[5] One must locate the theoretical basis for complementarity if one is to understand how it might operate to induce States to comply with international law. This chapter therefore discusses the different methods of enforcement in international law, as well as the different theories of international law. Much as one must acknowledge that "The ultimate reasons that impel States to uphold the observance of international law belong to the domain of political science, and cannot be explained by a strictly legal analysis",[6] complementarity is a legal concept, and an attempt ought to be made to analyse it as such.

The discussion in this chapter begins by addressing the origins of complementarity. This is against the background of the perennial problem of the non-observance of international obligations by States. As has been suggested above,[7] complementarity was a result of compromise and concessions. It is suggested that in the atmosphere of an international conference with delegates keen to see the establishment of the first truly International Criminal Court, it is not likely that they would have fully addressed their minds to such a matter as the theoretical basis for complementarity. This chapter therefore aims to explore this issue more closely.

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[5] See B Broomhall *op cit* (chapter one, note 10 above) who puts it thus at p 58:
"...International criminal law will only move towards more regular enforcement, or only maximize the legitimacy of such enforcement as it does achieve, if the 'real world' conditions in which it operates-including those of a sometimes unsettled and even contradictory international law-are examined more closely than has been done so far. Such pragmatic analysis must be considered a key task for the future, if the effective enforcement of international criminal law is to be secured in even a minimally fair and legitimate manner".

[6] Starke *op cit* (note 2 above) at 31; Henkin *op cit* at 39-40.

[7] See page 5 above.

This chapter is not an attempt to arrive at a definite conclusion as to which theory of international law is correct or plausible.[8] It is rather an attempt to see if one might explain complementarity in terms of one or other of the theories.

2.2 The Origins of Complementarity

It should be noted here that the Rome Statute of the ICC does not actually employ the term "complementarity". The term does, however, seem to have arisen as a result of commentators describing the nature of the Court's jurisdiction as provided for in the Statute.

As has been suggested above,[9] a feature of international law that has always been regarded as one of its weak points is that it lacks a central enforcement agency akin to what one would find in a domestic setting. International criminal law, by extension, has long suffered from this setback. Closely related to this dynamic are concerns over State sovereignty, which, as we have seen, have over the years hampered efforts to internationalise criminal law.[10]

It is instructive to study the Rome Statute's *travaux preparatoires* in order to gain an insight into the manner in which the principle of complementarity evolved. In a sense, this amounts to interpreting the complementarity provisions of the Statute by ascertaining what the intention of the contracting parties was in settling for the principle.

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[8] For a general discussion of the theories of international law, see M N Shaw *International Law* 3rd ed (1991) 3-12.

[9] Shaw *op cit* at 22.

[10] See Broomhall *op cit* (chapter one, note 10 above) at 58.

2.2.1 The *Travaux Preparatoires*

At the Diplomatic Conference on the Establishment of an International Criminal Court,[11] several statements were made by States' representatives regarding the vision they had for a future Court.[12] They decried the lack of progress over the years in achieving effective prosecutions for human rights atrocities, and expressed the hope that the Court would instigate a new resolve.

In his statement, the Minister of Foreign Affairs for Bosnia and Herzegovina, His Excellency Dr. Jadranko Prlic, expressed the view that the Court's sovereignty and independence, as well as its complementarity to national Courts, would bring an end to atrocities. He mentioned that, while Bosnia and Herzegovina had always cooperated with the International Criminal Tribunal for Yugoslavia, the latter had still not been effective in terms of successful prosecutions.[13]

The statement by the Croatian Deputy Prime Minister, Mr. Ljerka Mintas Hodak, also acknowledged the pivotal role played by the ICTY in bringing to justice those who had committed atrocities. He, however, hinted to problems that Croatia had had with the Tribunal, especially regarding aspects of its procedures and hoped that the Court would help cure such difficulties. Significantly, he said that one of the cornerstones of the Court should be the principle of subsidiarity.[14]

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[11] United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, held at Rome, Italy (15 June-17 July 1998).

[12] These are available at the "No Peace without Justice" website: at http://www.npwj.org/iccrome/index.shtml (Accessed 20/4/04).

[13] *Ibid.*

[14] *Ibid.*

The head of the Japanese delegation, Mr. Hisashi Owada, expressed the view that the Court should be formed on the basis of the principle of complementarity, meaning that the Court's jurisdiction should be invoked only when the national justice system was not operational or effective in relation with the specific case concerned. He also beseeched fellow delegates not to be influenced by parochial interests such as concerns about State sovereignty.[15]

As for the Russian Deputy Minister of Foreign Affairs Mr. Y.V. Ushakov, he envisaged a Court that operated in accordance with the prerogatives of the UN Security Council. He said that Russia desired a Court that would exercise its jurisdiction only with the consent of the territorial and the custodial State, except in situations where the Security Council had referred a matter to the Court, in which case the Court would exercise compulsory jurisdiction.[16]

Speaking on behalf of the Southern African Development Community (SADC) countries,[17] the late Mr. D. Omar, then South African Justice Minister, envisaged a Court with competence to decide admissibility issues regarding the inability or unwillingness of national justice systems to try those responsible for violations. However, he stated that, in doing so, the Court must respect the complementary relationship between itself and the national justice systems.[18]

Significant opposition to the idea of an International Criminal Court in general and the concept of complementarity in particular came from the United States.

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[15] *Ibid.*

[16] *Ibid.*

[17] These consist of South Africa, Lesotho, Botswana, Zimbabwe, Namibia, Malawi, The Democratic Republic of Congo, Tanzania, Mauritius, Mozambique, Angola and Swaziland.

[18] See note 12 above.

The American position was that the [19]Court would diminish national sovereignty, and that the Court would also entertain politicised prosecutions. In its complemenarity role, the Court would be a "jurisdictional leviathan"[20]. The fear was expressed that the Court's powers would be far-reaching, in effect bringing about a judicial review of national jurisdictions.[21] The head of the American delegation to the Rome Conference, David Scheffer, voiced the fear that the Court would be used to try American soldiers on Peace-keeping missions abroad.

However, the Canadian foreign affairs Minister, Lloyd Axworthy, envisaged "a court worth having". He acknowledged the obvious tension between the need to protect national sovereignty and the necessity of bringing an end to gross abuses of human rights, but saw the Court as an "innovation" that would serve a global need.[22] Significantly, he saw the Court's role as one not only of building peace through reconciliation, but also addressing the needs of the victims of atrocities through justice.

From the above statements, it will be seen that the chief concern for delegates was the kind of relationship that the Court would have with national courts.[23] They were sensitive that the latter should not pale into insignificance in terms of

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[19] The full statement is available at http://www.iccnow.org/documents/statements/governments/ usscheffer (accessed 27/6/04).

[20] G T Dempsey "Reasonable Doubt: The Case against the Proposed International Criminal Court" (1998) 311 Cato Policy Analysis 1.

[21] *Ibid.*

[22] See statement at the No Peace Without Justice Website, available at http:// www.npwj.org (accessed 29/4/05).

[23] See also J Crawford "The Drafting of the Rome Statute" in P Sands (ed) *From Nuremberg to The Hague* (2003) 133-134.

their role in the prosecution of the core crimes.[24] At the same time, however, it was made clear that, to end the culture of impunity, an institution was necessary that would redefine the concept of national sovereignty.

2.2.2 Comparison with the International Criminal Tribunals for Rwanda and Yugoslavia

The International Criminal Tribunals for Rwanda and Yugoslavia were established by the United Nations Security Council pursuant to Chapter VII of the UN Charter, which entrusts the Council with the task of overseeing international peace and security. For both the ICTR and ICTY, very particular conflicts with their own idiosyncrasies and demands needed to be addressed, and the need was felt to involve the Security Council in trying the perpetrators and ensuring that similar atrocities did not recur in future.

It is significant to mention that in the wake of both conflicts, the respective national justice systems were empirically and singularly unsuited for bringing the perpetrators to justice. In the case of Yugoslavia, there was a discernible unwillingness to prosecute, while in Rwanda the justice system had virtually ground to a halt resulting in inability to do so.

In the sphere of international criminal law, a major problem to be contended with is that of the demarcation of the roles of national courts and international

[24] This is akin to the concerns expressed in relation to subsidiarity, as to which see *infra*, pages 35-37. Politicians and the press in Europe stressed the importance of the retention of competence by national governments. See C McCrudden "The Effectiveness of European Equality Law: National Mechanisms for Enforcing Gender Equality Law in the Light of European Requirements" (1993) 13 *Oxford Journal of Legal Studies* 320 at 366. See also D Lasok "Subsidiarity and the Occupied Field" (1992) 11 *New Law Journal* 1228 at 1230.

tribunals respectively.[25] In the case of the ICTY and ICTR, Articles 9 and 8 of their respective constitutive Statutes are *in pari materia*. They provide that 'the International Tribunal[s] and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law '. However, it was also recognised that unanimity in terms of process is some times elusive, hence the Statutes give the Tribunals primacy in case of conflict.

For present purposes, it is important to analyse this aspect of the basic structure of the Tribunals. Conferring primacy on the Tribunals is *prima facie* a truncation of States' sovereignty. In the words of Judge Sidhawa, sitting in the Tribunal's Appeals Chamber in the *Tadic* case, this arrangement:

"…obliges States to accede to and accept requests for deferral on the ground of suspension of their sovereign rights to try the accused themselves and compels states to accept the fact that certain domestic crimes are really international in character and endanger international peace and that such international crimes should be tried by an international tribunal, that being an appropriate and competent legal body duly established for that purpose by law ".[26]

The above dictum evinces some major theoretical assumptions that arguably form the substratum of the two Tribunals. It is sufficient to mention them briefly, for a more detailed discussion will be undertaken herebelow: The first is the implicit assertion of a theory of competing rights as between the Tribunals on the one hand and States on the other. The second is the positivist theory of

[25] See J Denecke *The Admissibility of a Case Before the International Criminal Court: An Analysis of Jurisdiction and Complementarity* (2001) 66.

[26] *Prosecutor v Tadic* (Jurisdiction), Appeals Chamber, 2 October 1995, 106 ILR 453.

international law in terms of which the wish of the "law giver" is law in its own right, backed by sanctions.[27]

When one looks at the scheme of the Rome Statute, on the other hand, it is clear that primacy in terms of the prosecution of the core crimes is accorded to the States Parties and not the Court. This arrangement ensures that the prosecution of core crimes "remains" the cardinal duty of States[28], with the Court only becoming seized with a matter once it becomes clear that the concerned State is unable or unwilling to prosecute.

It is interesting to analyse this position in terms of the *Tadic dictum* above in order to see whether the Court is premised on substantially different principles. It is clear that, unlike the case with the Tribunals, the Rome Statute actually affirms the sovereign right of States to try accused persons. The Statute seems to predicate this right on the pre-existing duty of States to prosecute all crimes of international concern.[29] There is, thus, a co-extension between the right and the duty to prosecute. However, as will be argued here below, the idea that one can explain complementarity in terms of the maxim *aut dedere aut judicare* is problematic, not least because of the lingering confusion evinced by the literature as to what the concept actually means.[30]

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[27] H Kelsen *Pure Theory of Law* (Trans.1967) at 320 ("In accordance with the concept of law here accepted, so-called international law is "law" if it is a coercive order, that is to say, a set of norms regulating human behaviour by attaching certain coercive acts (sanctions) as consequences to certain facts, as delicts, determined by this order....")

[28] See preamble, Rome Statute of the International Criminal Court.

[29] See Rome Statute, preamble, paragraph 6:
"The States Parties to this Statute...recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes...."

[30] See note 44 *infra.*

2.2.3 Comparison of Complementarity with the Principle of Subsidiarity under European Law

As has been seen above,[31] the sentiments expressed by delegates during negotiations for the Rome Statute included that the Court should be premised on the principle of subsidiarity.[32] This principle is exemplified within the structures of the European Union, and describes the complex relationship between the Union and the sovereign States that form it.[33] It is "a mixed national/ community system…in which the emphasis is placed on the pooling of sovereignties".[34]

The Treaty of Maastricht,[35] upon which the present European Union is based, categorically sets out the terms of subsidiarity thus: "…the Community shall act within the limits of the powers conferred upon it by this Treaty...In areas which do not fall within its exclusive jurisdiction, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the member

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[31] See page 28 above. Subsidiarity has its origin in Roman Catholic social thought. Based on the autonomy and dignity of the human individual, it postulates that government should undertake only those initiatives that exceed the capacity of individuals or private groups acting independently.See http://www.encyclopaedia.thefreedictionary.com/subsidiarity (accessed 13/5/2004).

[32] See also Crawford *op cit* (note 23 above) at 138.

[33] See S Hix "The Study of the European Community: The Challenge of Comparative Politics" in B F Nelsen and ACG Stubb (eds) *The European Union* 2 ed (1998) 331.

[34] *Ibid.* See also R O Keohane and S Hoffman "Institutional Change in Europe in the 1980s" in Keohane and Hoffman *The New European Community* (1991) 10.

[35] The Treaty on European Union, Maastricht, 7 February 1992, 1757 UNTS 3.

States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community ".[36]

Evident in the above exposition is a deliberate demarcation of roles between the Community and States, thus a tacit recognition of the potential for conflict between the two in a given case.[37] It is, perhaps, not facile to conclude that this potential for conflict is not a preserve of the policy sphere. It is an instance of the power differential between States and international institutions, which may be manifested in matters of both policy and law.[38] Whereas on the one hand the principle of subsidiarity operates within the context of legislative competence, and is thus an instrument for managing conflict in policy, complementarity on the other hand addresses the issue of judicial competence. Complementarity seeks to harmonise the judicial powers of the ICC and States Parties. Thus, an institution such as the ICC presents similar challenges to those encountered in the subsidiarity regime. Hence, it is submitted, the reference to "subsidiarity" during the Rome negotiations. Moreover, complementarity enjoins the Court to have regard to the interests of a case before admitting it. If the case is not of sufficient gravity, the Court would decline jurisdiction.[39] This is akin to the "scale and effect" factor that the European Community is obliged to consider under subsidiarity.

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[36] *Op cit*, Article 3b. This bears the hallmarks of the managerial theory of compliance, discussed at page 58 *infra.*

[37] See the statement by the Croatian delegate to the Rome Conference (page 29 above).

[38] This is also a pointer to how effective a given international institution is. Indeed, echoing the basic approach of this thesis, it has been stated: "The effectiveness of Community law needs to be conceived as a theoretical issue. Effectiveness may refer not only to compliance but also to implementation, enforcement and impact". See F Snyder "The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques" (1993) 56 MLR 19 at 24-25.

[39] See Rome Statute, Article 17 (1) (d).

However, unlike subsidiarity, complementarity is generally not expressed in terms of a limitation of the Court's powers in relation to States.[40] The determination that a State is unable or unwilling to prosecute triggers the Court's powers, which are then exercised without any further reference to that State.[41] By contrast, the European Treaty requires the Community to act within the confines of the powers conferred by the Treaty in relation to those matters that do not fall within the Community's exclusive jurisdiction.[42] Evidently, this envisages a situation where the concerned State would still possess competence over the matter. In a sense, subsidiarity dictates "measured interference". The policy seems to be that of caution, by virtue of which interference would be difficult to justify.

This measured interference resonates another aspect of subsidiarity that is worth mentioning. This is the natural law underpinning of the concept. The language of the above provision manifests the desire to resort to reason, principles and policies as a basis for interfering. "Scale and effect" considerations are factors in that process of reasoning. In any event, subsidiarity bears very little by way of

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[40] However, Article 17 (2) of the Rome Statute provides guidelines for the Court in considering whether a State is unable or unwilling to prosecute. In summary, the Court inquires whether the proceedings are being undertaken for the purpose of shielding the defender, whether any delay experienced is inconsistent with an intention to prosecute, and whether the proceedings are not being conducted independently or impartially. In considering these matters, the Court does not defer to the concerned State.

[41] Except in terms of Article 18 (1) of the Statute, which obliges the Prosecutor to notify States of an investigation in certain specified circumstances.

[42] For the view that this apparent limit is only notional, see G Burca "Reappraising Subsidiarity's Significance after Amsterdam" available at: http://www.jeanmonnetprogram.org/papers/99/990703.html (accessed 13/5/04).

the traditional hallmarks of a positivist dispensation in terms of which law is law, irrespective of the ethical and other justifications behind it. There is an attempt at rationalization.[43] Although Article 17 (1) (d) of the Rome Statute is of similar import in that the effects of any proposed action must be considered, no guidance is provided as to how the evaluation will be made. It leaves open the possibility that the ICC will refuse to admit a case despite a State's unwillingness to prosecute, so long as the matter is not of sufficient gravity. This, it is submitted, would be an act of deference to the State concerned. It is therefore clear that, in a manner similar to what obtains under the subsidiarity regime, the Rome Statute envisages that the ICC will defer to States in certain cases.

2.3 Theoretical Foundations

2.3.1 Aut Dedere Aut Judicare

At customary international law, all States are under an obligation to either prosecute or extradite those suspected of having committed international crimes. This obligation is thus generally conceptualised as being absolute, as a binary imperative: you either prosecute or extradite.[44] The present task is to connect this

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[43] McCrudden *op cit* (note 20 above) at 367.

[44] However, this is not to say that the principle is free of conceptual difficulties. For instance, J Dugard, in his seminal work *International Law: A South African Perspective* (1994) 123, asserts that all that the principle does is to allow States to exercise jurisdiction, rather than compel them to do so. See also the decision of the Supreme Court of Columbia in *Re Bachnofer* 28 Int'l L. Rep 322 (1963), and that of the Supreme Court of Chile in *Re Muzza Aceituno* 18 int'l L. Rep 315 (1951). In both cases, no obligation to extradite was specifically recognised. International law was invoked simply to supply the conditions where extradition would, if undertaken voluntarily, be regulated. See I E Shearer *Extradition in International Law* (1971) 26, fn 2. Also, Broomhall *op cit* (chapter one note 10 above) at 110 asserts that genocide, war crimes and crimes against humanity give rise to "permissive international jurisdiction" at customary international law. The International Court of Justice, in *Case Concerning the Arrest Warrant of*

concept to the principle of complementarity as embodied in the Rome Statute, in a way that takes into account the evolution of extradition over the years.

As mentioned above, the principle of complementarity seems to have been built on the foundation of this prior obligation on States to either prosecute or extradite. This appears to be what the States Parties to the Rome Statute meant to signify by "recalling" that there was a duty on all States to ensure that they exercise their criminal jurisdiction over those responsible for international crimes.[45] Although there is no express use of the maxim *aut dedere aut judicare* in the Rome Statute, it seems obvious that this is what was contemplated.[46] Moreover, a corollary of the obligation to exercise jurisdiction is surely that if for any reason this cannot be achieved, extradition must be resorted to. This is the import of the maxim *aut dedere aut judicare.*

Extradition generally takes place within the framework of bilateral extradition agreements.[47] Such agreements record the specific crimes that the contracting States henceforth regard as extraditable. It seems that the notion of a general duty to extradite in the absence of a treaty is far from being unreservedly

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11 April 2000 (Democratic Republic of Congo V. Belgium) ILM 41 (2002) p536, has effectively decided that diplomatic immunity may be allowed to override the duty to prosecute. See the discussion of this case at page 41 *infra.*

[45] See Rome Statute, preamble, paragraph 6.

[46] See No Peace without Justice & UNICEF *International Criminal Justice and Children* (2002) 99: "All States have a duty either to prosecute or extradite (*aut dedere aut judicare*) those suspected of having committed certain crimes under international law. The ICC is therefore structured according to the principle of complementarity...." (Emphasis added).

[47] Shearer *op cit* (note 44 above) at 22. However, in some countries, extradition may take place on the basis of grace or comity rather than obligation. This would normally be achieved by legislation. *Ibid.* See also M G Cowling "Unmasking 'Disguised' Extradition: Some Glimmer of Hope" (1992) 109 SALJ 241.

accepted in international law. The actual practice of States appears to point to the fact that extradition is done through the medium of extradition treaties as desired.[48]

The question whether the obligation created under the maxim *aut dedere aut judicare* is permissive or mandatory is crucial to the present enquiry. What appears to be the prevalent view is that, at least in the cases of genocide, war crimes and crimes against humanity, the obligation is permissive.[49] It is submitted that such an approach is an exercise in pragmatism, and takes cognisance of the power differential between States, hence the need to approach each case with reference to the relationship between the specific States involved.

On the other hand, some commentators argue that the obligation created is mandatory at customary law. They assert that compulsory universal jurisdiction flows from the fact that the core international crimes are violations of *jus cogens* norms,[50] which fact in turn gives rise to obligations *erga omnes.*[51] However, this is all at the level of theory, for in practice, States have tended to leave the matter to the arena of international treaty. As Bassiouni observes:

" States' practice evidences that, more often than not, impunity has been allowed for jus cogens crimes, the theory of universality has been far from universally recognized and applied, and the duty to prosecute or extradite is more inchoate than established, other than when it arises out of specific treaty obligations".[52]

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[48] Shearer *op cit* at 27. See also Broomhall *op cit* (chapter one, note 10 above) at 122.

[49] See Kleffner *op cit* (chapter one, note 39 above) at 97.

[50] M C Bassiouni "International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*" (1996) 59 *Law and Contemporary Problems* 41 at 63.

[51] *Ibid.*

[52] *Ibid.*

Indeed, the International Court of Justice (ICJ) has not risen to the occasion with regard to the acceptance of the principle of universal jurisdiction. In the *Arrest Warrant Case*[53], the Court effectively held that a Minister of foreign affairs enjoys full immunity when abroad, regardless of whether the alleged acts were performed in a private or official capacity. Thus the arrest warrant issued by Belgium against the Congolese foreign Minister was a nullity. It seems to the author that this decision is a negation of the Nuremburg principles mentioned earlier[54], specifically the idea that criminal responsibility should attach to individuals irrespective of their official capacity.[55]

It is acknowledged that the case involved a delicate balancing act between the need to afford individuals protection against human rights abuses, on the one hand, and the need to ensure that diplomats discharge their functions effectively and unhindered, on the other. However, using diplomatic immunity to defeat individual rights was, with respect, an unfortunate outcome which further illustrates the weakness of the principle of universal jurisdiction. It is suggested elsewhere that complementarity transposes the issue of jurisdiction from the realm of customary international law to the sphere of treaty in order to achieve more clarity.[56]

Given that the necessary *opinio juris*[57] for the concept of compulsory universal jurisdiction is thus manifestly lacking, the issue is whether the Rome Statute does

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[53] *Case concerning the Arrest Warrant of 11th April 2000 (Democratic Republic of Congo v Belgium)* ILM 41 (2002) p 536.

[54] See pages 3 and 4 above.

[55] See also Rome Statute (*supra*) Article 27.

[56] See chapter five *infra.*

[57] This is one of the twin requirements for the establishment of custom in international law, and refers to the acceptance of custom as binding as a

not in fact create a new obligation not previously existing under customary international law. It is suggested that the answer to this question is in the affirmative. It is just as well, for treaties are one of the sources of international law.[58] However, the significant point to mention is that "treaty crimes" as opposed to "customary crimes" are the cradle of the maxim *aut dedere aut judicare*.[59] With the exception of piracy at customary law, treaties have been the distinctive avenue through which extraditable crimes have been created. For this reason, it is submitted that, rather than "recalling" that States were under an obligation to either prosecute or "extradite"[60], the States Parties were in fact ordaining that this should be so.

A further aspect of the unclear nature of the link between the *aut dedere* principle and complementarity deserves mention. This is that extradition is normally

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matter of law. See *The North Sea Continental Shelf Cases* (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. The Netherlands) ICJ Rep 1969, 3. The Court had to decide whether the State practice of continental limitation through the principle of equidistance has, subsequent to the 1958 Geneva Convention on the Continental shelf, been of such a kind as to satisfy the *opinio juris* requirement. By 11 votes to 6, the Court held that it had not, and that delimitation must be the object of agreement between the States concerned. Also of significance to the present enquiry is Judge Tanaka's caution in his dissenting opinion in the following terms: "...it is extremely difficult to get evidence of [*opinio juris*] existence in concrete cases. This factor, relating to international motivation and being of a psychological nature, cannot be ascertained very easily, particularly when diverse legislative and executive organs of a government participate in an internal process of decision-making in respect of ratification or other State acts".

[58] Starke *op cit* (note 2 above) at 32.

[59] See R Jennings and A Watts (eds) *Oppenheim's International Law* 9th ed (1996) 998, who are non-committal about the existence of universal jurisdiction at all except as provided by treaty or through the crime of piracy at customary law. See also J J Lambert *Terrorism and Hostages in International Law* (1990) 135. However, slavery and war crimes have often been mentioned as other customary law examples. See, for example, M Ndulo "The Developing Law of Air Hijacking" (1971-73) 5 *Zambia Law Journal* 125 at 129-130.

[60] Rome Statute (supra), preamble, paragraph 6.

carried out between States, and not between States and other entities.[61] In this regard, Bassiouni makes the following observation:

"Prosecution is premised on a State's willingness, but also on its ability to prosecute fairly and effectively. In the absence of these premises, the duty to extradite to a State willing and capable of prosecuting fairly and effectively arises".[62] (Emphasis added).

For the simple reason that the ICC is not a State but an international institution, it seems fair to argue that the Rome Statute does not envisage "extradition" *stricto sensu.* It is submitted that the institution of extradition cannot be extricated from the distinctive power play between States, a dynamic that is clearly lacking in the State-institution scenario. In the latter, pre-defined rules and the allocation of competencies ensure a more streamlined relationship, while the former is often determined and characterised by political expediency.[63]

As a matter of fact, the author argues that the suitability of extradition to the inter-State sphere is so pronounced that one of the exceptions often found in extradition treaties is telling: the "political offence exception".[64] Extradition is not germane to the complementarity regime that represents the relationship between national jurisdictions and the ICC, not national jurisdictions *inter se.*

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[61] See S K Gupta "Sanctum for the War Criminal: Extradition Law and the International Criminal Court" (2000) 3 *California Criminal Law Review* 1 at 3, available at http://www.boalt.org/CCLR/v3/v3guptanf.htm (accessed 18/5/04); Black's Law Dictionary 6 ed (1990) 585.

[62] M C Bassiouni *Crimes against Humanity in International Criminal Law* 2nd ed (1999) 220.

[63] Shearer *op cit* (note 40 above) at 22.

[64] The idea behind this exception is that, if the offence linked with the suspect is essentially a political one or was committed in the course of political agitation, there is no duty to extradite. For more on this concept, see generally G Gilbert "The Irish Interpretation of the Political Offence Exception" (1992) 41 ICLQ 66; B A Wortley "Political Crime In English Law and in International Law" (1971) 65 BYIL 219; D P King "The Political Offence Exception in International Extradition" (1980) 13 CILSA 247.

Indeed, this ambivalence about the place of extradition in the Rome Statute was difficult to avoid when the final text was settled upon.[65] Article 89 of the Rome Statute[66] deals, if ambiguously, with the matter of extradition. The *travaux preparatoires* of the Article reveals that delegates were split over the use of the terms "surrender", "transfer", and "extradition" to describe the process through which defendants would be released to the Court. [67] The dilemma that faced the drafters of Article 89 was that if States given the free reign to utilise their extradition laws while at the same time assuming obligations under the Statute, then extradition might serve as a defence for defendants who faced the prospect of being released to the Court.[68] By allowing States to approach the matter as they saw fit in each case, extradition laws would be resorted to where it was politically convenient.[69]

Regrettably, from the point of view of the Court's efficiency, the language of Article 89 leaves just such a possibility. Perhaps more significantly, it illustrates

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[65] Gupta *op cit* (note 61 above) at 19.

[66] Entitled "Surrender of Persons to the Court".

[67] Report of the International Law Commission on the Work of its Forty-Fifth Session, Annex: Report of the Working Group on a Draft Statute for an International Criminal Court, U.N. GAOR, 48th Sess., Supp. No. 10, at 324-30, U.N. Doc. A/48/10 (1993)

[68] Cf the Rules of Procedure and Evidence for both the ICTY and ICTR, which provide that the obligations regarding the surrender or transfer of a defendant prevail over the national law or extradition treaties of the State concerned. See International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, Rules of Procedure and Evidence, U.N. Doc. IT/3/Rev.9, art 28 (1997); International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda, Rules of Procedure and Evidence, U.N. Doc. IT/3/Rev.9, art.28 (1996).

[69] Gupta *op cit* at 6.

the difficulty of attempting to premise the unique relationship between the Court and national jurisdictions on the *aut dedere* principle.

2.3.2 *Pacta Sunt Servanda*

It is important to make the point that the provisions of the Rome Statute regarding the crimes of international concern are the subjects of various other treaties.[70] The issue is whether the principle of complementarity is an extension of the obligation to observe these and other like agreements (hence *pacta sunt servanda*). In chapter four of this thesis, the related issue of "auto-challenge" with respect to human rights obligations is discussed.[71]

As has already been mentioned, the ICC has some level of uniqueness in that it has been created by treaty. This is in contradistinction to, for instance, the ICTY and ICTR, which owe their genesis to Resolutions of the UN Security Council. *Ex facie*, an institution created by treaty portends broad agreement amongst the States Parties, therefore one's expectation would be that concerns about the institution's legitimacy would be minimal, if not altogether absent. Having undertaken treaty obligations, States are expected to obey their commitments in good faith (*pacta sunt servanda*).[72] Indeed, as will be seen below, the French

[70] Examples are the Convention on the Prevention and Punishment of the Crime of Genocide, GA Res 260 A (III) of 9 December 1948; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Doc A/39/51 (1984).

[71] See page 122 below.

[72] See The Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, UN Doc. A/Conf.39/27, article 26 ("Every treaty in force is binding upon the parties to it and must be performed by them in good faith") See also H Wehberg "*Pacta Sunt Servanda*" (1959) 53 AJIL 775 at 782.

Constitutional Council, in one of its opinions, has held that complementarity is a derivative of the maxim *pacta sunt servanda.*[73]

As Diehl[74] cautions, much more serious thought ought to be given to three crucial questions: First, how resolutely does the particular State accept the particular agreement? Second, how willing is it to comply with that agreement? Third, how tolerant will it be of violations committed by others? These questions go beyond the traditional conceptualisation of treaties as documents consented to by States.[75] Diehl argues that whether a State is party to a treaty has no correlation to whether it will observe its terms. It is not unknown for cs to break their treaty commitments. The present author agrees with this observation, and will be spurred by it in investigating the specific case of South Africa and the Rome Statute in the subsequent chapters. It is important to answer the three questions posed above with regard to South Africa's Act 27 of 2002.

Complementarity could be conceptualised as a specifically agreed regime[76] that seeks to subject national jurisdictions to some sort of vetting. The significance of it being an agreed regime rather than a gradually evolving one is that there is more exactness about the goals to be pursued by the States Parties, and the

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[73] See page 48 below.

[74] P F Diehl "Reconceptualizing Treaty Consent" (2003) 6 *Across Borders International Law Journal* 3, available at http://www.law.gonzaga.edu/borders/borders.html (accessed 14/4/04).

[75] See D Bodansky "The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?" (1999) 93 AJIL 596 at 597 ("In international law, the strongly consensualist basis of obligation has tended to moot the issue of legitimacy")

[76] Regimes have been defined as "sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations". See S Haggard and B A Simmons "Theories of International Regimes" (1987) 41 *International Organization* 491 at 493-494.

processes to be employed in that endeavour. As has been suggested, the major problem before the Rome Conference was the lack of prosecution of offenders. This was despite pervasive agreement on the outlawing of the crimes concerned. The Rome Statute therefore represents an effort to establish effective jurisdiction over offenders. It is suggested later in the thesis that the human rights dimension of the Rome Statute is a major reason for submission to such a regime.[77]

However, a regime instils order and maintains it. The idea, therefore, of a "treaty regime" such as that instigated by the Rome Statute, ought still to be seen in that light. It debunks any notion of a parity relationship between the ICC and national jurisdictions, a relationship that is merely "complementary". A hierarchy is inevitably implied in a relationship where one entity is to have vetting powers over another, as envisaged by Article 18 of the Rome Statute. At the apex of this hierarchy is the Court.[78]

The question of moment is whether *pacta sunt servanda* could be construed as the basis of an undertaking, by a State, to submit to the ICC's jurisdiction *if* found unable or unwilling to prosecute. The conditionality implied in this undertaking suggests that it is not an exact and clear one, made *serio ac deliberato*. This is especially so for a treaty which was concluded against the backdrop of

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[77] See chapter four *infra*.

[78] This may be contrasted with the situation between the International Court of Justice and the UN Security Council. The former has definitively held that there is no hierarchy between the two institutions. See the *Lockerbie Case* 1992 ICJ Rep 20 at 131-132. Interestingly, the Court, in effect, decided that it need not defer to the Security Council in cases where the Court was seized with a matter that was contemporaneously before the Council. On the other hand, as a matter of policy, the Security Council awaits the Court's decision before dealing with a matter. See V Gowlland-Debbas "The Relationship between the International Court of Justice and the Security Council in the Light of the *Lockerbie* Case" (1994) 88 AJIL 643 at 656. See also the *Anglo-Iranian Oil Company Case* 1992 ICJ Rep44 at 154.

particularly abominable atrocities and human rights abuses.[79] It is always open to a State to argue that no inability or unwillingness has been established in a particular case, and that therefore the pre-condition for the vesting of jurisdiction in the ICC is absent. The Rome Statute is not sufficiently clear on how the *desiderata* in Article 17 of the Rome Statute will be applied. As a result, it is suggested that there is agreement on the need to bring the perpetrators of international crime to justice, but no agreement on the exact details of the process by which this will be achieved.

2.3.3 Conditional Transfer of Judicial Power to an International Body

One of the corollaries of a State's exercise of sovereignty over its own territory is that it exercises curial power over any disputes or crimes happening in that territory.[80] This postulate recognises that such curial powers are exercised without the intrusion or spurring-on of any extraneous phenomena. Without this jurisdiction, the exercise of a State's sovereignty would be imperfect.

The power of jurisdiction is therefore, on the above hypothesis, not to be given away lightly. As has been shown above, there is always a veritable tussle between two entities when they both have competence over the same subject

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[79] See E Stein "International Law in Internal Law: Toward Internationalization of Central-Eastern European Constitutions?" (1994) 88 AJIL 427 at 450, for the view that it is problematic to rely on the "good faith" of States particularly in the case of treaties aimed at granting rights to, and imposing obligations upon, individuals.

[80] See A Ross a *Textbook of International Law* (1947) 155 ("each State is competent, within its territory to perform actions which-actually or potentially-consist in the use of the State's instrument of power"). In his dissenting opinion in the *SS Lotus Case* (1927) PCIJ Series A No.10 at 94, Judge Ajibola spoke of "the principle of the exclusive jurisdiction of a State over its own territory".

matter. In such a situation, the question of deferral will inevitably arise.[81] This may be as a result of the fact that competence-allocation rules within any international regime are often imperfect and unclear.[82] This textual indeterminacy of the rules brings to sharp relief the problem of aligning international norms to the municipal situation, where there is friction between the two.

What, then, is the prognosis for a regime that seems to proceed from the premise that a State's judicial processes are accessory to those of an international judicial institution? This author argues that this is the net effect of the complementarity regime, with its insistence that a State pass the "ability" and "willingness" tests before it can exercise full control over its curial functions. By interposing these twin requirements, the Rome Statute articulates a new and innovative notion, namely, the conditional exercise of national sovereignty through the judicial process.

Literature and case law emanating from certain jurisdictions in the advent of the Rome Statute suggests antipathy, at least by some, towards the above notion. The concern has been expressed from the perspective of individual rights, specifically the right to a fair trial before a competent court. For instance, on the 21st of April 1999, the Council of State of Belgium rendered an opinion regarding Belgium's ratification of the Rome Statute.[83] In terms of Article 13 of the Belgian

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[81] For instance, the Rome Statute deals with the issue of deference as between the Court and the UN Security Council (See Rome Statute *op cit* Article 16). Perhaps understandably, however, the Statute does not, in a similar manner, deal with the relationship between the Court and States, other than through the mechanism described as "complementarity".

[82] See Heiskanen *op cit* (chapter one, note 69 above) at 238 ("...it seems there can be no power without ambiguity").

[83] See International Committee of the Red Cross (ICRC), *Issues Raised With Regard to the 1998 Rome Statute of the International Criminal Court*

constitution as it then read, no one could be subtracted against his will from the judge that the law had assigned him.

In consequence of this, the Council held, no Belgian tribunal could relinquish its competence in favour of the ICC, as this would offend against a constitutional proscription. Central to the Council's reasoning was the principle of the independence of justice, protected under Article 151 of the Belgian constitution and Article 14 of the International Covenant on Civil and Political Rights (1966).[84] The Court also considered the potential impact of Articles 16 and 18 of the Rome Statute and opined that, insofar as they applied to national jurisdictions, they would run counter to Belgium's Constitutional imperatives.[85]

Earlier that year, the French Constitutional Council had been faced with a similar matter. It was asked to rule whether ratification of the Rome Statute required a revision of the Constitution.[86] After examining several issues pertaining to the Statute, it concluded that a revision of the Constitution was necessary. However, pertaining to the complementary jurisdiction of the ICC, it considered that this was a derivative of the *pacta sunt servanda* principle, which, it opined, was well defined.[87] In effect, the Council reasoned therefore that France would simply have to ensure that it was always able and willing to prosecute. The requirements of "ability" and "willingness" did not infringe on national

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by National Constitutional Courts and Councils of State (30 September 2001) 2.

[84] *Ibid.*

[85] *Ibid.*

[86] O*p cit* at 1.

[87] *Ibid.*

sovereignty. The Court also considered that Article 57(3) of the Rome Statute was not antithetical to the exercise of national sovereignty.[88]

The above examples bespeak a latent resistance towards the notion of transferring or relinquishing judicial powers to an international institution. Such a notion resonates complications in terms of human rights norms as well as State sovereignty, which compel the viewing of complementarity through a different prism.[89] On the one hand, human rights advocates would certainly inveigh against a system that simply transposes a national trial onto the international scene, reducing the defendant to a mere pawn in the tussle between the ICC and the State concerned. Such a transposition, they would argue, would have had precious little to do with the case itself and more to do with the Court's perception of whether the State could be trusted to conduct an effective trial. On the other hand, those concerned about State sovereignty would point out that the complementarity mechanism is gratuitously intrusive with regard to States and their judicial organs.

A further consideration to bear in mind is that the punishment of crime is often seen as such a jealously guarded prerogative of the State or the crown.[90] In many countries, prosecutions are instituted in the name of the State. This factor alone

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[88] *Ibid.*

[89] These difficulties can often only be resolved through some form of constitutional provision. For example, within the context of the European Community, some State constitutions in the 1970s allowed for the delegation of sovereign powers to international organizations. The constitutions of France and Italy are examples. Regarding such power transfer, the European Court of Justice stated in *Costa v. ENEL* 10 Rec 1143, 1160 (1964): "The transfer by the States from their internal legal system to the community legal order of rights and obligations to reflect those set forth in the Treaty therefore entails a definite elimination of their sovereign rights...."

[90] See, for example, *R V. Sikumba* (1955) 3 SA 125 [EDLD].

seems to militate against any notion of States delegating away such an important function as the investigation and prosecution of crime. Therefore, it is here, perhaps, that any similarity between the European regime and the complementarity regime comes to an end. It is in this light that challenges to the complementarity regime might begin to appear.

The conflict in Darfur, western Sudan, exemplifies the challenges of working the principle of complementarity in practice. In his second report to the UN Security Council on the situation in Darfur, the ICC Prosecutor indicated that the Sudanese authorities had set up "special courts" to try those accused of perpetrating atrocities in the Darfur region.[91] In addition, the authorities had embarked on a process of tribal reconciliation as a way of ending the conflict in the region. After pointing out that, due to the atmosphere of insecurity in the region, there are limitations on the Sudanese authorities' ability to conduct effective investigations, the report states that the Prosecutor has identified certain cases for prosecution.[92] On the issue of admissibility, the report states:

"In accordance with Article 53 (2) 9b) of the [Rome] Statute, the legal test is the specific cases selected by the office for prosecution, and not the state of the Sudanese justice system as a whole".[93]

However, it is submitted that, to the extent that the Prosecutor evaluates the efficacy of investigations in a situation of conflict, the Prosecutor necessarily passes judgment on the state of the criminal justice system. Even though the evaluation is done on a case-by-case basis, the ultimate indicator is the background against which these investigations take place.

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[91] See the Second Report of the Prosecutor of the International Criminal Court, Mr Luis Moreno Ocampo, to the Security Council pursuant to UNSC 1593 (2005), 13th December 2005, available at http://www.amicc.org/documents (accessed 19/2/06).

[92] *Supra* at 2.

[93] *Supra* at 5.

2.3.4 Complementarity as an Aspect of the Rule of International Law

It has been cautioned often enough that the likening of the international legal system to national systems can be very misleading.[94] The two possess distinct and disparate, if sometimes overlapping, attributes. International law is predominantly concerned with ordering relations between sovereign States, while municipal law's province is the regulation of human conduct. Additionally, unlike international law, municipal law is characterised by an elaborate system of oversight and enforcement.

When all this is said, however, appealing to municipal law concepts in a bid to rationalise the international legal system is not entirely a *faux pas*. There are particularly cogent reasons in this day and age for embarking on such an enterprise. International law has ceased to be merely a *corpus* of law regulating the relationship between States,[95] but has also become an instrument for ordering relations between States and international organizations. Individuals, too, have become actors on the international scene.[96] International law has increasingly sought to bestow upon them rights and saddle them with obligations.

Against this backdrop, it is submitted, one may analyse the complementarity regime in terms of the doctrine of the rule of law. Aimed principally at enforcing

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[94] See Broomhall *op cit* at 53; T M Franck "Legitimacy in the International System" (1988) 82 AJIL 705 at 706.

[95] See Broomhall *op cit* at 20. See also R Jennings and A Watts (eds) *Oppenheim's International Law* 9th ed (1994) 5 ("...[public international law] governs the relations of States and other subjects of international law among themselves....)

[96] Broomhall *loc cit.*

precepts of criminal law, complementarity resonates the idea of the rule of law.[97] It portends the instillation of order where there has been anarchy in the form of impunity for offenders. To the extent that complementarity is posited to be a palliative for the problem of impunity, it seeks to legitimise the ICC's power to pronounce that a national jurisdiction is deficient.

Additionally, since the concept implies that national jurisdictions will be under the keen eye of the ICC, the notion of national accountability to the international system is indicated.[98] States must now account for their use of judicial power insofar as the core crimes are concerned. This accountability will be realised through the *desiderata* set out in Article 17 of the Rome Statute, which enumerates the matters to be considered by the ICC in determining the *bona fides* of national prosecution initiatives.[99]

It is important to consider the traditional conception of the rule of law as it applies to the modern State. In the constitutional order of the State, the rule of law is a constraining device, a method to check the potential excesses of power, predominantly through legal means. According to Dicey, who is considered its foremost proponent, the concept entails three precepts.[100] These are, first, that no person may be punished except for a distinct breach of law administered by the Courts.[101] Second, all are equal before the law and are entitled to its protection.[102]

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[97] Broomhall *op cit* (chapter one, note 10 above) at 52.

[98] *Ibid.*

[99] See Rome Statute *op cit* Article 17.

[100] See A V Dicey *Introduction to the Study of the Constitution* 10 ed (1959); A Fagan "The Classical Rule of Law Theory: Does It Work?" (1988) 5 (4) *Responsa Meridiana* 362.

[101] Dicey *op cit* at 188.

[102] Dicey *op cit* at 193.

Third, the general principles of the constitution are a result of the decisions of the courts, which legitimise future government action.[103]

In Dicey's view, government was a threat to individual liberty because of its immense power, and only courts could interpose to protect that liberty. It is, therefore, fair to say that Dicey viewed the law and courts as having a crucial role to play in a rule-of-law dispensation.[104]

As regards complementarity, the principle certainly does emphasize the role of the ICC as its final arbiter. Rather than leave it to individual States to determine when and how to apply the principle, the Rome Statute assigns that role to an international judicial institution. Even though, strictly speaking, the Court does not have "formal" jurisdiction over States, in the sense that States are incapable of committing crimes, it does have "informal" jurisdiction over them as regards the application of the complementarity regime. In a sense, States become "punishable" for failing to honour their obligations under the regime.[105] The ICC's power is, however, curbed through the careful delineation of the considerations it ought to take into account when passing judgment on a State.

The above analogy, however, has its limits. The most important one is that the relationship between the State and the individual is *sui generis*, with its

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[103] Dicey *op cit* at 195.

[104] The importance of adjudication in the international arena was alluded to by Jeremy Bentham, according to whom "international relations on the basis of law does not require a sovereign power to originate its rules...but only a judicial power to interpret and apply rules having their origin in custom and treaties". See T Nardin *Law, Morality and the Relations of States* (1983) 79.

[105] It is suggested that the principle of complementarity is one premised on the imposition of punitive measures rather than the conferring of rewards. See Franck *op cit* (note 93 above) at 730.

distinctive overtones of power and subjugation. The State possesses power over its subject, and through the threat of the use of that power, achieves obedience. This power exists independently of any attempt to curtail it. Dicey's formulation of the doctrine of the rule of law recognises this innate power of the State and, as an extraneous influence, seeks to moderate it.

The ICC, on the other hand, has no such innate power over the States Parties. Its power over the States Parties is sourced from the same principle that seeks to check it, that is, complementarity. Furthermore, the exercise of such power would have to conform to the guidelines set out in Article 17 of the Rome Statute, as well as the strictures in Article 18 of the same Statute.[106] While it is true that Dicey's doctrine similarly aspires to impose such strictures, the point is that this attempt is made in spite of State power, not because of it.

The foregoing discussion illustrates the contradiction inherent in trying to premise complementarity on the idea of the international rule of law. It has to be recalled that international law's enforcement mechanisms are not nearly comparable to those of national jurisdictions.[107] As was suggested above,[108] international criminal law, in particular, has suffered a long period of emasculation as a result of this fact. What complementarity seeks to do is really to dress the ICC with power[109] rather than the converse. Article 17 of the Rome Statute, it is suggested, is a pragmatic attempt to allay any fears that this power will be used arbitrarily. It remains to be seen how the Court would apply this

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[106] Contrast this view with that expressed at page 30 above, namely that complementatity is not generally cast in terms of limitations to the ICC's powers.

[107] Crawford *op cit* (note 23 above) at 113.

[108] See Chapter 1, pages 2 to 4 above.

[109] However, as will be argued below, this power is only putative.

provision in specific cases. The Darfur case discussed above[110] is still in its preliminary stages and will be interesting to watch.

It has been argued that the international rule of law and State sovereignty are incompatible.[111] In fact, the argument goes, resort to the UN security apparatus is necessary to ensure an optimal balance between the two, for past experience has shown that there is no will to censure States which fail to cooperate with international criminal tribunals. As has been shown, in the case of the ICC, the idea of creating the Court through a Resolution of the Security Council was rejected.[112] It seems that States would rather deal with the subtle powers granted to the Court by the Statute, than contend with the more pervasive powers of the Security Council.

The ICC's powers are only putative and need not be exercised at all so long as there is faithful prosecution of international criminals. In this regard, the Rome Statute has been criticised as being excessively deferential to concerns about State sovereignty.[113]

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[110] See page 52 above.

[111] Broomhall *op cit* at 71;

[112] In the run-up to the signing of the Rome Statute, it had been suggested that, given past experiences of non-cooperation, the Court should be set up through the Security Council. See J Dugard "Obstacles in the Way of an International Criminal Court" (1997) 56 *Cambridge Law Journal* 329 at 336.

[113] A Cassese "The Statute of the International Criminal Court: Some Preliminary Reflections" (1999) 10 EJIL 144 at 170-171.

2.3.5 The Managerial Theory of Compliance

Understanding why States comply with international agreements has become a major topic for scholarly investigation.[114] Jurists have mainly drawn from international relations theory in propounding theories of compliance with international law.[115] This especially important of international lawyers as a basis for understanding how best to address the concerns of States in international agreements in order to ensure optimal compliance. In the context of this thesis, it is important to consider whether what theoretical assumptions underpin the concept of complementarity.

One of the major theories under continual scrutiny is the managerial theory of compliance. The basic thrust of this theory is that the compliance activities of any given number of participants in an endeavour can be managed according to well-defined rules.[116] This theory is really the antithesis of the impositional model of compliance, which insists on the various participants towing the line in accordance with a certain regime. The managerial model acknowledges and indeed anticipates certain subtle differences in the way the participants comply, thus focusing rather on gradually reconciling the various modes of compliance with a view to achieving the ultimate goal of the regime. The hallmark of this theory is, therefore, freedom to manoeuvre and to explore solutions to problems.

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[114] See, for example, Harold Hong Ju Ko "Why do Nations Obey International Law?" (1997) 106 YLJ 2599; Andrew T. Guzman "A Compliance-Based Theory of International Law" (2002) 90 *California Law Review* 1823.

[115] See Robert O. Keohane "International Relations and International Law: Two Optics" (1997) 38 *Harvard International Law Journal* 487.

[116] See generally W W B White "A Community of Courts: Toward a System of International Criminal Law Enforcement" (2003) 24 *Michigan Journal of International Law* 1 at 83.

The key value of the managerial model of compliance is its "socialization"[117] component. States are given the leeway to tailor their compliance machinery in accordance with their own aspirations, while at the same time meeting their basic international obligations. The idea is that the internally evolved models meet with acceptance and approval within the State. For instance, because of the unique history and problems that Rwanda has experienced, a system of community courts known as *gacaca* has evolved to complement the work of the normal courts in trying genocide suspects. The *gacaca* system is rooted in a traditional dispute settlement mechanism typical of Rwandan society.[118]

The principle of complementarity, as has been pointed out, was the subject of intense debate and discussion at the Rome Conference. It is, in itself, a novel concept that, as has been seen, bears similarities with the concept of subsidiarity. However, complementariy is very much the cradle of "hard" as opposed to "soft" obligations, for it tends to subject States' compliance to a system of sanctions in the form of loss of jurisdiction.

Complementarity is the product of agreement rather than socialization.[119] Complementarity does not, directly or indirectly, address the issue of the capacity of States to comply with the Rome Statute. Rather, it assumes that non-compliance is a product of the "rational calculation" of States intending to evade international obligations.

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[117] See White *op cit* at 84.

[118] *Op cit* at 55.

[119] See K Linos "How can International Law shape National Welfare States?: Evidence from Compliance with European Union Directives" Paper presented at the 2004 Plenary Conference of the European Political Science Network- Prague, 18-19 June 2004 (...the managerial thesis...attributes compliance failures not to rational calculation, but instead to treaty ambiguity, capacity limitations of States, and uncontrollable social and economic changes")

2.4 Conclusion

The objective of this chapter was not to pigeonhole the principle of complementarity into a neatly defined theory. The point was rather to view complementarity through as many lenses as possible from the standpoint of international law theory. It is submitted that it would not have been sufficient to simply view complementarity as a novel principle in international law without embarking on some sort of theoretical enquiry about its import.

From the foregoing discussion, it is clear that the emergence of the principle of complementarity as a means to establish and regulate the relationship between the ICC and national jurisdictions was influenced by a number of factors. These relate both to the international institutional arrangements that existed at the time, as well as the recognition of the shortcomings that had hitherto afflicted the development of international criminal law in particular. Within the context of an emerging system of world governance in which concerns over State sovereignty are assuming less significance,[120] it was possible to come up with a model that at least sought to address those concerns. Here, the European Union system, in particular, was heavily relied upon.[121]

The values of transparency and effectiveness, which characterise the European system, can be traced in the complementarity regime. This seems to be in keeping with the general observation that there is a great affinity between the principles

[120] See L R Helfer "Constitutional Analogies in the International Legal System" available at: http://www.lls.edu/academics/faculty/pubs/HelferTransnationalConstitutionDraft.PDF (accessed 22/5/04).

[121] See pages 35-38 above.

of international law and European culture.[122] However, for this very reason, the complementarity regime may begin to face serious challenges. What the complementarity regime seeks to do is to transplant the European *volksgeist* to other legal systems. This may prove unrealistic in the long run, as States continue to insist on their sovereignty.[123] Ironically, the fear has also been expressed that complementarity may not be a strong enough tool, owing to its being overly deferential to State sovereignty.[124]

This thesis has alluded to the position, in relation to the fight against international crime, as it existed prior to the advent of the ICC. Ineffectual as it may have been, it represented the realities of international law, illustrating that State sovereignty continues to be an obstacle to the true realization of international governance. This was (and, it will be suggested later in this thesis, still is) the internal logic of the international criminal justice system.[125] Complementarity seeks, in a pragmatic way, to subvert this logic.

It is submitted that the complementarity regime does have manifestations of an imperious system that exerts demands on its adherents and does not in turn confer any benefits upon them. There is no reward system for the States that shore up to the expectations of the Rome Statute. From the point of view of the State, the faithful prosecution of the core crimes is an end in itself. This

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[122] Editorial "Aspiration and Control: International Legal Rhetoric and the Essentialization of Culture" (1992) 106 (2) *Harvard Law Review* 730 at 733.

[123] See Savigny *loc cit* (chapter one, note 7 above); O Kahn "On Uses and Misuses of Comparative Law" (1974) 37 MLR 1 at 7; J C Barker *International Law and International Relations* (2000) 48.

[124] Cassese *loc cit* (note 113 above).

[125] See E Orucu "An Exercise in the Internal Logic of Legal Systems" (1987) 7 (3) *Legal Studies* 310 at 311-312.

submission contradicts the view that every nation derives some benefits from international law and international agreements.[126] It may be true that the international community, as a collective, benefits from such agreements. However, a State may have its own parochial interests that are at odds with those of the international community. Yet it may adhere to an agreement even though its own interests are not thereby served!

Complementarity possesses little by way of natural law inclinations. To the extent that the proscriptions contained in the Rome Statute are based on the common morality of mankind, the Statute has a natural law background. However, in its operation with regard to States, it appears to be steeped in a positivist thinking which requires States to observe a certain code rather than encourage them to achieve the goals of the Rome Statute through their own means.[127] This may be a result of the common purposes of participants at the Rome Conference, or due to social necessity.[128] Given the opprobrium with which the atrocities preceding the Rome Statute were regarded, it is hardly convincing to state that complementarity does not require States Parties to enact the substantive law of the Statute.[129]

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[126] Henkin *op cit* at 29. See also L Brilmayer *Justifying International Acts* (1989) 63.

[127] The ideological differences between the two theories create the differences between the theories regarding the nature and extent of perceived obligations. See B Reynolds "Natural Law Versus Positivism: The Fundamental Conflict" (1993) 13 *Oxford Journal of Legal Studies* 441.

[128] See O Schachter "Towards a Theory of International Obligation" (1968) 8 *Virginia Journal of International Law* 300 at 304.

[129] See Werle and Jessberger *op cit* (Chapter one, note 17 above) at 194.

If one has regard to the purpose of the Statute, it is clear that such enactment is required.[130] This is in contradistinction to the European system, which appeals more to natural law and reason, and largely lets member States choose the means of implementing the Union's policies.

Lastly, there is an important distinction that has emerged from the foregoing discussion. This distinction relates to the relationship between the Court and the individual on the one hand, and the Court and States Parties on the other. As regards the former, the Court has jurisdiction over individuals, just as States do. However, as regards the latter, it is clear that the Court will have a supervisory role over States. There will thus be a hierarchy. It is therefore suggested that the relationship between the Court and States Parties may be described as complementary only in the sense that both will try similar offences. In reality, however, the relationship between the two is hierarchical.

[130] *Op cit* at 195.

Chapter Three

SOUTH AFRICA AND INTERNATIONAL COOPERATION IN CRIMINAL MATTERS

"In an optimal solution, sharing of the implementing functions between international and national judiciaries would generate a functional synergy comparable to that found in a mature federal system, with national and provincial courts providing mutual reinforcement of essential norms".[1]

3.1 Introduction

The enactment in South Africa of the Implementation of the Rome Statute of the ICC Act[2] (hereafter SAIA) is undoubtedly a salutary step towards compliance with the tenets of the Rome Statute. It places South Africa on a sound footing with regard to her contribution in the fight against international crime. The Act is a clear indication of the political will[3] to make a dent on the burgeoning menace that is international crime, and to ensure that International criminals do not evade justice. It also gives the assurance that South Africa is not a safe haven for fugitives.

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[1] I Tallgren "Completing the 'International Criminal Order': The Rhetoric of International Repression and the Notion of Complementarity in the Draft Statute for an International Criminal Court" (1998) 67 (2) *Nordic Journal of International Law* 107 at 109.

[2] The Implementation of the Rome Statute of the International Criminal Court Act No.27 of 2002.

[3] As regards the importance of politics for the enforcement of international criminal law, see S J Toope "Emerging Patterns of Governance and International Law" in M Byers (ed) *The Role of Law in International Politics* (2000) 104.

It is important to consider SAIA in terms of the wider context of the South African criminal justice system and the manner in which it deals with international crime.[4] Within that context, legislative enactments and judicial attitudes preceding and after SAIA are significant. International humanitarian norms and human rights norms, case law, and principles of criminal procedure and evidence arise for consideration as aspects of a particular criminal justice system, and provide a background for evaluating the strides made in enacting new norms. This chapter therefore provides an overview of South Africa's "baseline of conduct"[5] in combating international crime. This is important in the wider context of the thesis, as it will help to establish to what extent the procedures put in place after the enactment of SAIA are different from those that preceded SAIA. In this way, the claim that complementarity is a catalyst for implementation will be scrutinised.[6] This chapter will consider SAIA against the foregoing background. The ultimate aim of the chapter is to gauge SAIA in terms of its likely impact on the prosecution of international crimes.

The legal institutions characterizing post-Apartheid South Africa are more apt to the present study, it being the case that the ICC Statute only operates with prospective effect.[7] Indeed, SAIA itself would, according to the conventional canons of statutory interpretation, operate prospectively.[8] However, in order to

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[4] See G Triggs *op cit* (chapter one, note 76) for a similar discussion of the Australian legislation.

[5] See L Heifer "Constitutional Analogies in the International Legal System" (2004) 37 *Loyola of Los Angeles Law Review* 1 at 21.

[6] See G Werle and F Jessberger "International Criminal Justice is Coming Home: The New German Code of Crimes against International Law" (2002) 13 (2) *Criminal Law Forum* 191 at 214.

[7] See Rome Statute Article 11 (1) ("The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute").

[8]Since SAIA itself is a "penal" legislation, it falls to be interpreted prospectively by South African courts. See generally on the subject of

achieve the stated objectives of this chapter, it will be important to delve into the Apartheid era norms in order to attain a comprehensive view of the importance of SAIA in the South African legal landscape. The South African constitution and sundry legislative enactments[9] will form the basis for discussion, together with illustrative case law. The central and all-important enquiry is whether SAIA represents a seismic shift from such pre-established norms. In answering this question, the thesis *uno flatu* will assess SAIA's compliance with the ICC Statute.

It is hoped that, as the discussion in this chapter progresses regarding the legislative choices and judicial attitudes in South Africa, an elementary picture will emerge as to the theoretical underpinnings of complementarity discussed above. This picture will further be refined in chapter four.

3.2 South Africa and International Crime

The South African legal system has not had an easy co-existence with international law in general.[10] This was especially the case during the Apartheid era, when South Africa's attitude towards international law was, at best, regarded as "ambivalent".[11] Understandably, the international odium that the Apartheid system triggered meant that the Apartheid government no longer felt

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retrospectivity, S G G Edgar *Craie on Statute Law* 7 ed (1971); F Dunkel and D Smit "Preventive Detention of Dangerous Offenders Re-examined: A Comment on Two Decisions of the German Federal Constitutional Court" (2004) 5 (6) *German Law Journal* 619 at 625; R Clarke "Retrospectivity and the Constitutional Validity of the Bali Bombing and East Timor Trials" (2003) 5 *Asian Law* 1 at 3; Universal Declaration of Human Rights (1948) Article 11(2).

[9] Only the major enactments, in the sense of their importance to the procedural enforcement of international criminal law, will be considered in this work.

[10] See J Dugard "International Law and the South African Constitution" (1997) 8(1) EJIL 77.

[11] *Ibid.*

obligated to regard itself as being bound by the tenets of good neighbourliness and the comity of nations. In fact, matters came to a head when, in 1973, Apartheid was declared a crime against humanity by the international community.[12]

It is important to lay a foundation for this state of affairs. South Africa's legal system was one that recognised the supremacy of the Legislature.[13] This meant that the legislature could pass any law untrammelled by any constitutional or other considerations regarding respect for international law.[14] This had obvious repercussions for the enforcement of international criminal law as well, for this does depend upon a State's acceptance of international law generally. Although South Africa was a party to the Hague Regulations of 1907[15] and the four Geneva Conventions of 1949[16], for instance, South Africa refused to sign the 1977 Additional Protocols Relating to the Protection of Victims of International and

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[12] See International Convention on the Suppression and Punishment of the Crime of *Apartheid*, adopted and opened for signature, ratification by General Assembly Resolution 3068 (XXVIII) of 30th November 1973.

[13] See G Marshall *Parliamentary Sovereignty and the Commonwealth* (1957) 139-248.

[14] See the Appellate Division's decision in *Ndlwana v. Hofmeyr* 1937 AD 229, which confirmed the supremacy of Parliament. It was held that once Parliament had passed a law, courts of law could not question but could not apply it. But see the subsequent decision in *Minister of Interior v. Harris 1952* (4) SA 769 (AD). In this case Parliament had set up a "High Court of Parliament" which was challenged on the basis that Parliament had no powers to set up such a body. The Appellate Division held that the High Court of Parliament could not constitute a "court". Centlivres CJ held: "In the case before us Parliament has described itself as a court of law, but such a description does not alter the fact that the high court of Parliament is Parliament...and not a court of law. In my view Parliament cannot, by passing an Act giving itself the name of a court of law, come to any decision which will have the effect of destroying the entrenched provisions of...the constitution".

[15] See Convention (IV) Respecting the Laws and Customs of War and its Annex: Regulations Concerning the Laws and Customs of War on Land, The Hague, 18 October 1907.

[16] The Geneva Conventions were ratified by South Africa in 1952.

Non-international Armed Conflicts.[17] The apparent reason for this was that the latter applied to conflicts in which particular groups were fighting against racist regimes.[18]

Given the foregoing, it is apt to state that the principles of International Humanitarian Law received scant regard in Apartheid South Africa. As a corollary, the outlawing of genocide, war crimes, and crimes against humanity within the South African legal system was, to use Professor Dugard's terminology, "ambivalent".[19] However, with the advent of Constitutional democracy, the importance of international law and international criminal law within the legal system has been accentuated.

3.3 The Legislative Framework of South Africa's Fight against International Crime

It is important to consider the legislative provisions that are in place for the purpose of enhancing South Africa's cooperation in international criminal matters in general. This is for two reasons. First, these provisions are expected to complement the application of SAIA. One should therefore ascertain whether there would be any conflict in the application of these pieces of legislation. Second, and perhaps more importantly, it is helpful to gauge the extent to which SAIA has modified or altered the "baseline of conduct"[20] established by the pre-existing legislation. This is important in the context of

[17] South Africa only became a party to the Additional Protocols in September 1999.

[18] Article 1(4).

[19] Dugard *loc cit* (note 10 above).

[20] See Heifer loc cit.

ascertaining whether SAIA is "revolutionary"[21], in which case it may be asserted that complementarity is a catalyst for implementation. What follows is a discussion of various pieces of legislation with this goal in mind.

3.3.1 The Regulation of Foreign Military Assistance Act[22]

This Act seeks to regulate the involvement of South African citizens, whether individuals or juristic persons, in armed conflicts abroad. The Act takes its cue from the constitution of 1996, which expresses the ideal of realizing peace and harmony, both nationally and internationally.[23]

The Act defines foreign military assistance as including "military services or military-related services" or any attempt to render such services which may be in the form of medical or paramedical services, personnel recruitment, procurement of equipment, finance or training, or any action aimed at overthrowing a government, or furthering the military interests of a party to a conflict. [24] However, the Act excludes from its ambit assistance of a humanitarian nature granted to civilians in an area of armed conflict.[25]

Apart from outlawing mercenary activities abroad, the Act provides a framework for regulating the provision of foreign military assistance. In essence, a person wishing to render such assistance to any State, organ of State, group of persons or individual, ought to first obtain permission from the National

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[21] See Triggs *loc cit* (chapter one, note 76).

[22] Act 15 of 1998.

[23] *Op cit*, preamble. See also The Constitution of the Republic of South Africa Act 108 of 1996, section 198(b).

[24] *Op cit*, section 1(iii).

[25] *Op cit*, section 1 (iii) (d).

Conventional Arms Control Committee.[26] The Committee would then consider any such application and make an appropriate recommendation to the Minister in charge of Defence.[27]

The matters to which regard must be had in granting or refusing any such permission are expressly stipulated by the Act.[28] In a nutshell, they may be captured under the rubric of international law and international comity. Thus, authorisation or permission may not be granted if it would result in the violation of one or other of South Africa's international obligations, if it would be contrary to her national or international interests, if it would support terrorism or encourage regional conflicts.

Seemingly, the Act does not regulate the deployment of South African regular forces. This is a matter regulated by the Constitution and international law. The Constitution mandates the President to deploy the Defence Force, *inter alia*, in fulfilment of an international obligation.[29] However, this power is subject to parliamentary oversight.[30] Under rather controversial circumstances, on the 11th of September 1998 the South African National Defence Force (SANDF) participated in a SADC[31]-sanctioned intervention in Lesotho to quell civil unrest. At the time, it was difficult to legally justify this action since SADC is not a defence organization.[32] Subsequently, however, a SADC Mutual Defence Pact[33]

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[26] *Op cit*, section 4(1).

[27] *Op cit*, section 4(2).

[28] *Op cit*, section 7(1).

[29] See the Constitution (*op cit*) section 201 (2) (c).

[30] *Op cit* section 201 (3).

[31] Southern African Development Community.

[32] In this respect, it is different from, for instance, the North Atlantic Treaty Organization (NATO).

has been signed between the member States, which appears to make it easier for South African troops to be deployed in foreign States.

Therefore, it is fair to state that the provision of military assistance is not outlawed, but is tightly regulated. Crucially, the member of the Executive responsible for defence is required, in considering a request for permission under the Act, to assess the impact that any such assistance would have on South Africa's foreign policy. This would necessitate an input by the Ministry of Foreign Affairs, it is submitted.

3.3.2 The Military Disciplinary Code[34]

The Code regulates military discipline. In terms of Chapter One of the Military Discipline Supplementary Measures Act,[35] which repeals section 2 of the Code, the latter applies, *inter alia*, to all persons attached to the South African National Defence Force (SANDF) in terms of the law,[36] members of the auxiliary force,[37] students attending any military training institution,[38] members of the permanent force[39] and reserve force,[40] and Prisoners of War (POWs) recognised as such in terms of international law.[41]

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[33] Signed at Arusha on 26 August, 2003.

[34] First Schedule to the Defence Act 44 of 1957, as repealed by the Defence Act 42 of 2002. The latter repeals the former save for, *inter alia*, section 104, which provides for the Schedule. Therefore, in terms of Act 42 of 2002, the Military Disciplinary Code still stands. See Schedule to Act 42 of 2002.

[35] Act 16 of 1999.

[36] *Op cit* section 3 (2) (e).

[37] *Op cit* section 3 (2) (d).

[38] *Op cit* section 3 (2) (f).

[39] *Op cit* section 3 (2) (a).

The Code principally creates offences relating to military discipline, while Act 16 of 2002 creates specialised military courts to deal with these offences.[42] Thus, those deserting to join enemy forces,[43] communicating intelligence to the enemy,[44] fomenting mutinies,[45] serving with the enemy while being held as Prisoners of War (POWs),[46] or helping the enemy to procure ammunition or other equipment,[47] do commit an offence and are liable, upon conviction, to imprisonment for a period not exceeding thirty years.

Commanders of troops, vessels and aircraft who fail to pursue the enemy commit an offence for which they shall be imprisoned for a period not exceeding ten years.[48] It is also an offence for those under lawful command to disobey lawful orders.[49] Depending on the specific circumstances, the periods of imprisonment range from six months to two years.

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[40] *Op cit* section 3 (2) (b)

[41] *Op cit* section 3 (2) (h).

[42] See Chapter 2 of Act 16 of 1999.

[43] Military Disciplinary Code *op cit* section 4 (d).

[44] *Op cit* section 4 (b)

[45] *Op cit* section 4 (h).

[46] *Op cit* section 4 (e).

[47] *Op cit* section 4 (f)

[48] *Op cit* section 5 (c). Particularly, section 27 of the Defence Act 42 of 2002 authorizes any warship or aircraft of the Defence Force to engage in "hot pursuit" of any ship at sea in accordance with the United Nations Convention on the Law of the Sea.

[49] *Op cit* section 19.

Significantly, the Code does not oust any jurisdiction that a civil court would otherwise have over a person.[50] Therefore, members of the disciplined forces may find themselves before civil courts for acts amounting to offences under any other law. Particularly, a person subject to the Code who is suspected of having committed murder, treason, rape or culpable homicide shall be tried in a civilian court[51] in accordance with section 27 of the National Prosecuting Authority Act.[52] However, the Code recognises the defences of *autrefois convict* and *autrefois acquit* to any charges brought against a person before a military court.[53]

The significance of section 27 of the National Prosecutions Authority Act in this context is that, once information has been laid before an Investigating Director, then there shall be an inquiry into those allegations, which shall take place *in camera.*[54] This provision, together with the aforementioned section of Act 16 of 1999, seems geared towards the protection of military information whose disclosure would endanger national security. The rationale for having an Investigating Directorate is that such information is kept out of the public domain, while at the same time justice is done through the effective investigation and prosecution of these crimes.

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[50] Military Code *op cit* section 54.

[51] See section 3(3) of the Military Discipline Supplementary Measures Act 16 of 1999.

[52] Section 27 of the Act provides for the laying of information regarding certain specified offences before an Investigating Director.

[53] *Op cit* section 55.

[54] See section 28(3) of the National Prosecuting Authority Act *op cit*.

The Code stipulates that offences will generally prescribe after a period of three years, save for treason, murder, rape, culpable homicide and sundry other specified offences.[55]

3.3.3 The Promotion of National Unity and Reconciliation Act[56]

The Act provides a framework for the investigation and exposure of the nature, causes and extent of the human rights abuses that took place during South Africa's past.[57] It also provides for a mechanism for granting amnesty to those who, having participated in the atrocities, fully disclose the circumstances of their participation.[58] This is an integral part of the healing process embarked upon by South Africa after the end of Apartheid and the inauguration of constitutional democracy.

An Amnesty Committee established in terms of the Act considers applications for amnesty, with or without a hearing as the case may require.[59] The Committee may then grant amnesty, whose effect is to foreclose any criminal or civil proceedings arising from the applicant's activities during the period under review.[60]

The processes sanctioned by this Act have been the subject of intense debate. The concern raised in some quarters is that the Act's provisions fly in the face of every State's international obligation to investigate allegations of past human

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[55] See Military Code *op cit* section 58.

[56] Act 34 of 1995.

[57] *Op cit* preamble.

[58] *Ibid.*

[59] *Op cit* sections 16 and 17.

[60] *Op cit* section 20(7).

rights violations and institute prosecutions if the evidence warrants such action.[61] It has also been conceded, however, that international law does not require States to take action that poses a serious threat to vital national interests.[62]

In what sense does the reconciliation process accord with South Africa's vital national interests? The South African Constitutional Court, in the seminal case of *Azania Peoples Organization (AZAPO) v. President of the Republic of South Africa*[63], was faced with a constitutional challenge to section 20(7) of the Act which empowers the Amnesty Committee to grant amnesty, thus eliminating any possibility of a civil action by aggrieved families against an alleged perpetrator. The Court pointedly steered clear of any analysis of the problem in terms of South Africa's international obligations. Instead, the Court viewed the interim constitution's[64] ideal of achieving "National Unity and Reconciliation" as sanctioning the limitation on the right of access to courts. In the opinion of the late Mahomed DP[65], the enquiry was simply whether the constitution sanctioned

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[61] See D Orentlicher "Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime" (1991) 100 *Yale Law Journal* 2537.

[62] *Op cit* 2595.

[63] 1996 (4) SA 671 (CC), per Mahomed DP.

[64] Act 200 of 1993.

[65] *AZAPO supra* at 25: "The issue which falls to be determined is whether section 20(7) of the Act is inconsistent with the constitution. If it is, the enquiry as to whether or not international law prescribes a different duty is irrelevant to that determination." (Per Mahomed DP). Professor John Dugard has criticized the judgment, describing it as disappointing from the perspective of international law, although "probably correct as a matter of constitutional interpretation". See Dugard *Op cit* (note 8 above) at 89. See also Z Motala "The Constitutional Court's Approach to International Law and its Method of Interpreting the "*Amnesty Decision*": Intellectual Honesty or Political Expediency?" (1996) 21 SAYIL 29.

such a law, the applicability of international law not being relevant, at least not directly.

Perhaps the Court's task in *AZAPO* was made easier by the fact that, effectively, the Court was making a decision over the State practice of the forum. In that sense the Constitutional Court was better placed than the House of Lords in the *Pinochet* case,[66] because in the latter case Chile's State practice was in issue. However, the House of Lords did not feel constrained to consider only the Chilean situation. The Court considered that the practice of granting amnesties was well established, citing examples from India, Bangladesh and Pakistan.[67]

It is submitted that the Court in *AZAPO* ought to have considered international practice regarding the matter.[68] That it might have come to the conclusion that State practice in this regard was unsettled is immaterial. Considering the problem from an international law perspective would have helped to legitimise international law within the municipal system. Eschewing this path only served to reinforce the perception that international law pursues a different agenda from that of municipal law. This phenomenon, which has been termed the "micro-macro problem", is discussed elsewhere in this thesis.[69]

The result produced by the *AZAPO* decision is ahistorical, and a *non sequitor* to the efforts of the international community to punish apartheid as a crime against

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[66] *R V. Bow Street Metropolitan Stipendiary Magistrate, ex Parte Pinochet* [1998] 4 ALL ER 897 (HL).

[67] *Supra* at 929, per Lord Lloyd.

[68] Courts in other jurisdictions have, in similar circumstances, resorted to a consideration of the international law rules on crimes against humanity. See, for example, *Polyukhovich V. The Commonwealth of Australia* (1991) 172 CLR 501 (Australian High Court); *R V. Finta* (1989) 61 DLR (4th) 85 (Ontario High Court).

[69] See page 157 below.

humanity.[70] Far from leading to a political compromise, the amnesty process may in fact result in deep-seated resentment towards the municipal system. This is not true reconciliation. The idea of pitting the constitution against international law in order to achieve this "compromise" does not augur well for the development of international law.

The point to be made here is that the above reasoning in *AZAPO* evinces a conscious deferral to national interests, as opposed to international law or international comity. This thesis will, at a later stage, address the question whether South African courts are in future likely to exhibit such deference on matters perhaps not equally emblematic of South Africa's past.

3.3.4 The Extradition Act[71]

The Act provides for the extradition of persons to foreign States with respect to certain offences.[72] This would be pursuant to extradition agreements between South Africa and such foreign States. Persons alleged to have committed certain offences in the territory of a foreign State with whom South Africa has an extradition agreement are therefore liable to be extradited.

However, the Act also allows for the "surrender" of persons to States with whom South Africa has no extradition agreement, but only for acts that would also be punishable in South Africa as offences.[73] The State President, however, must

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[70] It has been argued that the *AZAPO* case called for the "broad brush of history". See J Dugard "International Law and Foreign Relations" (1996) *Annual Survey of South African Law* 165.

[71] Act 67 of 1962.

[72] *Op cit* preamble.

[73] *Op cit* section 3(2).

consent in writing to such surrender.[74] It seems, therefore, that the provision goes beyond the formal requirement of an extradition agreement, and caters for situations where none exists.[75] It is submitted that the State President, in deciding whether or not to consent, would effectively be exercising a foreign policy decision. In such situations, considerations of international comity, rather than law, would be determinative. The only exception to this appears to be cases where the possibility of the imposition of the death penalty on the suspect is real. In such a case, international comity will be over-ridden by the legal requirement that an assurance be sought from the other State that the suspect's life will be spared in the event of a conviction.[76]

The above provision of the Extradition Act was challenged for its alleged unconstitutionality in *Harksen v. President of the Republic of South Africa and Others.*[77] In that case, Harksen, a German national residing in South Africa, was wanted in Germany to stand trial on charges of fraud. In the absence of an extradition treaty between South Africa and Germany, the South African President relied on section 3(2) of the Extradition Act to consent to Harksen's extradition. It was argued on Harksen's behalf that such consent in effect amounted to an "international agreement" in terms of the constitution, and that since there had been no legislative involvement in the conclusion of this agreement as required by the constitution, it was *a fortiori* unconstitutional.

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[74] *Ibid.*

[75] See chapter two, note 42.

[76] See *Mohamed V. President of the Republic of South Africa* 2001 (3) SA 837 (CC) (discussed at page 99 *infra*).

[77] 2000(1) SA 1185 (CPD). The subsequent Constitutional Court decision is reported at 2000(2) SA 825 (CC).

The Cape High Court (per Van Zyl J) roundly rejected this argument and held that any international agreement must create reciprocal rights and obligations for the parties, an element that was clearly lacking in this case as this was a domestic act carried out by virtue of a legislative enactment.[78] The Court therefore endorsed the view that certain informal arrangements are not "international agreements" and therefore fall outside the purview of the constitution.

On appeal to the Constitutional Court, Goldstone J approached the matter from the point of view of the significance of the Extradition Act. In the learned Judge's view, the Act only regulated extradition "on the domestic plane", as opposed to initiating the extradition process. The Court, likewise, dismissed the application. This decision appears to underline the fact that, in international law, extradition may take place in the absence of an extradition agreement. This, however, depends entirely on the state of the law in the extraditing State, as well as the arrangements and negotiations[79] in place between the States concerned.

Requests for extradition, in terms of the Act, are directed to the Minister for Justice.[80] The request must be made by a diplomatic or consular representative of the requesting State, or by a minister of the requesting State. The Ministry of Foreign Affairs does not feature in the process in terms of the Act.

Another aspect of the extradition process deserving mention is the role of the magistracy. In accordance with the Act, magistrates play a crucial role in issuing warrants of arrest upon notification by the Minister for Justice that a request has

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[78] (2001) 1 SA 1185 (CPD), par 52.

[79] In the *Harksen* case, these consisted of the exchange of diplomatic notes between the two governments.

[80] Extradition Act *op cit* section 4 (1).

been made for the suspect's surrender.[81] They may also issue warrants for the further detention of persons arrested without warrants under any law.[82]

The Act makes interesting categorizations in terms of States. With respect to African States, a magistrate in South Africa may simply endorse warrants of arrest issued therein, provided that the relevant extradition agreement says so.[83] This obviates the need for the Minister for Justice to transmit a request to the magistrate. All that need be done is for the warrant issued in such State to be produced before the magistrate. Such States are termed "associated States".[84] On the other hand, "foreign States" consist of any other foreign territory that cannot be dealt with under the rubric of "associated States".[85] There seems, therefore, to be an explicit policy of according preferential treatment to African States when it comes to matters of extradition.

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[81] *Op cit* section 5.

[82] *Op cit* section 7.

[83] *Op cit* section 6.

[84] In terms of section 1 (i), "Associated State" means any State to which section 6 of the Act applies. See also J Dugard *International Law: a South African Perspective* 2 ed (2000) 171.A further category of "designated States" has been added by amendment. See the Extradition Amendment Act 77 of 1996, section 1 (a).

[85] Extradition Act *op cit* section 1 (iii).

3.3.5 The International Co-operation in Criminal Matters Act[86]

The Act facilitates the provision of assistance in criminal matters between South Africa and other States.[87] Its main concern is the provision of evidence and the execution of sentences, as well as the handling of the proceeds of crime between South Africa and such other States.[88]

The Act empowers judicial officers to issue letters of request should it appear in the course of proceedings that it is necessary to examine a person who is in a foreign State.[89] This course would be resorted to if it is in the interests of justice, and if the attendance of the person concerned cannot be obtained without undue delay, expense or inconvenience.[90] Although the judicial officer may, in cases of emergency, send the letter of request directly to the court or tribunal of a foreign State,[91] in all other cases the request ought to be sent to the Director-General of the Ministry of Justice for onward transmission.[92]

On the other hand, a similar request emanating from a foreign State must first be channelled to the Director-General.[93] Upon being satisfied that there are proceedings pending in the foreign State and that an offence may have been committed, the Director-General would then forward the request to the Minister

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[86] Act 75 of 1996.

[87] *Op cit* preamble.

[88] *Ibid.*

[89] *Op cit* section 2(1).

[90] *Ibid.*

[91] *Op cit* section 2 (4) (a)

[92] *Op cit* section 2 (3) (a) and (b).

[93] *Op cit* section 7 (1).

of Justice for approval.[94] Upon such approval, the Director-General then forwards the request to the magistrate in whose area of jurisdiction the suspect is believed to be.[95]

As regards the admissibility of evidence obtained by letter of request, such is deemed to be under oath if the witness was warned, in terms of the requested State's law, to tell the truth.[96] This obviates the need for a formal oath being administered at the proceedings. However, it appears that the evidence would still have to meet the general test of relevance in order to be admissible. Hearsay evidence, for instance, would not be admitted.

In the scheme of the Act, therefore, a request from a foreign State is treated relatively stringently, and requires the personal attention of the political head of the Justice Ministry. Understandably, such a request could be far-reaching in terms of its implications for the legal system. By contrast, a request by South Africa may on occasion be handled less onerously, such that a judicial officer has direct contact with the officials of a foreign State.

That the Act affects foreign relations between South Africa and other States is beyond doubt. However, all indications are that the Judiciary will be keen to emphasize that matters arising from the application of the Act are justiciable, the foreign relations dimension notwithstanding. Thus in *Kolbatschenko V. King NO*[97] the applicant attacked the procedure that had been adopted under the Act on the basis that it violated his constitutional rights. For the respondent, it was argued

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[94] *Op cit* section 7 (2) read with (4).

[95] *Op cit* section 7 (5).

[96] *Op cit* section 5 (1).

[97] 2001 (4) SA 336 (C).

in limine that matters pertaining to the Act were not justiciable as the Act related to foreign affairs, the exclusive domain of the Executive. The Court dismissed this contention, holding that the Act was justiciable inasmuch as the procedure followed impinged on applicant's rights.[98]

The case of *Thatcher v. Minister of Justice and Constitutional Development and Others* presented yet another opportunity for the Act's interpretation. Thatcher, a British national resident in South Africa, was suspected of having been involved in financing an eventually abortive *coup* in Equatorial Guinea. Relying principally on the provisions of the Act, the South African authorities issued a *subpoena* against Thatcher consequent upon receiving a request for assistance from Equatorial Guinea.

Thatcher challenged the *subpoena, inter alia,* on the basis that it infringed his constitutional right to silence[99] and to protection against self-incrimination.[100] He averred that the process amounted to an attempt by the South African authorities to embark on a fishing expedition in order to have an insight into his possible defence. This, he argued, would enable the authorities to prefer charges against him with prior knowledge of his defence. He further contended that his answers in obedience to the *subpoena* could be used to initiate his extradition to Equatorial Guinea. He therefore prayed that the process be set aside.

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[98] *Supra* at 357. What distinguishes this case from *Kaunda supra*(see page 99 *infra*) is the fact that, in the latter case, the applicants' main prayer was effectively for a *mandamus* compelling the South African Government to prevail upon the Zimbabwean government to deal with the applicants in a certain way (extradition to South Africa). The Court would not countenance such a strategy. In *Kolbatschenko*(*supra*), the applicant's presence within the Republic brought him under the constitution's protection, making foreign relations a secondary concern.

[99] Constitution, Act 108 of 1996, section 35 (1) (a) and (c).

[100] *Op cit*, section 35 (3) (h) and (j).

The Cape High Court, in dismissing the application, observed that there was nothing offensive about a legislative provision that compelled an individual to answer questions, provided that the answers to such questions must be excluded to the extent that they were incriminating. Since no criminal proceedings were as yet pending against Thatcher, it could not avail him to complain at that stage.[101] The Court regarded the matter before it as involving matters of foreign policy, of which the Executive was the best judge.[102]

The *Thatcher*[103] decision, handed down on the 24th November 2004, is the culmination of a succession of judicial pronouncements that seem to indicate that South African courts are reticent to interfere in matters involving foreign policy. More significantly, the Court in *Thatcher* appears to have eschewed the "legacy of *Makwanyane* and *Mohamed*",[104] two decisions in which the Constitutional Court regarded the death penalty as a violation of the right to life. In concluding this chapter, this thesis will address the importance of the *Thatcher* decision for the enforcement of SAIA.

[101] See paragraph 94 of the judgment.

[102] See paragraph 102 of the judgment.

[103] *Supra*

[104] *Supra* paragraph 98.

3.3.6 The Constitution[105]

In terms of the South African constitution, international law is recognised by the South African legal system. All legislation ought, as far as possible, to be interpreted in consonance with the tenets of international law.[106] The constitution also makes customary international law applicable in South Africa unless it is inconsistent with the constitution or an Act of Parliament.[107]

The latter position is a reflection of the South African common law, which is of a monist orientation with regard to customary international law.[108] This seems to have been the position in South Africa for decades now, as exemplified by the case *R v. Giuseppe and Others* [109] where the 1929 Geneva Convention on the Treatment of Prisoners of War, was applied by the Court as part of South African law, even though the Convention had not been implemented by South Africa.

There is an interesting point of divergence between the 1996 constitution and its predecessor, the 1993 interim constitution. While the latter expressly provided in Section 231(4) that "the rules of customary international law [are] binding on the Republic", the former omitted the word "binding" from its language. This has engendered some debate concerning the significance of such an omission. The argument has been made that this means that all rules of customary international

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[105] The Constitution of the Republic of South Africa Act 108 of 1996.

[106] *Op cit* section 233.

[107] *Op cit* section232.

[108] See *South Atlantic Island Development Corporation v. Buchan* 1971 (1) SA 234 at 238.

[109] 1934 TPD 139.

law, irrespective of whether South Africa objects to any, are part of South African law.[110] The entirety of customary international law is *per se* binding.

On the other hand, it has been pointed out that it is not proper to regard South Africa as being bound by a rule to which she has persistently objected.[111] On the strength of the latter argument, it is possible to argue that, as respects the alleged duty on governments to prosecute the atrocities of past regimes, South Africa is a persistent objector, and is therefore not bound by any such rule.[112] South Africa's tacit objection has been through the amnesty procedures, which, as has been seen, have been given the Constitutional Court's imprimatur in the *AZAPO*[113] case.

The term "binding", it is suggested, was indicative of the fact that South African courts recognised that a State cannot be bound by a rule of customary international law to which it objects. Perhaps the need was felt to make that abundantly clear in the interim constitution of 1993, hence the term. However, as

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[110] See R Keightley "Public International Law and the Final Constitution" (1996) 12 SAJHR 405 at 408.

[111] See N Botha "International Law and the South African Interim Constitution" (1994) 1 *South African Public Law* 245 at 255.

[112] See J Gavron "Amnesties in the Light of Developments in International Law and the Establishment of the International Criminal Court" (2002) 51 ICLQ 91 at 106. At 104, the writer argues that the amnesty process is in contravention of customary international law relating to crimes against humanity. See also C Braude and D Spitz "Memory and the Spectre of International Justice: A Comment on AZAPO" (1997) 13 SAJHR 269, 273; C C Joyner "Redressing Impunity for Human Rights Violations: The Universal Declaration and the Search for Accountability" (1998) 26(4) *Denver Journal of International Law and Policy* 591 at 602. In fact, quite to the contrary, it has been argued that there is an "emerging practice" of domestic transitional amnesty. Such a practice, South Africa might argue, seems to counter the alleged customary international law rule of prosecution. See A F Perez "The Perils of Pinochet: Problems for Transitional Justice and a Supranational Governance Solution" (2000) 28(2) *Denver Journal of International Law and Policy* 175 at 185.

[113] *Supra.*

it came to be regarded as axiomatic that a State cannot be bound by a rule to which it objects, the term was done away with as being tautologous.[114]

It is submitted that a rule to which South Africa objects is probably evidence of lack of *opinio juris* on the subject, and therefore is not, properly speaking, a rule of customary international law. A judicial officer presiding over a matter in South Africa is not likely to apply a rule about which reservations have been expressed.[115] Indeed, in the past, South African judges have been accused of being overly positivistic in their interpretation of the law and simply insisting on legislative enactments and judicial decisions as statements of the law.[116] Seemingly, the attitude is that legislators, as the popular representatives, are best placed to effect changes to the law.[117]

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[114] Dugard *op cit* (note 8 above) at 80.

[115] See P Kovacs "Developments and Limits in International Jurisprudence" (2003) 31(3) *Denver Journal of International Law and Policy* 461 at 477-478 (Judges ought to be concerned about the social acceptability of their decisions)

[116] See H Botha "The Values and Principles Underlying the 1993 Constitution" (1994) 9(2) *South African Public Law* 233 at 234; J Dugard "The Judicial Process, Positivism and Civil Liberty" (1971) 88 SALJ 181 at 186-187, 200. An instance of this predisposition is the case of *Moulang v. Port Elizabeth Municipality* 1958(2) SA 518 (AD), where failure to act to protect the rights of others was viewed against the backdrop of statutory permissive powers, exercised in the public interest. At 523, Schreiner AJ said: "I do not think that the Court should enter upon the suggested reinvestigation of the bases of such a well established set of rules as that to be found in the four decisions of this Court in question. Whatever may be the better view about liability for omissions in general, the particular branch of law with which we are concerned should not be disturbed merely in order to make it confirm with what may or may not be the proper inference to be drawn from certain passages in the Digest. If the practical results of the present state of the law are seen on balance to be seriously unsatisfactory the remedy lies in legislation". See also D M Davis "Integrity and Ideology: Towards a Critical Theory of the Judicial Function" (1995) 112 SALJ 104 (warning of the danger of developing a juristocracy, owing to the fact that the judiciary will now decide such a wide range of issues under the Constitutional dispensation)

[117] See, for example, the Constitutional Court's decision in *Jordan & 2 Others V. The State* 2002 (6) SA 642 (CC). In this case, although the

With regard to treaty law, traditionally South Africa has adopted a dualist approach in terms of which a treaty is not part of municipal law until legislation is passed to give effect to the treaty. The treaty-making role falls exclusively within the competency of the Executive arm of Government. This, however, is tempered with the need for parliamentary approval of treaties.[118] Thus, Section 231 of the Constitution provides for a shared role between the National Executive and the Legislature with regard to treaty making. While negotiation and signature are for the Executive, a treaty binds the Republic only after Parliament, through its two Houses, has assented to it.[119]

3.3.7 The National Prosecuting Authority Act[120]

The Act creates a single Prosecuting Authority for the Republic. This contrasts with the position during the Apartheid era when provincial Attorney Generals were entrusted with the prosecution of crime. Prosecutorial discretion was also not subject to judicial control, except through judicial review. The Act therefore

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Court found a section of the Sexual Offences Act 23 of 1957 discriminatory, it nevertheless refrained from issuing a declaration of invalidity, reasoning that Parliament should be given a chance to ameliorate the offensive provision.*Supra* paragraphs 123-128 of the judgment (per O' Regan J and Sachs J).

[118] A comparable position is that under English law, as a corollary of the Crown's exclusive control of foreign relations, treaty-making power resides in the Executive and, according to Lord Denning, the exercise of that power cannot be challenged in English courts. See *Blackburn v. Attorney General* [1971] 1 WLR 1037 (CA). On the other hand, it was held in *AG for Canada v. AG for Ontario* [1937] AC 326 at 347 (PC), that while the formation of treaties is for the Executive, implementation is for the Legislature. See also L Collins "Foreign Relations and the Judiciary" (2002) 51 ICLQ 485 at 493.

[119] See Constitution of the Republic of South Africa Act 108 of 1996, section 231.

[120] Act 32 of 1998.

repeals the Attorney–General Act of 1992,[121] under which the system of provincial Attorney Generals still operated. Under the present Act, the Minister of Justice exercises ultimate control over the Authority.[122] This ensures political accountability in the prosecutorial process.

In addition to laying out the basic structure and composition of the Authority, the Act further makes provision for the President's power to set up "Investigating Directorates"[123] in respect of specified offences. It is important to note, however, that this can only be with the concurrence of the Minister of Justice and the National Director of Public Prosecutions.[124] This raises the delicate issue of the extent of the Executive's powers in relation to the prosecution machinery.[125] As a result of ministerial control, it is undoubtedly the case that the Executive does feature in the formulation of policy. It is suggested that this is due to the fact that prosecutorial policy involves the vital interests of the State, the *ordre public*, as overseen by the Executive.[126]

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[121] Act 92 of 1992.

[122] *Op cit* section 33.

[123] *Op cit* section 7.

[124] *Ibid*

[125] With regard to the doctrine of separation of powers, it has been contended in the United States that it is impermissible for the President to appoint a "Special Prosecutor" to prosecute certain high-ranking officials in government. The Supreme Court's majority judgment in *Morrison v. Olson* 108 S. Ct 2597 (1998) sanctified this office, but this decision has attracted a lot of adverse commentary. See S A J Dangel "Is Prosecution a Core Executive Function? *Morrison v. Olson* and the Framers' Intent" (1990) 99 YLJ 1069.

[126] See B Wible "De-jeopardizing Justice: Domestic Prosecutions for International Crimes and the Need for Transnational Convergence" (2002) 31(2) *Denver Journal of International Law and Policy* 265 at 293 ("When prosecutors are part of the executive framework their actions may be adequately constrained by political actors so as not to upset political settlements that would be more productive than a judicial proceeding").

Significantly, the National Director is, under the Act, responsible for formulating policy and issuing policy directives.[127] This is in line with the constitutional imperative of ensuring an effective and transparent prosecution service. It is also a far cry from the previous position when provincial prosecutorial autonomy meant that there was no unitary or uniform policy.

Interestingly, recent press reports indicate that the Authority has resolved not to stop investigating Apartheid-era criminals unless requested to do so by Parliament.[128] It has also been revealed that no blanket amnesty is being considered for such suspects.[129] Judging by such public pronouncements, it is apparent that the office of the National Director formulates prosecutorial policy subject to direction by at least two arms of Government, namely, the Executive and the Legislature. However, in terms of the prosecution of actual cases, the National Director exercises an independent discretion.

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[127] See National Prosecuting Authority Act 32 of 1998, section 21.

[128] B Humber "More Amnesties for South Africa?" available at http://www.brandonhumber.com/pipermail/list.brandonhamber.com/2004-April/000080.htm (accessed 17/7/2004). On the need for "democratic accountability" through parliamentary oversight, see J Sarkin and S Cowen "The Draft National Prosecuting Authority Bill 1997: A Critique" (1997) 10 (1) *South African Journal of Criminal Justice* 64 at 71 to 72.

[129] See media briefing by Honorable Dr. P Maduna, Minister for Justice and Constitutional Development, 13th February 2004, available at: http://www.pmg.org.za/briefings/feb2004/04021justice.htm (accessed 17/7/2004); Speech by the National Director of Public Prosecutions, Advocate Bulelani Ngcuka, at the International Society for the Reform of Criminal Law Conference, Canberra, 26-30 August 2001, available at http://www.isrcl.org/papers/Ngcuka.pdf (accessed 17/7/2004).

3.3.8 The Implementation of the Rome Statute of the International Criminal Court Act[130]

Against the foregoing background of laws calculated to deal with international crime, it is clear that the ascension of South Africa from the status of Pariah State to that of a respected international player has coincided with increased legislative activity in the international law sphere. The enactment of SAIA will undoubtedly have an impact on the enforcement of international criminal law in South Africa. But just how revolutionary is it? This thesis next considers SAIA's provisions insofar as complementarity is concerned.

The Act creates a framework for the effective implementation of the Rome Statute, and also seeks to ensure that, in the event that a prosecution is not undertaken, the ICC is enabled to investigate and prosecute the relevant cases.[131] This is in line with the basic idea of the complementarity principle. However, as has been seen, merely explaining treaty obligations in terms of State consent is misleading.[132] One must identify other motivations for assuming treaty obligations.[133]

The applicable law is spelt out in the Act.[134] This consists of the constitution, conventional law, customary international law and comparable foreign law. In terms of SAIA, the court must consider, and may apply, any of these.[135] It is apt

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[130] Act 27 0f 2002.

[131] *Op cit* section 3(e).

[132] See pages 45 to 48 above.

[133] See Diehl *loc cit* (chapter two, note 73 above).

[134] *Op cit* section 2.

[135] *Ibid.*

to compare this position with Section 39 of the constitution[136], which, in the context of the protection of the rights spelt out in the Bill of Rights, states:

"In interpreting the provisions of this Chapter any tribunal or forum

a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom

b) must consider international law; and

c) may consider foreign law.

Therefore, it seems that the spirit behind section 39 of the constitution would have to infuse the interpretation of the Act, inasmuch as the court applying the Act must have regard to international law as well as comparable foreign law. The court must consider South Africa's international obligations in order to resolve any ambiguities. However, this apparent synergy belies the potential for tension in the actual interpretation and application of international norms on the municipal scene, as exemplified by the *AZAPO* decision discussed above. In interpreting an Act of SAIA's significance, the essential interests of a State are an important consideration to bear in mind. In this scheme, the aspirations of the "international community" are alien.[137] Inherent in Statehood, it is submitted, is resistance to the notion of absorbing foreign influence. The loose amalgam commonly known as the "international community"[138]is not on par with the more organic structure of a State, characterised by shared values and goals, and thus constituting a germination ground for the *volksgeist*.[139]

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[136] Act 108 of 1996.

[137] See the *AZAPO* case (*supra*) discussed at page 75 above.

[138] See note 139 *infra*.

[139] See S J Toope "Emerging Patterns of Governance and International Law" in M Byers (ed) *The Role of Law in International Politics* (2000) 91 at 103 to 104 (There is no such thing as the "international community". Nations just have to learn to live together as strangers).

Section 5 of SAIA deals with the institution of prosecutions under the Act in South African courts. In accordance with this section, the National Director of Public Prosecutions must first consent to any prosecution commenced under the Act. Significantly, the provision enjoins the National Director, when deciding whether to prosecute, to have regard to the Republic's obligations under the complementarity principle.[140] Should the National Director decline to prosecute under this section, he is required to provide the Central Authority[141] with the full reasons for his decision, which must then be forwarded to the ICC's Registrar.[142]

Two matters arise for comment in this regard. First, it seems that not all investigations regarding Rome Statute violations need be placed before the National Director. He need not conduct the prosecution himself: all that the Act requires him to do is to consent to the prosecution. However, this presupposes that the investigation has been placed before him. Theoretically, an instance may well arise where a matter is not placed before the National Director, perhaps in order to shield the suspect. In such cases, the ICC would be precluded from considering the matter owing to the absence of the *sine qua non* to the Court's powers, namely, the National Director's decision. To remedy this situation, there may be need for the Act to enjoin the National Director to investigate all Rome Statute-related matters in person. However, a comprehensive prosecution policy with regard to such matters would obviate the need for this step.

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[140] *Op cit* section 5 (3).

[141] According to section 1 (definition section) paragraph iii, this is the Director-General, Ministry of Justice and Constitutional Development.

[142] *Op cit* section 5(5).

Second, the Section gives the National Director a free hand to prosecute in the Republic without first having to defer to the ICC.[143] This is in recognition of the fact that States have the primary duty to prosecute.[144]

However, in the context of the relationship between the ICC and national courts, it may be important to express this in terms of a right/duty paradigm: do States have the right to prosecute, and the ICC the corresponding duty to defer to such prosecutions? It is suggested that the answer is in the affirmative, as the ICC cannot admit a case so long as an investigation is being undertaken in good faith. Thus there is, on the part of the ICC, a duty of restraint as States seek to exhaust their legal processes in prosecuting cases.

The above position may be contrasted with an interesting provision in the Swedish Cooperation with the International Criminal Court Act.[145] Section 16 of the Act provides as follows:

"Prosecution and criminal proceedings in Sweden for an act may not take place…if the [ICC] has decided that the issue of liability for the act should be considered by the [ICC] although a Swedish preliminary investigation or prosecution is in progress…."

Nothing in the Rome Statute empowers the ICC to make such a determination as to the issue of liability, least of all where an investigation is in progress.[146] The

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[143] Except that the prosecution of an offence against the administration of justice may only take place with the consent of the National Director *and* at the request of the ICC. See the Rome Statute *op cit* section 37(2).

[144] Under the Australian International Criminal Court (Consequential Amendments) Act 2002, no proceedings may be brought without the Attorney General's written consent. Any decision by the Attorney-General "is final, must not be challenged, appealed against, reviewed, quashed or called in question, and it is not subject to prohibition, *mandamus*, injunction, declaration or *certiorari*". *Op cit,* Section 268.121 (2).

[145] Co-operation with the International Criminal Court Act (2002: 329).

[146] See Rome Statute Article 17 (1) (a).

only plausible basis for interference by the ICC seems to be lack of *bona fides* in the investigation or prosecution process.[147]

Therefore, the above provision may be interpreted as a repudiation of the State's primary duty to prosecute, in the sense that it relinquishes that responsibility to the ICC in circumstances not contemplated by the Rome Statute. It could also be viewed as an effective waiver of a State's right to do so. The above provision is set out in terms indicating that it is an all embracing, for-all-times waiver. It is, however, submitted that it would be highly unusual for a State to waive its jurisdiction so fundamentally, much less by legislation. It may well be that a State may waive its jurisdiction in a particular case. This question is left open by the Rome Statute, and was not addressed at the Rome Conference.[148]

The Act also regulates the endorsement in the Republic of warrants of arrest issued by the ICC. In terms of Section 8, a request for arrest issuing from the ICC must be referred to the Central Authority[149] who must forward the same to a magistrate. The magistrate is obliged to endorse the warrant for execution. It will be recalled that under the Extradition Act, endorsement only occurs in the case of warrants issued within certain "associated States".[150] Section 8 of SAIA seems to be the extension, therefore, of a "Most Favoured Nation" treatment accorded to certain States (and institutions) on the basis of their perceived importance to the municipal legal order. This treatment portends a favourable regime of cooperation with the ICC.

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[147] See Triggs *op cit* (chapter one, note 76) at 17.

[148] J T Holmes "The principle of Complementarity" in R S Lee (ed) *The International Criminal Court, The Making of the Rome Statute, Issues, Negotiations, Results* (1999) 41 at 77 to 78.

[149] See note 141 above.

[150] Extradition Act *op cit* section 6.

However, in the case of provisional warrants of arrest, a request from the ICC to the Central Authority must subsequently be forwarded to the National Director of Public Prosecutions who should apply for a warrant of arrest in respect of the concerned person.[151] It seems that the ICC must specifically request for the "provisional arrest" of the concerned person under this section. Indications are that this would be in cases of emergency, for instance, where it is believed that the suspect may commit more crimes or tamper with witnesses in the Republic.

In terms of SAIA, the ICC may also request South Africa to transfer a prisoner to it for purposes of giving evidence or in order to assist in investigations.[152] A "prisoner" in this instance would be a person serving a sentence or awaiting trial.[153] The relevant provision is of a wide import and is not confined to prisoners serving sentences or detained under the Act, making it possible to transfer a prisoner who is serving sentence for a traffic offence to the ICC if his assistance there will be material.

The Rome Statute makes provision for the transfer of prisoners to the ICC to testify or assist in investigations.[154] It is significant to underscore the point that, in this context, "prisoner" refers to a person already serving sentence within the transferring State.[155] However, three conditions are attached to any request by the ICC to a State for assistance in this regard, to wit, the prisoner must give his

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[151] Act 27 of 2002 (SAIA) section 9.

[152] *Op cit* section 20.

[153] SAIA *op cit* section 1 (xiii).

[154] See Rome Statute *op cit*, Article 93(7) (a).

[155] For this reason, and for the avoidance of doubt, such a person is hereinafter referred to as a "prisoner witness".

or her consent to the transfer,[156] the requested State must assent to the transfer,[157] and the prisoner must remain in custody during the period of the transfer.[158] The first two conditions, it is submitted, raise issues of human rights and foreign policy that call for closer scrutiny.

On the human rights front, it seems that any transfer would have to be on an entirely voluntary basis in the sense that the prisoner would have to assent to it.[159] On a cursory reading of Article 93(7) of the Rome Statute, an individual would not be transferred if he did not consent, State consent notwithstanding. It seems that the prisoner is here given primacy with regard to this decision. Section 20 of SAIA implements this primacy in the Republic, but in rather ambivalent terms, as suggested herebelow. The Section makes provision for the event that a prisoner consents to the transfer, in which case the Commissioner for Correctional Services would issue an appropriate warrant of transfer.[160]

However, the Section glaringly omits to make provision for the event that a prisoner resists transfer. In the latter event, it is suggested, there would ensue a veritable tussle between individual and State, especially if the State is inclined to consent to the transfer in a bid to fulfil its obligation to co-operate with the ICC.

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[156] *Op cit* Article 93 (7) (a) (i).

[157] *Op cit* Article 93(7) (a) (ii).

[158] *Op cit* Article 93(7) (b).

[159] The literature on prisoner transfer indicates that this phenomenon is normally encountered between States, and the transfer is usually permanent (serving sentences) rather than temporary (testifying). A major concern in prisoner-transfer agreements appears to be the protection of the civil liberties of prisoners. See generally M A Aziz "Transfer of Prisoners: International Perspective" in M C Bassiouni *International Criminal Law: Procedural and Enforcement Mechanisms* 2 ed (1999) 487at 491.

[160] The Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002, section 20(b).

Presumably, the matter would end up in the Constitutional Court for adjudication. It is respectfully submitted that such consent would not fall under the rubric "administrative action"[161], but would rather be an "executive" decision by the Commissioner of Correctional Services.[162] This means that the Court would have to enquire whether the limitation of the prisoner's rights is authorised under section 36 of the constitution.

The above situation is reminiscent of the difficulty with which a magistrate was faced in the United States in the *Ntakirutimana* case.[163] In that case, a Rwandan national had been provisionally arrested in Texas for his alleged involvement in the 1994 genocide in Rwanda. A request for his surrender had been made by the ICTR to the United States, pursuant to an agreement that had been concluded between the two States. The United States government filed a motion for the hearing of the request. Magistrate M. C. Norton denied the request on the ground, *inter alia*, that the agreement between the United States and the Tribunal had not been ratified by Senate after being enacted by Congress as required by

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[161] In terms of the Promotion of Administrative Justice Act 3 of 2000, section 1 (i) (a) and (ii), decisions of organs of State are not automatically "administrative action". It is to the nature of the act, rather than the nature of the office, that one must look. The decision maker must be exercising a public power or performing a public function in terms of legislation.

[162] The distinction between "administrative" and "executive" action was drawn by the Constitutional Court in *South African Rugby Football union V. President of the Republic of South Africa* 2000 (1) SA 1 CC). See also *Premier, Province of Mpumalanga V. Executive Committee of the Association of Governing Bodies of State-Aided Schools: Eastern Transvaal* 1999 (2) BCLR 151 (CC).

[163] *In the Matter of the Surrender of Elizaphan Ntakirutimana*, Misc. No. L-96-5, US District Court for the Southern District of Texas, Laredo Division, 1997 US Dist. LEXIS 20714, 17 December 1997. Of course, this case concerned the rendition of an indictee and not a witness. In this sense, therefore, it is not quite apposite to the problem at hand. However, the surrender of a fugitive and the transfer may evoke similar human rights concerns, especially if the surrender or transfer is undertaken against the individual's will.

the Constitution. In making this finding, the Court also held that a fugitive could not be surrendered without a valid extradition treaty.[164]

Reverting to Section 20 of SAIA, it is submitted that a prisoner's resistance to transfer could be premised upon the fundamental rights of a prisoner contained in the constitution's Bill of Rights. Specifically, the prisoner may harbour the reasonable apprehension that his contemplated centre of detention[165] lacks "conditions of detention that are consistent with human dignity…adequate accommodation, nutrition, reading materials and medical treatment",[166] or that he or she would not be able to communicate with and be visited by their spouse or partner, religious counsellor or doctor.[167] This would present the Court with a conflict between State interests and individual rights.

The Constitutional Court's decision in *Mohamed v. President of the Republic of South Africa*[168] may provide some guidance on what is likely to be the Court's attitude on the matter. Mohamed, a Tanzanian national, resided in Cape Town. He was arrested by immigration officials acting in concert with American intelligence officials on suspicion of his involvement in the 7th of August 1998

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[164] For a critical analysis of this decision, see G Sluiter "To Co-operate or Not to Co-operate? The Case of the Failed Transfer of Ntakirutimana to the Rwanda Tribunal" (1998) 11 *Leiden Journal of International Law* 383.

[165] In accordance with Section 20 of SAIA, the prisoner remains in detention during the period of transfer.

[166] See the Constitution of the Republic of South Africa Act 108 of 1996, Article 35(2) (e).

[167] *Op cit*, Article 35(2) (f). Empirical research seems to suggest that 94.8 per cent of South African prisoners are allowed visits. See J C Mubangizi "The Constitutional Rights of Prisoners in South Africa: The Law Versus the Practice" (2001) 14(3) *South African Journal of Criminal Justice* 310 at 317 to 318. This high percentage, it is suggested, would increase the likelihood of resistance to transfer.

[168] 2001 (3) SA 837 (CC).

bombing of the United States embassy in Dar-es-salaam, Tanzania. A day later, he was transferred to the United States to stand trial. He faced the death penalty if convicted for murder, one of the charges against him.

After an unsuccessful application to the Cape High Court, he brought an urgent appeal to the Constitutional Court arguing that his illegal deportation to the United States exposed him to the risk of the death penalty. He contended that this went against the spirit of the South African constitution, which the South African Government was under an obligation to protect, specifically the right to life, to dignity, and the right not to be subjected to cruel, inhuman or degrading treatment or punishment. Again, it is important to note that this was a case involving the surrender of a fugitive rather than the transfer of a witness.

Nevertheless, the Constitutional Court found that the South African authorities had erred in surrendering Mohamed to the United States without first seeking the assurance that he would not be sentenced to death in case he was convicted.[169] The deportation was found *ex facie* to be illegal and unconstitutional. The Court also found that Mohamed's right to life and dignity had been infringed.[170] Fundamental to the Court's reasoning was its earlier decision in *S v. Makwanyane*,[171] in which it had held that capital punishment was inconsistent with the values and provisions of the then interim constitution.

Is it not conceivable that the Court might likewise hold that transferring a prisoner witness to the ICC without first seeking assurances as to his conditions

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[169] See paragraph 26 of the judgment.

[170] *Ibid.*

[171] 1995 (3) SA 391 (CC).

of detention there is unconstitutional?[172] Even if the State were to secure such an assurance, the prisoner might nevertheless persist in his resistance. After all, this would not simply be a case of an individual having to obey a summons issued by the ICC and enforceable by South African courts.[173] It involves movement outside the jurisdiction within which a prisoner is serving sentence, and therefore raises much more fundamental questions than the municipal subpoena.[174] On the other hand, the State might argue that, in the particular instance, the prisoner's rights are susceptible to limitation in an open and democratic society given the purpose of the Act, namely, compliance with the Rome Statute.[175]

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[172] In the *Mohamed* case *supra*, the Constitutional Court's conclusion that there was a duty to seek assurances was based upon the Constitution's protection of the right to life. See pages 12 to 14 of the judgment. In principle, there is no reason why a similar obligation should not be imposed on the State where rights under section 35 of the constitution are concerned. This is the essence of the concept of the indivisibility of human rights, that is, all rights should be protected on an equal footing. See Vienna Declaration of the UN World Conference on Human Rights (1993) section 1.5.

[173] See section 19 of The Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002. As to the sensitive nature of the rights of sentenced as opposed to awaiting-trial prisoners, see D V Z Smit "Anchoring the Treatment of Sentenced prisoners in a Rights Discourse: The Example of Rewards for Prison Labour in Germany" (1999) 116 SALJ 613.

[174] Under the Rules of Procedure for the ICTY, there is no nexus between the Tribunal and the witness. See F J Hampson "The International Criminal Tribunal for the Former Yugoslavia and the Reluctant Witness" (1998) 47 ICLQ 50 at 56. A common way to circumvent this obstacle is to provide, through national legislation, for the State's power to coerce a witness to attend. *Op cit* 57. For instance, the United Kingdom has passed the United Nations (International Tribunal) (Former Yugoslavia) Order 1996 SI 1996 No. 716], Articles 19 and 9 of which provide for the service of ICTR summons and impose an obligation to comply therewith, as well as empowers a competent court to order that a witness be arrested and transferred. See also, in the case of South Africa, The Implementation of the Rome Statute of the International Criminal court Act 27 of 2002, section 19.

[175] See the *Kaunda* case discussed at page 102 *infra.*

The Constitutional Court's recent decision in *Kaunda and Others V. The President of the Republic of South Africa and Others*[176] has major implications for the conduct of foreign relations in South Africa. The Court affirmed that the State is the best judge of its foreign policy, and that courts of law should be slow to interfere in such matters. The Court therefore dismissed the applicants' prayer that the Government be compelled to set in motion processes for their extradition from Zimbabwe to stand trial in South Africa for alleged mercenary activities. At paragraph 177 of the judgment, Chaskalson CJ referred to the considerable deference that Government is owed in such matters. However, it is suggested that in the case of a contemplated transfer of a prisoner witness against his will, the Court might well arrive at a different conclusion. The explanation for this is simply that courts of law are not wont to make orders that have extra-territorial effect, and are therefore likely to act to protect the rights of an individual who is within the territory, than one who is without.

As regards the substantive law of the Rome Statute, SAIA adopts a definition-by-reference approach, in effect copying the Rome Statute definitions root and branch. The definition of crimes under SAIA is important for South Africa as giving an indication of how seriously conduct that would otherwise be characterised as ordinary crime under municipal law will be treated. If South Africa chooses to define the crimes exactly as they appear in the Rome Statute, one might think, there is full and faithful compliance. Such a course demonstrates convincingly that a State intends to fulfil her international obligations.

[176] 2004 10 BCLR 1009 (CC).

What is remarkable about this adhesion to the Rome Statute formula is the fact that no constitutional impediments lay in the way of such a course. In several jurisdictions, minor adjustments have had to be made to the Rome Statute definitions in order to make them fit within the national context. The quest for legal certainty in definition has particularly been of great concern, given that most constitutions insist on penal laws being clear about the definition of crimes.[177]

The question is whether South Africa's wholesale incorporation of the Rome Statute definitions is a result of the principle of complementarity, or whether it is simply a bid to avoid the inconvenience of having to devise new definitions.[178] As has been argued, although the Rome Statute does not in terms impose the obligation to implement its substantive law, not doing so simply increases the chances that a State will be adjudged unable or unwilling to prosecute under the Rome Statute. As this question is comprehensively addressed in the next Chapter, it suffices to point out that, *ex facie*, this approach accords with the basic impulse of compliance with the Rome Statute.

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[177] See, for example, the German Constitution (*Bestimmtheitsgebot*) Article 103 (2). The Rome Statute definition of genocide has resultantly been reconfigured to meet this requirement, such that the definition may be satisfied when only one person is killed. This is in contrast to the Rome Statute definition, which contemplates the destruction of at least a group of people. See Werle and Jessberger *op cit* (chapter one, note 18 above) at 204.On the significance of the term "genocide" generally, see B Saul "Was the Conflict in East-Timor "Genocide" and Why Does it Matter?" (2001) 2 *Melbourne Journal of International Law* 477 at 480 to 483. The South African equivalent of this constitutional requirement would be Article 25 (3) of the constitution, which requires that an accused person be informed "with sufficient particularity" of the charge against him. See The Constitution of the Republic of South Africa Act 108 of 1996.

[178] On the pressure to stick to the "well-established" language with regard to some of the concepts discussed during the Rome Conference, see R S Clark "Crimes Against Humanity and the Rome Statute of the International Criminal Court" in M Politi and G Nesi (eds) *The Rome Statute of the International Criminal Court: A Challenge to Impunity?* (2001) 75 at 91.

3.3.9 Legislative Amendments Pursuant to SAIA

The enactment of SAIA has seen the concomitant amendment of 2 legislative provisions in the Criminal Procedure Act[179] and the Military Discipline (supplementary Measures) Act[180] respectively. The process of amendment was undoubtedly necessitated by the desire to bring the above legislations in line with SAIA. It is instructive to consider these amendments in detail.

The amendment to the Military Discipline Act relates to the application of that Act. Hitherto, military personnel could be charged for such crimes as murder and rape in civilian courts. There was no provision for their being charged with genocide, crimes against humanity or war crimes. In view of South Africa's new obligations under SAIA, the Military Act will henceforth apply when an offence under sections 4[181] or 37[182] of SAIA has been committed.[183] What this amendment does is to bring members of the Armed Forces within the reach of SAIA. They will not be exempt from the SAIA machinery simply by virtue of their membership of the Armed Forces. It is significant to note that, elsewhere, it has been lamented that military officials have simply escaped prosecution for crimes they allegedly committed especially in times of war.[184] SAIA sends a clear signal that the contrary will be the case in South Africa.

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[179] Act 51 of 1977.

[180] Act 16 of 1999.

[181] Genocide, war crimes, and crimes against humanity.

[182] Offences against the administration of justice.

[183] See section 3(4) of the Military Discipline Supplementary Measures Act 16 of 1999.

[184] Latin America has been particularly notorious for this phenomenon. See C C Joyner "Redressing Impunity for Human Rights Violations: The Universal Declaration and the Search for Accountability" (1998) 26(4) *Denver Journal of International Law and Policy* 591 at 612.

However, within the context of the principle of complementarity, this provision presents an intricate problem relating to the protection of military information and secrets. Should the ICC decide to admit a case in which the accused is a military official, concerns will be raised over whether the accused should be allowed, at the trial, to answer questions relating to the operations of the military.[185] This issue was one of the sticking points during the Rome Conference leading up to the adoption of the Rome Statute. Article 93(4) of the Rome Statute thus enables a State Party to resist the production, at any trial by the ICC, of information that, in the opinion of the State, is likely to compromise her national security interests.[186]

For its part, SAIA does not expressly provide for a penalty in the case of a person who divulges sensitive information relating to national security,[187] but instead provides in broad terms that any assistance to the ICC by any competent authorities within the Republic must be "subject to the domestic law of the Republic and the [ICC] Statute".[188] This, obviously, does not cover military personnel appearing before the ICC. Neither does section 4 (b) of the Military

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[185] Indeed, in the United States, concerns over the exposure of United States troops to this kind of prosecution prompted the passing by congress of the Protection of United States Troops from Foreign Prosecution Act of 1999. Section 2 (5) (titled 'findings") reads: "Because the guarantees of the Bill of Rights in the United States Constitution would not be available to those individuals prosecuted by the Court, the United States could not participate in, or facilitate, any such Court".

[186] See also Article 72 of the Rome Statute.

[187] There appears to be no need for this to be provided for in legislation. See Rights & Democracy and The International Centre for Criminal Law Reform and Criminal Justice Policy *International Criminal Court: Manual for the Implementation of the Rome Statute* (2000) 76 (What amounts to "national security interests" is a decision that lies with the Executive arm of government).

[188] See The Implementation of the Rome Statute of the International Criminal court Statute Act 27 of 2002, section 14.

Discipline Code, which only applies to officers who "treacherously [communicate] intelligence to the enemy".[189] Clearly, the ICC cannot be construed to be an "enemy". It is clear, therefore, that the Republic can only protect such information through the aforementioned provisions of the Rome Statute.[190]

The amendment to the Criminal Procedure Act relates to the prescription of the right to institute criminal proceedings. The erstwhile section 18 of the Act provided for the general prescription period of twenty years, except for certain enumerated offences for which no prescription period would apply.[191] As amended by SAIA, the section now includes the Rome Statute crimes of genocide, war crimes and crimes against humanity.[192] As a result, no prescriptive period will apply with respect to these offences. This seems to be in keeping with the abhorrence with which these crimes are viewed internationally.

Viewed in the context of the other crimes provided for in the section, there does not seem to be a quantum leap that has been introduced by the latter amendment. It seems that the Rome Statute crimes may be classified as crimes against the person or property, in common with the crimes enumerated under

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[189] See The Military Discipline Code 1957 as amended by the Military Discipline Supplementary Measures Act 16 of 1999.

[190] Australia's International Criminal Court Act of 2002 follows the same trend in not criminalizing the diverging of vital information relating to her national security interests. However, a crucial backstop measure is included in the Act, which vests the Attorney General with the determination of whether or not national security interests will be compromised during the course of proceedings before the ICC. *Op cit* sections 144 to 149.

[191] These offences were murder, treason committed in times of war, robbery with aggravating circumstances, kidnapping, child stealing and rape. See section 18 of the Criminal Procedure Act 51 of 1977.

[192] *Ibid.*

the old section 18 of the Criminal Procedure Act. If one presumes that the rationale behind the non-prescription of these crimes is the protected interests that they offend against, and the sense of shock that they induce in a given society,[193] then they are very similar to the Rome Statute crimes in that respect.

3.4 Conclusion

South Africa's observance of her international obligations portrays a cautious balance between the demands of international law and the realities of the national situation. The amnesty laws that are in place to address South Africa's past best exemplify this phenomenon. Even though it has been argued in this thesis that the obligation to prosecute the human rights violations of the past is yet to develop into a rule of customary international law, there is increasing pressure to regard it as such.[194] This pressure has focused the international spotlight on the Truth and Reconciliation process being undertaken in South Africa. Therefore, the fact that the Rome Statute is silent on the issue of amnesties has not lessened this pressure.

Yet, having weathered the storm and resolved to stay the course, South Africa surely finds it necessary to demonstrate that there is the requisite resolve to ensure that such human rights abuses are punished in future. It is suggested that the enactment of SAIA may be viewed in that light. This is a paradox, because the suggestion here is that a matter upon which the Rome Statute is silent has influenced South Africa in enacting SAIA. This will be explored further in chapter four.

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[193] See chapter one, note 6.

[194] See J Dugard "Possible Conflicts of Jurisdiction with Truth Commissions" in A Cassese *et al* (eds) *The Rome Statute of the International Criminal Court: A Commentary* Vol. 1 (2002) 693 at 698.

From the foregoing discussion, it seems that very modest changes have been effected to the South African legal landscape by SAIA. The growing awareness of and willingness to embrace international law since the beginning of constitutional democracy in 1994 had already ensured seismic shifts in the way South Africa's international obligations are conceptualised. The ratification of the two Additional Protocols to the 1949 Geneva Conventions is a case in point. The fact that there is now a constitution in place[195] that provides a wide array of guarantees of human rights would seem to have provided the necessary impetus towards ratification.[196]

The role of the National Prosecutions Authority under SAIA deserves scrutiny. The traditional principles of prosecutorial independence are designed to ensure fair trials for accused persons.[197] In this sense, they are principles contrived with the individual in mind, as opposed to the interests of States as such. As principles rooted in human rights, they tend, generally, to pit the individual against the State machinery involved in the prosecution of crimes.

Naturally, the insulation of the National Prosecuting Authority from undue influence is a key ingredient in the effort to secure the Authority's

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[195] The Interim Constitution of 1993, the precursor to the 1996 Constitution.

[196] Section 12 of the Constitution, Act 108 of 1996 protects the right to security of the person. It is submitted that this enjoins the State to take all reasonable measures, including the implementation of laws, to protect this right. See, in relation to terrorism, Neethling *infra* (chapter four, note 29).

[197] Guidelines on the Role of Prosecutors, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27th August to 7th September 1990, U.N. Doc. A/CONF.144/28/Rev.1 at 189 (1990), preamble, paragraph 2.

independence.[198] The National Prosecuting Authority Act[199] provides for parliamentary oversight, as well as policy input by the Executive. By any standards, and in principle, these measures are commonplace. It is their implementation in each case that will determine whether or not the influence being exerted on the Authority is unconscionable.

However, the fact that, in terms of SAIA, the prosecution of an offence against the administration of justice may only take place at the request of the ICC is peculiar.[200] It is submitted that it is a significant attenuation of prosecutorial discretion. Offences such as contempt of court and perjury, which are covered by this provision, are punishable under South African law.[201] This boils down to the question whether the ICC is a "court" within national jurisdictions. Does SAIA create a separate and unique court within the South African judicial structure? For if it does, there is no reason in principle why offences against the administration of justice committed in South Africa should not *per se* be prosecuted in South Africa. There appears to the author to be no reason why a request by the ICC should be a precondition for such prosecution.

The above notwithstanding, it is inconceivable that section 37(2) of SAIA would be impugned on the basis that, in the context of a fair trial, it exposes the National Director of Public Prosecutions to undue influence. This section may

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[198] *Op cit* Guideline 4.

[199] Act 32 of 1998.

[200] See The Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002, section 37(2).

[201] See generally J R L Milton *South African Criminal Law and Procedure* 2 ed, Vol.II (1982) 105 to 178; J Burchell and J Milton *Principles of Criminal Law* (1991) 626 to 647; C R Snyman *Criminal Law* 2 ed (1989) 341 to 360.

therefore be characterised as a procedural norm steeped in international comity, which does not alter the substance of a fair trial.

However, it is also possible to argue that the ICC is not a "court" within national jurisdictions. For this reason, the legislature has, in its wisdom, decided not to allow the National Director of Public Prosecutions to *mero motu* prosecute offences relating to the ICC's authority.[202] Such prosecutions may only take place in South Africa on the basis of comity, which will be the guiding factor when the National Director receives a request from the ICC to prosecute. Seemingly, this is not a matter that lies within the policy competency of the National Director in terms of the National Prosecuting Authority Act.[203]

It is suggested that the role of the courts in the operation of SAIA will be crucial. The major concern will be to ensure that the Executive does not over-step the mark in its quest to honour South Africa's international commitments.[204] At the same time, however, the judiciary will be wary of interfering with the Executive in the latter's conduct of foreign relations.[205] Even though SAIA has not necessitated major constitutional or legislative amendments, its actual application may nevertheless accentuate the tension between international and national norms, often resulting in constitutional litigation. Judicial thinking seems to incline towards deferring to the Executive. In *Mohamed*[206], the Court

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[202] Cf the Canadian Crimes against Humanity and War Crimes Act [2000, c.24]. The Act does not require the ICC's request before a prosecution may be undertaken in Canada for these offences. *Op cit* sections 16 to 26.

[203] See Act 32 of 1998, section 21.

[204] See *Mohamed v. President of the Republic of South Africa* 2001 (3) SA 837 (CC).

[205] See *Kaunda supra* and *Harksen V. President of the Republic of South Africa* 2000 (2) SA 825 (CC).

[206] *Supra.*

considered that the removal of an individual to a jurisdiction in which he faced the death penalty was unconstitutional. However, the applicant was already outside South Africa, and there was little the Court could do to vindicate his right. In *Kaunda*[207], the applicants were similarly outside the jurisdiction of South African courts, and the Court declined to apply the South African constitution extra-territorially. In *Thatcher*[208], despite the applicant's presence in South Africa, the Court was unimpressed by the argument that the applicant's prayers should be granted since he stood to suffer the death penalty upon conviction. Given that the ICC will have no power to impose the death penalty, it is submitted that there is no reason to expect that the courts will demur from the policy of cooperation with the ICC.

The Constitutional Court in *State v. Basson*[209] has, *obiter*, endorsed the policy of cooperation with the ICC. That case was an appeal in a case in which the respondent had been charged before the trial court with various counts of murder, fraud, and conspiracy to commit various other crimes outside the South African borders. One of the questions which the Constitutional Court had to decide was whether the failure of the Supreme Court of Appeal to have regard to South Africa's international obligations as mandated by the constitution in deciding whether or not to quash certain charges laid against the respondent, was a constitutional issue. This issue was raised *in limine*.

The Court held[210] that the duty to prosecute those involved in grave breaches of humanitarian law was rooted in customary international law, and that failure to

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[207] *Supra.*

[208] *Supra.*

[209] 2005(1) SA 171 (CC).

[210] Supra per Sachs J at paragraph 126 of the judgment.

consider this obligation constituted a constitutional issue. [211] The Court was keen to emphasize that courts of law must always take into account South Africa's international obligations, and that South Africa was definitely under an international obligation to prosecute the perpetrators of such abuses.[212] This decision indicates that the Constitutional Court considers the right to prosecute as being an established one at international law. However, what distinguishes this decision from *AZAPO*[213] is that the latter dealt with a compromise which had been explicitly sanctioned by the constitution. This position, though undoubtedly a painful one, simply had to be accepted.[214]

The "carrot–and-stick" mechanism that underlies the principle of complementarity envisages a situation of anarchy and lawlessness in which it will operate.[215] That situation clearly did not exist in South Africa between the period 1994 and 2002 when SAIA was enacted. The "internal logic" of the South African legal system has therefore largely been unaffected by SAIA.

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[211] *Supra*, paragraph 127 of the judgment.

[212] See also *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA)* 1986 ICJ 14 at paragraph 220.

[213] *Supra* (page 75 above).

[214] *S v,Basson supra* at paragraph 118 of the judgment.

Chapter Four

A RATIONALIZATION OF SOUTH AFRICA'S IMPLEMENTATION OF THE ROME STATUTE

"I believe there is no more important problem in the social sciences, and none that is more difficult. Understanding why people cooperate and trust one another may be the first step toward bringing about more cooperation and trust"[1]

4.1 Introduction

As has been seen above, SAIA's provisions largely accord with those of the Rome Statute of the ICC. However, what has equally clearly emerged from the foregoing discussion is that States' compliance models vary according to their preferences and specific situations. The crucial task is to examine, in the specific case of South Africa, the impulses that have led to the choices reflected in SAIA. This rationalization process would have to be undertaken against the background of the general legal system as discussed in the previous chapter. This would assist one in better understanding how best international law precepts may be applied in South Africa.

The positivistic overtones of the complementarity regime pose a major challenge for the international law enforcement enterprise.[2] The structure and powers of the ICC, as previously described, make it likely that non-cooperation with the ICC will be encountered. It seems, however, that, in the actual implementation of the Rome Statute, States have tended to infuse into their legislation comity-based

[1] J Elster *Rationality, Morality and Collective Action* (1985) 141.

[2] See Kaul *loc cit* (chapter one, note 18 above).

provisions, perhaps to minimise the chances of conflict with the ICC. Hopefully, this consensual-based approach will ensure the smooth operation of the principle of complementarity.[3]

This chapter seeks to evaluate the obligatory nature of the Rome Statute of the ICC within the South African context. More particularly, it poses the question whether, and to what extent, the principle of complementarity has influenced the enactment of SAIA. In doing so, it is, of course, instructive to recall the observation that entirely non-legal considerations may influence a State's actions.[4] The motivations for the enactment of SAIA may indeed turn out to be wholly political. However, as will be argued, this does not preclude one from extrapolating the legal significance of those considerations. It is hoped that the discussion in this chapter will reveal the broad policy concerns of the legislature in enacting SAIA, and in what way these correlate with complementarity.

One of the abiding features of the enactments discussed above is that the South African Foreign Affairs Ministry only sparingly gets involved in criminal justice matters. The bulk of these matters are handled by the Justice Ministry, which also often acts as the interface between the Republic and foreign States.[5] In reality, however, there must be a high level of consultation between the two ministries, especially where relations with foreign States are likely to be affected by any decision made.

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[3] However, see Diehl *loc cit* (chapter two, note 74 above) on the pitfalls of consensualism, and what other factors ought to be taken into account in evaluating a State's compliance with a treaty.

[4] See Henkin *op cit* (chapter one, note 82 above) at 39 to 40.

[5] See the Extradition Act and the International Cooperation in Criminal Matters Act discussed in chapter two above.

Furthermore, the role of the Judiciary in shaping foreign relations is evident from the previous chapter. Far from being a passive spectator to the machinations of the Executive in such matters, the Judiciary is in some instances quite proactive in checking excesses of power. In other instances, legislation mandates judicial officials to be in direct contact with officials of other States with regard to the provision of evidence and the apprehension of suspects.[6] This is particularly so in what are termed "cases of emergency".[7] Apart from these specific cases, however, the judiciary seems to tread carefully in matters concerning foreign relations, often deferring to the wisdom of the Executive.[8] Decisions such as *Harksen*[9] and *Kaunda*[10] are emblematic of this tendency.[11]

This thesis now investigates the role of other factors in the implementation of SAIA. Three main issues are discussed: First, is there a possibility, in law, of South Africa being held liable for damages arising out of international crimes, and is that an important factor in implementation? Second, are there underlying benefits to the implementation of the Rome Statute that have influenced South

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[6] *Ibid.*

[7] See, for example Act 75 of 1996, section 2 (4) (a), discussed at page 81 above.

[8] See E Benvenisti "Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts" (1993) 4 EJIL 159.

[9] *Harksen V.President of the Republic of South Africa* 2000 (2) SA 825 (CC).

[10] 2004 10 BCLR 1009 (CC).

[11] See generally E Benvenisti "Judges and Foreign Affairs: A Comment on the *Institut de Droit International*'s Resolution on 'The Activities of National Courts and the International Relations of their State' " (1994) 5 EJIL 1 at 2 (National courts have consistently refused to be the custodians of international law, especially where they deem that its application is inimical to national interests). For a South African perspective, see R C Blake "The World's Law in One Country: The South African Constitutional Court's Use of Public International Law" (1998) 115 SALJ 668.

Africa in the enactment of SAIA? Is the enactment of SAIA a conscious design to insulate the South African Judiciary from the systems of international law, thus preserving the core characteristics or "internal logic" of South Africa's legal system? Lastly, what is the role of South Africa's human rights ethos in the enactment of SAIA?

4.2 Civil Liability for International Crimes

While the individual's criminal liability for international crimes is now well established and widely accepted in international law,[12] the same cannot be said of States' criminal liability. States are still incapable, in law, of committing crimes.

Civilly, however, States may be liable in damages to other States or individuals for failing to take decisive steps to curtail such crimes.[13] As has been pointed out above, all of the international crimes set out in the Rome Statute offend against *jus cogens* norms in international law. As a result, each State Party owes every other State Party a duty to ensure that, at the very least, such acts are outlawed within its territory.

Is the above consideration a catalyst for implementation? It seems to the author that criminalizing or outlawing an act diminishes the risk of liability for that act, principally through deterrence.[14] The act of criminalization may also reduce a

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[12] See the Nuremberg Principles, discussed at pages 3 and 4 above.

[13] See generally J F Murphy "Civil liability for the Commission of International Crimes as an Alternative to Criminal Prosecution" (1999) 12 *Harvard Human Rights Journal* 1. The phenomenon of holding governments liable for international crimes has particularly proliferated in United States courts. *Op cit* at 32.

[14] But see K D Krawiek "Cosmetic Compliance and the Failure of Negotiated Governance" (2003) 81 *Washington University Law Quarterly* 487 at 489 to 490 (criticises the use of "internal compliance structures"

State's moral blameworthiness in the event of a civil suit.[15] Therefore there are two levels of discourse; at the global level, general deterrence helps to pre-empt a crime that is of concern to the "international community". At the State level, costly civil suits arising from the commission of these crimes are avoided.

It seems to the author that there is a nexus between civil liability and implementation. For instance, it was only after Bosnia-Herzegovina took the former Yugoslavia to the ICJ for alleged genocide that the latter incorporated the Geneva Conventions into its own law.[16] The Convention had been in place since 1951, but no steps had been taken to implement it. Finally, on 12th march 2001, the former Yugoslavia acceded to the Convention.[17] It is submitted that the fact that Bosnia-Herzegovina had brought a claim at all may have influenced the decision to accede.

The ICJ, mainly on jurisdictional grounds, dismissed the claim. Bosnia-Herzegovina had alleged that the former Yugoslavia had breached its international obligations towards her during the years 1992 and 1993, when the latter's officials presided over acts of genocide in the territory of the former. However, the Court inquired whether the Genocide Convention[18] bestowed

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in Corporate America as a liability determinant. At 491, the writer argues that there is little evidence to suggest that the use of these mechanisms has deterred prohibited conduct within organizations).

[15] Krawiek *ibid* alludes to the "extraordinary" favourable legal treatment that organizations with these internal structures receive.

[16] See *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Judgment of 11th July 1996* (Preliminary Objections), I.C.J. Reports 1996, p.595.

[17] See United Nations, *Treaty Series*, Vol. 78 p.277.

[18] Convention on the Prevention and Punishment of the Crime of Genocide, GA Res 260 A (III) of 9 December 1948.

rights upon States *qua* States, thereby enabling them to base their claims against other States thereon.

In the Court's opinion, this is not so. The Convention was *sui generis* in that it imposed upon States obligations towards humanity, not towards individual or specific States *per se*. In the Court's reasoning:

"The failure of any Contracting Party 'to prevent and punish' [genocide] may only be rectified and remedied through (i) resort to a competent organ of the United Nations…or (ii) resort to an international penal Tribunal, but not by invoking the responsibility of States in inter-State relations before the International Court of Justice".[19]

The Court further observed that, even if it were to be assumed that officials of the former Yugoslavia were guilty of genocide within the Applicant's territory, this alone did not amount to a "dispute" between the parties that would have enabled the Court to be seized of the matter.[20]

Would the same outcome be arrived at if the interpretation of the Rome Statute's provisions were at issue? It is submitted that an occasion would never arise for the ICC to consider the matter in the first place, as it has no jurisdiction over States, criminally or civilly.[21] Similarly, the ICJ is likely to decline jurisdiction

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[19] *Op cit* at 623.

[20] It is humbly suggested that the above reasoning is sound. Given the nature of the crime of genocide, which often strikes at the very existence of humanity, it is submitted that the interests at stake are far too significant to be identified with a particular State. Through acts of genocide, the values of humanity as a whole are under siege.

[21] Rome Statute (*op cit*) Article 1 (The Court shall have "jurisdiction over persons for the most serious crimes of international concern"). It has been argued that reference to "persons" implies "natural persons". See M Frulli "Jurisdiction *Ratione Personae*" in A Cassese *et al* (eds) *The Rome statute of the International Criminal Court: A Commentary* (2002) 527 at

over any such matter. As all Rome Statute proscriptions are based upon *jus cogens* norms, the standing of individual States to sue for reparation in respect of these crimes is highly doubtful, given the reasoning in the *Application of the Genocide Convention* case.[22]

In the final analysis, therefore, such claims for reparation would have to be brought before national courts. However, the prospects for the success of such claims is a separate matter altogether. For the purpose of this study, it is proposed that a distinction be made between two strands to the enquiry regarding the prospects of success: The first relates to claims before South African courts against the South African Government. The second relates to claims brought in foreign jurisdictions against the South African Government. The second category is outside the scope of this study, as the study is specifically concerned with the attitudes of South African courts.[23]

As for the first category of claims, the author is unable to find any precedent for these. Issues such as the South African occupation of South West Africa (Namibia) in the 1970s, and South Africa's "hot pursuit" operations in the territories of neighbouring States during the Apartheid years, have not

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532. It is respectfully submitted that this view is incorrect, and that the inclusion of juridical persons in this formulation would present insurmountable difficulties relating to the Rome Statute crimes.

[22] See note 16 above.

[23] However, where South African courts are called upon to assist in such matters, the protection of national interests is an important concern. Thus in *Minister of Water Affairs and Forestry and Others V. Swissborough Diamond Mines (PTY) LTD and Others* 1999 (2) SA 345 (T) it was affirmed that the principle of absolute sovereign immunity is part of South African law. Thus, the Court declared invalid a *subpoena* issued under section 7 of the Foreign Courts Evidence Act 80 of 1962, requiring South African State officials to produce certain evidence before Lesotho courts. In the Court's reasoning (at 352) this provision does not bind the State and its officials.

engendered any such claims. Perhaps this should hardly be surprising, given social attitudes in South Africa as revealed by research. A survey conducted under the auspices of the Centre for the Study of Violence and Reconciliation indicates widespread support for the Namibian occupation within the white section of the South African population.[24] This is despite unequivocal condemnation by the United Nations.[25]

Similarly, the "Apartheid suits"[26] commenced in the United States against companies that allegedly supported the Apartheid regime have been criticised by the South African Government as being counter-productive and going against the ideals of reconciliation.[27] It is suggested that, were these suits to be instituted in South Africa, they would most likely encounter similar reactions by the Judiciary.[28] Judicial attitudes towards the "Apartheid suits" are likely to reflect

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[24] See G Theissen "Between Acknowledgement and Ignorance: How White South Africans have Dealt with the Apartheid Past" *Centre for the Study of Violence and Reconciliation* available at http://www.csvr.org/papers/papgt6.htm (accessed 29/08/2004).

[25] General Assembly A/RES/S-14/1 (20th September 1986).

[26] In June 2002, a group of black South Africans instituted an action against several defendant multi-national companies, including Credit Suisse and Citi Group. The defendants are alleged to have financed the former apartheid regime, which in turn allegedly violated the plaintiffs' fundamental rights. The claim was brought under America's Alien Tort Claims Act of 1789, which reads: "The District Courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States" (28 U.S.C. SS 1350).

[27] Mr. Joel Netshitenzhe, the South African Government spokesperson, has been quoted as saying that the case "has profound effects for the future of the country, for instance for the assessment of the country risk profile, and for investment and job creation. See http://www.episcopalchurch.org/3577_27367_ENG_HTM.htm (accessed 11/9/2004).

[28] The task of examining the crucial role that the Judiciary plays in consolidating social and political order has fallen to legal sociologists. To some, judges are loath to be seen to disturb any sense of order through their judgments. See, for example, R Cotterrell *The Sociology of Law: An Introduction* (1992) 234. See also E Benvenisti "Judges and Foreign

the Constitutional Court's stance on the alleged duty in international law to prosecute the perpetrators of past human rights abuses.

By parity of reasoning, a civil suit against the South African Government in respect of the Rome Statute crimes is unlikely to yield much. The reason for this contention is twofold: since the Rome Statute creates no enforceable rights for individuals, SAIA falls to be interpreted in the same vein, such that individuals may not sue the Government purely on the strength of its provisions. Persons living in South Africa would probably have to rely on the common law regarding delict, provided they satisfy its requirements.[29] Moreover, a civil suit by a non-resident would likely be viewed as an attempt to enforce extraneous values within the South African legal system.

Given the above, the prospects of success for such suits in South Africa are bleak. However, this is not to suggest that the possibility of a suit being *instituted* in South Africa is not a factor that would influence implementation of the Rome Statute. As in the case of the former Yugoslavia, perhaps the negative publicity that such suits inevitably entail, especially for a nation wishing to embark on reconstruction, is a major factor.

Affairs: A Comment on the *Institut de Droit International*'s Resolution on 'the Activities of National Courts and the International Relations of their State' "(1994) EJIL 1 at 3.

[29] That is, the normal delictual grounds of liability. Generally, liability for an omission does not arise unless the omission is wrongful, and there exists a duty of care towards the plaintiff. See *Minister Van Polisie V. Ewels* 1975 (3) SA 590 (A) at 596-597. See also J Neethling "Aspects of Delictual Liability for Acts of Terrorism" (2003) 120 SALJ 90 at 100.

4.3 Benefits of Implementation

The ICC is an international institution with wide-ranging membership. What, however, needs to be determined, is the underlying rationale behind membership in the institution. From the preceding discussion, the ICC certainly manifests the hallmarks of a rule-imposing, rather than benefit-conferring, entity. This issue is further explored here below.

According to Henkins, "every nation derives some benefits from international law and international agreements".[30] This postulate is advanced by the learned writer within the context of explaining why States enter into international agreements, thereby limiting their own freedom of action. Since this freedom is limited across the board for all States concerned, "one nation gets others to behave as it desires".[31]

A variant of Henkins' argument is advanced by Rawls,[32] according to whom "when an institution creates benefits through the voluntary cooperation of its members, those who share in the benefits have an obligation to support the institution".[33] Therefore, the voluntary act by which a State becomes a party to a treaty ought to ensure observance by that State. The use of the phrase "creates benefits *through* the voluntary cooperation" appears to imply that Rawls considers that an agreement arrived at through voluntary cooperation *ipso facto* confers benefits.

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[30] Henkins *op cit* at *29.*

[31] *Ibid.*

[32] See J Rawls "Legal Obligation and the Duty of Fair Play" in S Hook (ed) *Law and Philosophy* (1964) 23.

[33] *Ibid.*

However, it is respectfully submitted that the above arguments are too consensualist-oriented and ignore the value-laden nature of State action. In the first place, Henkins' postulate, while it may be true of some agreements, does not apply to all. For agreements such as the Rome Statute, one certainly has to examine the exigencies leading up to their conclusion. It is further submitted that the Rome Statute is not so much a pact between the States Parties *inter se,* as it is an arrangement between the States Parties and the ICC, spelling out the conditions under which States will continue to exercise their right to prosecute international criminals. It represents a sort of compromise between the ICC and the States Parties, aimed principally at ameliorating the effects of the impunity atmosphere that existed prior to the Rome Statute coming into force. The *motivation* for States entering the agreement was purely to ensure that they would always be able to prosecute international crimes, thus keeping the ICC at bay.[34]

Moreover, the argument that appears to be advanced by Rawls overstretches the significance of "benefits" in international agreements. According to the Vienna Convention on the Law of Treaties,[35] a State can plead coercion and therefore escape the obligations of a treaty if "its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations".[36] In practice, very few treaties can be invalidated on this ground, meaning that most treaties are entered into voluntarily. However, this cannot be taken to mean that all treaties entered into

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[34] International relations theory presumes "self-interested, purposive and calculated behaviour by States". See A A Stein *Why Nations Cooperate: Circumstance and Choice in International Relations* (1990) 10.

[35] The Vienna Convention on the Law of Treaties, signed at Vienna 23 May 1969 (1155 UNTS 331).

[36] *Op cit* Article 52.

voluntarily provide benefits for the signatories. As has been seen in relation to the maxim *pacta sunt servanda,* a wider enquiry ought to be undertaken as to the legitimacy that an agreement enjoys in the estimation of a specific State.[37]

In relation to the Rome Statute, it is submitted that the State players consist of what may be termed "relevant States"[38] with respect to international crimes. These are States whose interest in the prevention and punishment of international crime is relatively higher, by dint of having either experienced strife first hand or borne the brunt of refugee influxes as a result of atrocities committed elsewhere. South Africa is a fitting example, given the human rights abuses that characterised the Apartheid era. For such a State, there is much more at stake when the decision as to whether and how to implement the Rome Statute is made.

While the characterization of some States as "relevant" heavily implies the inequality of States in decision making and policy formulation on the international plane,[39] it also serves to underscore the varying interests of States in

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[37] See Diehl *loc cit* (Chapter two, note 73 above).

[38] This expression is adapted from the phrase "pertinent States" as employed by C L Carr and G L Scott "Multilateral Treaties and the Environment: a Case Study in the Formation of Customary International Law" (1999) 27 (2) *Denver Journal of International Law and Policy* 313, within the context of the formation of customary international law. At 317, they define pertinent States as "...those States whose participation in a treaty is required if the treaty is to have real meaning and a real chance of achieving its intended objective".

[39] See Carr and Scott *op cit* at 318: "One might object that, by placing such great weight on pertinent states in determining whether multilateral treaties create instant custom, we turn efficacy into a condition of lawfulness.... One might wonder, however, about the significance of thinking that an efficacious treaty should obligate states whose people have less at stake with regard to the regulations in question".

any given agreement.[40] States are self-interested entities, and will seek to foster those interests through the agreements they enter into. Indeed, the very idea of a "consensus" relative to an agreement suggests a compromise, often arrived at after much haggling and shifting of goal posts.

As regards the range of options available to States implementing the Rome Statute, these have been alluded to in the previous chapter. It has been suggested that South Africa's preferred option, as a whole, is one that preserves the military disciplinary structures provided for by legislation,[41] subjects the national prosecution machinery to a measure of external scrutiny insofar as the prosecution of international crimes is concerned,[42] and disaffirms the existence of any absolute duty in international law to prosecute the perpetrators of past atrocities.[43] The Constitutional Court's decision in *S v Basson*[44] seems to point to the fact that a State may choose to pursue prosecutions for past atrocities. The facts of this case are distinguishable from the facts in *AZAPO* in that, in the former, Basson did not apply for amnesty before the Truth and Reconciliation Commission (TRC). The decision to prosecute is not due to obedience to the behests of international law.[45]

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[40] *Ibid.*

[41] See Military Disciplinary Code 1957.

[42] See Act 27 of 2002.

[43] See the *AZAPO* case (*supra*) discussed at page 75 above.

[44] *Supra.*

[45] The Constitutional Court in *AZAPO* (*supra*) did not invoke any comparable foreign case law. This is in contrast to the *Makwanyane* decision *supra* in which foreign case law was widely cited. This apparent inconsistency may perhaps be explained on the basis that *AZAPO* more directly involved the interests of the State, touching on national security issues. On the other hand, *Makwanyane* entailed the right of an individual as against the State. Benvenisti *op cit* (note 8 above) at 4, rationalizes this matter thus: "Whereas the government tolerates its own litigation losses in the domestic legal sphere, since these very defeats

4.4 Human Rights and Implementation

Whilst it is true that the Rome Statute creates obligations principally for States, individuals, too, acquire obligations under the Statute, mainly in the form of the duty not to engage in acts of genocide, war crimes and crimes against humanity. These obligations, in turn, implicate the individual's rights, making these rights significant in the implementation process.[46]

As a result, the Rome Statute cannot be viewed as simply another treaty entailing purely State obligations. States ought to pay special regard to the manner in which they define crimes under their implementing laws and the manner in which suspects and witnesses are dealt with within the established legal structures. This, it is suggested, is the context in which authoritative rulings have been sought from several constitutional courts regarding the implementation strategies of the respective States.[47]

How might a State's human rights ethos affect the decision whether or not to implement the Rome Statute? It is suggested that implementation may be as a logical result of the State's having subscribed to any major human rights instrument(s). Such instruments then provide an occasion and basis for a State to

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prove the overall soundness of the national legal system, it has no interest in a defeat in the courtroom in the name of the international legal order". Therefore, in cases involving governmental action with international implications, courts will often apply municipal law in such a way as to further the Executive's policy in the matter. *Op cit* at 5.

[46] See D C Clarke "China's Legal System and the WTO: Prospects for Compliance" (2003) 2(1) *Washington University Global Studies Law Review* 97 at 100 to 102 (points out that the Chinese official view has always been that international law automatically becomes part of domestic law. He further observes that this view was preponderant in an era when all international obligations were State obligations and private rights were not involved. The writer, however, argues that this view is less convincing now that the majority of international obligations are beginning to impinge on private rights).

[47] See chapter two, pages 49 to 51 above.

enact the Rome Statute. This sets the State on a course of what may be termed "implementation inertia". Of course, this begs the question whether there are innate qualities of the Rome Statute that align it to the major international human rights instruments. If so, are these similarities sufficient to assure implementation without calling to aid the principle of complementarity?

Certainly, a look at an international instrument such as the International Covenant on Civil and Political Rights[48] (ICCPR) of 1966 makes clear the range of Covenant rights that would be infringed in situations of genocide, war crimes and crimes against humanity. The very basis for the protection of the right to life, for instance, would cease to exist in such circumstances. Under the Torture Convention,[49] too, the rights protected would be under jeopardy.

Indeed, the preamble to the Rome Statute echoes the dire episodes that have resulted in massive violations of human rights, such as the two World Wars.[50] States Parties to the Statute affirm their determination to ensure that such egregious violations are put to an end. The significance of this section of the preamble is the belief that, in order to enhance the protection of human rights, the Rome Statute is a necessary tool.

The decision to implement the Rome Statute may be purely as a result of the concept of "auto-challenge", whereby States, on their own volition, set for themselves human rights standards that they should meet.[51] States do so because

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[48] International Covenant on Civil and Political Rights, UNTS No.14668, Vol.999 (1976) 171.

[49] See Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Doc A/39/51 (1984), entered into force June 26 1987.

[50] See Rome Statute (*Op cit*) preamble, paragraph 2.

[51] See D P Forsythe *The Internationalization of Human Rights* (1991) 43.

of the belief in the innate qualities of these standards, thus no external agency is necessary to inspire compliance.[52] In Forsythe's view, although States "are pressured in various ways to implement human rights standards, but in a formal sense they have initially challenged themselves to meet those standards".[53] This initial consent serves to undercut the State's role as sole determinant of what its human rights policies should be.[54]

Forsythe's view therefore recognises the limited value of "initial" State consent, as it rightly implies that other forms of pressure may be brought to bear upon a State. It is submitted that, to an extent, this idea dovetails with that of Diehl who, as has been seen, questions consensualism as the basis of international obligation. However, unlike Forsythe who seeks to rely on "pressure" (implying external influence), Diehl suggests factors internal to the State that would tend to explain the apparent readiness by States to be bound by international agreements. These relate to the legitimacy that States ascribe to the international system as a whole, and to particular international instruments.[55]

One of the factors suggested by Diehl is the degree to which a State would be willing to overlook violations by other States of the obligations embodied in an

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[52] As stated by Judge Weeramantry in the *Application of the Genocide Convention* case (*op cit)*, "there is not even the semblance of a suggestion in contemporary international law that [human rights] obligations amount to a derogation of sovereignty".

[53] Forsythe *op cit* at 44.

[54] *Op cit* at 43.This phenomenon has been attributed to the fact that international law is no longer an "subject-centred" system but a "actor-centred" one. See F Schorkopf and C Walter "Elements of Constitutionalization: Multilevel Structures of Human Rights Protection in General International and WTO-Law" (2003) 4(12) *German Law Journal* 1359 at 1362.

[55] Diehl *loc cit.*

agreement. It is to be expected that where an agreement embodies *jus cogens* norms, the violation of any obligations provided for would attract absolute censure. The Rome Statute being such an agreement, it seems that its implementation is almost guaranteed solely by virtue of that fact. This aspect also brings into sharp focus the international relations function of human rights instruments, as States increasingly define their relations *inter se* on the basis of the protection mechanisms they adopt.

South Africa's re-entry into the international fold after years of isolation would have been a perfect opportunity to define her international relations for a new era. On the 10th December 1998, a decisive step was taken: South Africa ratified the ICCPR[56] and the Torture Convention[57], and acceded to the Genocide Convention.[58] This crucial step placed South Africa on a moral pedestal in the international sphere. The clear message being sent out was that her foreign policy will henceforth be conducted within the bounds of the respect for human rights. It would have been self-defeating not to follow this trend through with the implementation of the Rome Statute. This highlights the inertia of implementation alluded to earlier. The significant point here is that the implementation of the Rome Statute was both strategic and inevitable, given the foreign relations dimension.

Moreover, the Rome Statute's import in terms of attenuating State sovereignty in the sphere of human rights is minimal.[59] As a human rights instrument, the

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[56] See note 48 above.

[57] See note 49 above.

[58] Convention on the Prevention and Punishment of the Crime of Genocide, GA Res 260 A (III) of 9 December 1948.

[59] See note 52 above.

Rome Statute makes no major dents on the treasured fabric of State sovereignty (although as a procedural instrument it does). There are no reporting mechanisms in place, or the individual complaints procedure characteristic of several other international human rights instruments.[60] As a purely procedural instrument designed to ensure cooperation between States, however, the Statute may have far-reaching implications, or at least may be seen by national judiciaries as having such an effect.[61]

Therein lies the paradox. As discussed earlier, whether an instrument is perceived as having its roots in positive law or natural law affects the manner in which the obligations thereunder are observed. The Rome Statute has the intriguing distinction of being steeped in both. Whilst States, on their own accord, may see the virtue in implementing the Statute, the complementarity aspect of the Statute seeks to impose a regime on them. The inclination to respect international human rights is characteristic of a trend in which States see themselves as actors rather than subjects within the international legal structure.[62] The result is that States may, quite willingly, implement the Rome Statute on principled grounds. However, through the operation of the carrot-and-stick mechanism that is the hallmark of complementarity, there is likely to be a disjuncture between expectation and reality, as States that are adjudged unwilling or unable to prosecute, begin to feel the rigours of the complementarity process, and to question the exact circumstances in which the *desiderata* in Article 17 of the Rome Statute should apply.

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[60] See, for example, the ICCPR *op cit* Article 40 (reporting); First Optional Protocol to the ICCPR (1966) Article 1 (individual communications).

[61] In the realm of enforcement, the views that count are those of court officials. See Clarke *op cit* (note 46 above) at 102.

[62] See note 54 above.

As was argued earlier, one of the major assumptions of the principle of complementarity is its own ability to ameliorate the effects of impunity. The principle has been put forward as a reversal of the anarchical state of affairs, in which States have failed to comport themselves in accordance with the basic tenets of humanity. Yet, through the concept of human rights in international law, States, independently of the principle of complementarity, have realised the need to implement international instruments that have significance in the area of human rights, as a tool in foreign relations. Of course, whether or not such implementation bears fruits in the actual practice of States remains to be seen.

Regarding the State's concerns in the implementation of international human rights instruments, these tend to be at variance with the individual's expectations. Therefore, under the complementarity concept, the principle of the independence of justice as protected under the ICCPR may be in jeopardy.[63] As has been pointed out,[64] the incompatibility between the two may arise from a provision within a State's constitution. The main concern here is that accused persons should only be tried by courts established by law. *Ex facie*, a mechanism by which a body other than the courts established by law tries an accused person is unlawful. Even though SAIA establishes a mechanism for cooperation with the ICC, the fact of the matter is that SAIA does not establish the ICC.

[63] See Article 14 of the International Covenant on Civil and Political Rights (1966).

[64] See chapter two, note 89 above.

4.5 Conclusion

The process of implementing the Rome Statute involves both political and legal considerations, and the weight accorded to each varies from State to State. The main consideration is the value of implementation to the internal legal order. Any major reconfiguration of this order is unlikely to be countenanced.[65]

The Rome Statute's proper taxonomy in terms of the natural law/positive law dichotomy is difficult to ascertain. The principle appears to be steeped in both schools of law in particular respects. However, it seems that, in its complementarity aspect, it is positive law-oriented. This may affect the way States understand their obligations under the Statute, especially as regards their relationship to, and cooperation with, the ICC. The threat of loss of curial power is an integral part of the mechanism by which compliance is ensured. To be fair, however, this carrot-and-stick mechanism has been touted as a catalyst for, not the cause of, compliance.[66]

Naturally, therefore, other factors come into play in rationalizing the compliance model of any particular State. In the case of South Africa, her particular history and legal system may explain the kind of compliance model she has chosen. This is in keeping with the general observation that compliance will vary from State to State. However, it has also been demonstrated that complementarity may have a very limited role to play in influencing compliance. South Africa, at the time of enacting SAIA, had already acquired obligations under the major instruments on

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[65] See I Tallgren "The Sensibility and Sense of International Criminal Law" (2002) (13) (3) EJIL 561 at 564 to 566. See also E Orucu "An Exercise in the Internal Logic of Legal Systems" (1987) 7 (3) *Legal Studies* 310 at 311 to 312.

[66] Kleffner *op cit* (chapter one, note 39 above) at 89. See also Newton *infra* (chapter five, note one above) at 32.

human rights and humanitarian law. It has been suggested that the enactment of SAIA was a logical conclusion to this process.

There is a distinction between the decision as to whether or not to comply on the one hand, and the kind of compliance model to adopt. In the case of the former, the decision involves broad policy considerations including compatibility with the constitution.[67] It also involves enquiring into the actions of the "relevant States" in the field that is the subject matter of legislation. Should such States decide to implement, then the indication is thereby given that the considering State should implement, in the interest of diplomatic relations with such States. This would seem to be a purely foreign policy decision, because the consequences of not complying would be unpalatable.[68]

Therefore, if South Africa had, in principle, decided not to implement the Rome Statute, this would probably have undercut her influence on the African continent, especially with such "relevant States" as Rwanda and Burundi. These States have been through the throes of civil strife, and continue to suffer from the effects thereof. South Africa's hand at diplomacy in these States is all the more strengthened if she demonstrates her will to fight international crime. One way to do that is to implement the Rome Statute.[69]

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[67] See H Duffy "National Constitutional Compatibility and the International Criminal Court" (2001) 11 *Duke Journal of Comparative and International Law* 5 at 6.

[68] With the deployment of South African troops in Burundi and the Democratic Republic of Congo (DRC) to help in peacekeeping efforts, South Africa cannot be seen as a serious peace-broker if she remains outside the Rome Statute framework. This is the problem that the United States of America finds itself in following her repudiation of the Rome Statute. See K K Schonberg "The General's Diplomacy: U.S. Military Influence in the Treaty Process, 1992-2000" (2002) *Seton Journal of Diplomacy and International Relations* 68.

[69] South Africa's strategic interest in deploying troops to other African countries lies in the expected upholding of regional and national

The obligation on States Parties to cooperate with the ICC, as has been contended, entails the obligation to enact the substantive norms of the Rome Statute. Therefore, the proscription of the crimes of genocide, war crimes and crimes against humanity within the national system leaves a State with no choice but to submit to the higher authority of the ICC. The latter then ensures that the State's prosecution of the aforesaid crimes is above board, through the "threat" of intervention in case of default. This serves to demonstrate the State's *bona fides* in the prosecution of these crimes.

However, as has been demonstrated, there is a more fundamental reason behind the decision to render the aforesaid acts punishable within the national justice system. In the case of South Africa, a pre-existing constitutional order favourable to, and requiring, the protection and upholding of human rights is a key factor. This "auto challenge", coupled with the role of human rights in South Africa's foreign policy, has contributed to the decision to implement. As will be pointed out, though, a different significance may be attached to the principle of complementarity. This is that, rather than ensure that most trials for international crimes take place at the State level, it may actually increase the role of the ICC in the municipal order, much to the chagrin of States.

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security. See, for example, S Grunau "Negotiating Survival: the Problem of Commitment in U.S.-North Korea Relations" (2004) 15 *Journal of Public and International Affairs* 99.

Chapter Five

SUMMARY AND CONCLUSIONS

"Complementarity is in theory an impartial, reliable, and de-politicised process for identifying the cases of international concern, hence international jurisdiction. However, the thicket of subjective provisions designed to implement complementarity allows treaty opponents to argue that national justice systems are threatened with displacement…."[1]

5.1 Summary

The establishment of the ICC heralds the beginning of a complex relationship between it and States Parties to the Rome Statute. The process of inaugurating the ICC has, without doubt, been an exhausting one in terms of energy and diplomacy. It has also been long in coming. The compromise reached by the States Parties to the Rome Statute underscores these efforts.

The principle of complementarity, the organising principle of the ICC, is an integral part of the functioning of the ICC. It is an innovation designed to ensure that the ideals espoused in the Rome Statute are realised. The projected *modus* for achieving this goal is that States will, by themselves, *without fail* prosecute those who are suspected of having committed certain crimes that are deemed to be of grave concern to the international community. This will put a timely end to a streak of unfortunate episodes in the history of mankind, characterised by arrant

[1] M A Newton "Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court" (2001) 167 *Military Law Review* 20 at 73.

impunity and political shoe shuffling on such an important matter as grave breaches of human rights.[2]

The exercise by States of universal jurisdiction over suspected international criminals has been an important tool in the quest for justice against international criminals.[3] However, serious obstacles, owing to the fact that the existing and emerging jurisprudence on universal jurisdiction is unsynchronised, have beset this device.[4] In the final analysis, it has always been up to individual States to decide whether or not to prosecute. In the process of States deciding whether or not to prosecute, they have sought to perpetuate their own parochial interests, and thus produced a limping jurisprudence that has hardly helped to solve the problem.

However, with the added impetus of an International Criminal Court with jurisdiction over individuals suspected of committing international crimes, States seem to have awakened to the reality that they are no longer the sole determinants of the fate of such individuals. These States have now submitted to a mechanism through which their *bona fides* with regards to the prosecution of these individuals will be determined. The purpose of such a determination, however, will no longer be the hortatory condemnation of the defaulting State. The ICC will take over specific cases and prosecute them as a remedial measure,

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[2] Rome Statute *op cit*, preamble, paragraph 2.

[3] See Amnesty International *14 Principles for the Effective Exercise of Universal Jurisdiction* (1999) AI Index IOR 53/01/99.

[4] See Princeton University Program in Law and Public Affairs, *The Princeton Principles on Universal Jurisdiction* (2001). Even the International Court of Justice has on occasion failed to lead the way in developing this jurisprudence. In *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo V. Belgium)*, judgment of 14 February 2002, the Court effectively held that a Minister of Foreign Affairs enjoys full immunity when abroad, regardless of whether the alleged acts were performed in a private or official capacity.

at the expense of the concerned State. In this paradigm, the ICC and States Parties to the Rome Statute are placed in a position of competition with each other over jurisdiction. This has already been referred to as the theory of competing rights.

The evolution of the principle of complementarity suggests a marked shift from the traditional modes of enforcement of international law. Given the dearth of effective prosecutions prior to the advent of the Rome Statute, there does appear to have been consensus at the Rome Conference that these traditional modes would no longer suffice for purposes of ending the culture of impunity. Sanctions, for instance, appear not to have been effective in bringing about prosecutions.[5] What, however, are the prospects for success of the "carrot-and-stick" mechanism of complementarity? What are its implications for the relationship between the ICC and State Parties? More importantly, to what extent does complementarity compel a change, seismic or otherwise, in the national laws of State Parties?

To arrive at answers to the above questions, a theoretical discussion of complementarity was necessary in this study. This discussion, it was hoped, would provide a clearer indication of how complementarity would function within the context of contemporary international law principles and institutions. It was also hoped that this discussion would provide a basis for suggesting any reforms to the cooperative machinery between the ICC and States Parties.

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[5] See A A Angelova "Compelling Compliance with International Regimes: China and the Missile Technology Control Regime" (1999-2000) 38 *Columbia Journal of Transnational Law* 419. See also A Chayes and A Chayes *The New Sovereignty: Compliance with International Regulatory Agreements* 2 ed (1995) 2 (Coercive economic sanctions are illegitimate and costly).

The affinity between complementarity and the principle of subsidiarity under European law suggests that inspiration for the evolution of the former was drawn from the latter. However, and perhaps crucially, it seems to obfuscate the distinction between the two, with the result that it will often be difficult to ascertain what the drafters of the Rome Statute intended in this regard. White makes the following claim:

"Complementarity governs the allocation of jurisdiction within the supranational and the national level, while subsidiarity determines the location of prosecution within the national level."[6]

The prized right of States to exercise jurisdiction over crimes is supposed to be a major cog in the wheel of complementarity. It is primarily to safeguard this right that States appear to implement the Rome Statute. It has been seen that the main stumbling block to efforts to enforce international criminal law has been concerns over State sovereignty. By assuring States that their sovereign right to prosecute is not taken away, while at the same time requiring States Parties to conduct effective prosecutions, complementarity will ensure that this sovereign right is utilised accountably.

Interestingly, under subsidiarity, accountability appears to be required on the part of the European Community too.[7] There is, therefore, a reciprocal obligation of accountability. Under the Rome Statute, on the other hand, much is required of the State, and very little of the ICC. The idea of setting up the International Criminal Court appears to have been intended as a remedial measure, which casts upon States the burden of ensuring that there is an end to impunity.[8] In such an arrangement, the ICC exists purely as a panacea for the fundamental

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[6] See White *op cit* (Chapter two, note 116 above) at 91.

[7] See chapter two, pages 35 to 38 above.

[8] See Rome Statute, Preamble, paragraphs 2 and 5.

problem. No comparable *onus* is placed on the ICC, and States cannot call the ICC to account quite in the same way as the ICC can States.[9]

There is little emphasis on the capacity of States to perform their obligations under the Rome Statute. Once a State becomes a party to the Statute, it is taken for granted that it can, and should, perform its obligations. In other words, on the basis of its commitment in signing up to the Statute, a State may be taken to be making a guarantee that it has the means to perform. This is what has been referred to as "consensualism".[10] Therefore, should an allegation arise regarding the commission of any of the crimes covered by the Statute, an enquiry is immediately initiated as to what a State party is doing about it. Unless the State can satisfy the requirement of being able or willing to prosecute, it is presumed that the State has contravened its obligations under the Statute.

The question of *onus*, it is submitted, will define the way the principle of complementarity is put into practice. Indeed, during the preparatory stages of the Statute, it was evident that some were of the view that an onus should operate against States. Thus, regarding its 1994 Draft Statute of the ICC, the International Law Commission (ILC) was of the view that any State challenging the admissibility of a case before the ICC[11] should bear the burden of proving that a case is not admissible.[12] Although this provision was not included in the

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[9] In terms of Article 86 of the Rome Statute *op cit*, States Parties are under an obligation to cooperate fully with the ICC.

[10] See Diehl *op cit.*

[11] Article 35 of the ILC Draft Statute, 1994.

[12] See J Bleich "The International Criminal Court: Report of the ILA Working Group on Complementarity" (1997) 25 (2) *Denver Journal of International Law and Policy* 281 at 291.

final draft in the same terms,[13] it is indicative of the reasoning behind complementarity and how it may work in practice. It provides evidence of the enormous burden that States will have to bear in keeping the ICC at bay.

It has been written of the Rome Statute that it "articulates no principles or policies to govern…decision making on fundamental issues".[14] An overall critique of the Rome Statute is outside the scope of this study. However, on the issue of complementarity, it certainly has emerged that the Statute leaves a lot of questions unanswered. For instance, the *indicia* contained in Article 17 of the Rome Statute are vague, as they do not provide for the manner of determining the inability or unwillingness of a State to prosecute. Moreover, it is unclear how the ICC would determine that a case is of sufficient gravity to justify its action,[15] and whether the ICC would decline to admit a case for insufficient gravity even where it appears that a State is evading its obligation to prosecute.[16]

Complementarity is a "negotiated regime" in the field of international criminal law. As the product of a treaty, it may be distinguished from the regimes established by the ICTR and ICTY, which were formed by the Security Council of the United Nations. In the case of the Tribunals, these take precedence over

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[13] Article 19 of the final draft (the Rome Statute) provides, *inter alia*, for the right of States to challenge the admissibility of a case before the ICC, but makes no mention of the issue of *onus*. However, paragraph 5 requires a challenging State to lodge the challenge "at the earliest opportunity".

[14] White *op cit* at 92.

[15] See Rome Statute *op cit* Article 17 (1) (d).

[16] *Op cit* paragraphs (a) and (b). For more on the unanswered questions regarding complementarity, see M Bergsmo "Occasional Remarks on Certain State Concerns About the Jurisdictional Reach of the International Criminal Court, and Their Possible Implications for the Relationship between the Court and the Security Council" (2000) 69 (1) *Nordic Journal of International Law* 87 at 97 to 100.

States in matters in which the former and the latter have concurrent jurisdiction. Complementarity, however, is primarily a set of restraints to sovereignty agreed to by the State parties. However, as a regime must instil order, there is an obvious tension between the idea of effective regulation and that of a negotiated regime. Such a regime can only be incomplete, for no agreement is, in truth, complete.[17] It has been stated that the prelude to most agreements is "opportunistic rent-seeking behaviour", especially by States.[18] This phenomenon appears to be reminiscent of game theory, the gravamen of which has been discussed above.

However, "game theory", as a possible basis for the implementation of the Rome Statute, is rather unconvincing. Game theory envisages a situation where States will seek to outplay one another on a specific issue, often with the hope of making gains against other States. This does not seem to be the underlying reason for States implementing the Rome Statute. However, other benefits, especially on the foreign relations front, are attached to implementation. These benefits are not part of a game, but accrue to States in such a manner that they are able to enhance their influence on the international political plane.

It has been maintained in this thesis that complementarity describes the relationship between the ICC and States, and not between States *inter se*. It has also been asserted that, as a result of the theory of competing rights, States Parties to the Rome Statute are virtually in competition with the ICC over jurisdiction. This is competition among unequal entities, with States striving to rise up to the expectations of the ICC as spelt out in Article 17 of the Rome Statute.

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[17] Agreements leave room for manoeuvre by the parties, often necessitating interpretation.

[18] See Krawiek *op cit* (chapter four, note 14 above) at 542.

The challenge posed by the complementarity regime is for States to preserve their own sovereignty while at the same time meeting their obligations under the Rome Statute. The Statute contains various "assuring" provisions as regards State sovereignty.[19] Although detail on important issues is lacking, it is clear that an attempt is made to assuage States' fears of the impact of complementarity to their respective national justice systems. It is submitted that, in this regard, specific attention ought to be directed at those States which, undergoing some form of transition or another, are likely to be keen to preserve the compromises that have been achieved.[20]

5.2 South Africa and Cooperation with the ICC

South Africa's implementation of the Rome Statute is indicative of the importance attached to the vision of putting an end to the egregious abuse of human rights. The Rome Statute's substantive provisions are now part of South African law, with the result that they will be enforced as such.[21] The significance of implementing the Rome Statute is that, as a human rights instrument, it has been given effect within the realm. The implementation of significant and far-reaching human rights standards has not always been the norm in South Africa.[22]

Having had an uneasy co-existence with the international community and international law, South Africa's implementation of the Rome Statute is especially significant. Parliamentary sovereignty is no longer a feature of South

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[19] See Rome Statute, Articles 17, 18 and 19.

[20] H Jackson "Status of Treaties in Domestic Legal Systems: A Policy Analysis" (1992) 86 AJIL 310 at 339.

[21] See De wet and Strydom *op cit* at 48.

[22] See Dugard *International Law Op cit* (Chapter two, note 44 above) at 263.

African law. A constitutional democracy is now in place and, imbued with one of the most progressive constitutions in the world, South Africa must protect the rights of the individual from the effects of international crime. However, these rights ought, also, to be protected against interference to the extent that the State's obligations under the Rome Statute are at variance with the constitution.[23]

Heiskanen's notion of a "conflict of obligations" is therefore quite real. As seen in relation to the transfer of detained persons to the ICC as witnesses, South Africa's obligations under the Rome Statute may not accord with the requirements of the constitution in relation to the rights of the individual. In situations of such conflict, it is likely that the Constitutional Court will be called upon to resolve them. It has therefore been significant in this study to gain an insight into the attitudes of South African courts towards international law in general.

The preceding discussion depicts a conscious policy of deference to the Executive in matters of foreign relations. In such matters, the courts are reticent to second-guess the judgement of the Executive, and often defer to the latter. This trend has emerged from the discussion of such cases as *Kaunda*[24] and *Harksen*[25]. In applying SAIA, this attitude is unlikely to change given the foreign relations dimension of the Rome Statute. Significantly, the way in which the courts in general resolve any conflict between individual rights on the one hand and State interests on the other will be crucial. It is, perhaps, important to emphasize that judicial attitudes are key to understanding any process by which it is sought to apply international law to the domestic arena. Knop presciently observes:

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[23] See De wet and Strydom *loc cit.*

[24] *Supra.*

[25] *Supra.*

"Domestic Courts seem the best hope for putting international law into action. But this relies on and enforces a mechanical view of how international law is applied domestically, one that sees international law as simply inserted into the domestic legal system, which will carry it out. The language used to promote domestic courts as instruments of international law-implementation, compliance, enforcement-only further de-emphasizes the exercise of judgement involved in translating from international to domestic law".[26]

Perhaps the above sentiment sounds a caution for those, like the author, engaged in studies such as the present. International law can only apply within the domestic arena through the judgment process, which necessarily has no structured reference point from which one could unassailably extrapolate a line of judicial thinking that is the "norm". One can only surmise.

To revisit the *AZAPO* decision, it will be recalled that the Constitutional Court was called upon to resolve a matter concerning the Truth and Reconciliation Commissions (TRCs) that had been set up to deal with the human rights abuses of the past. The Court effectively upheld the essential interest that South Africa has in post-Apartheid reconstruction. The Court chose to apply domestic law, specifically the constitution, in such a way as to give pre-eminence to its ideals, at the apparent expense of an alleged international law obligation.

As has been mentioned, the criticism is often levelled against domestic courts that they do not appreciate international law and, therefore, do not apply it when an opportunity presents itself for such application.[27] However, this criticism is

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[26] K Knop "Here and there: International Law in Domestic Courts" (2000) 32 *International Law and Politics* 501 at 516. See also Tallgren *op cit* (chapter three, note 1 above) at 492.

[27] See Motala *op cit*. See also Knop *op cit* at 501.

probably too harsh, considering the role of courts within the polity.[28] Courts are unlikely to apply a rule of international law that is not socially acceptable within the realm. The author agrees with Benvenisti's assertion that courts should, first and foremost, have regard for domestic law in matters involving foreign affairs.[29] This is an effective way of constraining State officials in their dealings in such matters, especially insofar as they affect individual human rights.[30]

As far as complementarity and cooperation with the ICC is concerned, it has been suggested above that the surrender of persons to the ICC is likely to present the courts with difficult choices. They may have to decide whether cooperation with the ICC is a plausible ground for limiting individual rights under section 36 of the constitution. It is suggested that, rather than decide whether, as a matter of principle, such cooperation can withstand section 36 scrutiny, the courts will instead resort to factual determinations of whether, for instance, the conditions of detention in the specific proposed location are adequate. If they are, then cooperation with the ICC in this regard will be endorsed.

Prosecutorial discretion has been limited by SAIA to the extent that the National Director of Public Prosecutions' decision not to prosecute is not a bar to prosecution. South African law recognises the National Director as *dominis litis* in all criminal matters. In the seminal case of *R v. Sikumba*[31] De Villiers J said the following:

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[28] See note 31 *infra.*

[29] Benvenisti *op cit* at 5.

[30] *Ibid.*

[31] 1955 (3) SA 125 [EDLD].

"The Prosecutor, as the representative of the Solicitor-General, is the dominis litis. It is within his powers to withdraw the charge at any stage of the proceedings and no court can prevent him, just as no court can force him to prosecute.[32]

Indeed, this is the position in many common law jurisdictions, and is therefore not peculiar to South Africa.[33] Significantly, with regard to any decision that the Solicitor-General makes, he "need not give any reasons".[34] Yet, in the case of SAIA, the National Director is required to give reasons for any decision not to prosecute.

No other State has implemented the Rome Statute in quite the same manner. In other words, it seems that States have generally preferred not to provide *expressis verbis* for the Attorney General's discretion in deciding whether or not to prosecute.[35] Specifically, there is no provision similar to the one alluded to above, in terms of which the Attorney General, or any other official in charge of prosecutions, is required to provide reasons for any decision not to prosecute. Quite to the contrary, it has been observed, in the case of Australia, that its implementing legislation preserves the *Gouriet* position.[36]

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[32] *Supra* at 127.

[33] See also the English case of *Gouriet V. Union of Post Office Workers* [1978] AC 435 at 487, per Viscount Dilhorne.

[34] *Ibid.*

[35] See Act No. 65 of 15 June 2001 Relating to the Implementation of the Rome Statute of the International Criminal Court of 17 July 1998 in Norwegian Law (Norway); International Criminal Court Act 2001 (United Kingdom); Cooperation with the International Criminal Court Act 2002 (Sweden).

[36] This seems to be an instance where Australia would contravene her obligations under the Rome Statute if she were to insist on the *Gouriet* principle on the international stage. Therefore, it seems doubtful that the *Gouriet* posture taken by the Australian provision would have been intended to bind the ICC. See also Heiskanen *loc cit* (chapter one, note

In the above respect, it could be argued that SAIA has caused a true revolution in South African law. Given that the independence of the National Director is constitutionally protected, it is particularly significant that he is now required to give reasons for his decision. However, this observation is quite different from asserting that in specific cases the courts would hold that the SAIA provision is unconstitutional. As was pointed out above, in each case the question is whether the fair trial rights of an accused person are jeopardised by any alleged interference with prosecutorial independence. The requirement that the National Director provide reasons for his refusal to prosecute is unlikely to have such effect.

Therefore, the issue of whether or not SAIA's provision regarding prosecutorial discretion is revolutionary has to be answered from the perspective of the courts.[37] They decide specific cases before them rather than provide opinions about particular provisions in Acts of Parliament. The provisions of SAIA can only be revolutionary insofar as the courts view them as such. It has already been contended that they are not, regard being had to the substance of the right to a fair trial.

Earlier in this thesis the question was posed whether there was any possibility that the amnesty alternative to prosecution may in future be extended to matters arising out of the Rome Statute and SAIA.[38] To answer this question, one must revisit the *AZAPO* case once more, for in its decision the Constitutional Court alluded to the fact that the amnesty laws are defensible on the grounds of "a

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69 above) on the "conflict of obligations" pertaining to the application of international law in domestic courts.

[37] See Clarke *op cit* (Chapter 4, note 69 above) at 102.

[38] See chapter three, page 77 above.

historical situation which required amnesty for criminal acts to be accorded for the purposes of facilitating the transition to, and consolidation of, an overtaking democratic order".[39]

At first blush, it seems that any matters arising from the Rome Statute must be treated differently. Even though the Rome Statute is silent on the issue of amnesties, it is likely that resorting to such action will be viewed as an attempt to side-step the requirements of Article 17 of the Rome Statute. Since the very essence of this procedure is the perceived need to avoid criminal prosecutions, it lends itself too readily to the 'unwillingness" language of the Article. The "historical" reasons suggested in *AZAPO* must therefore be regarded as confined to the era of Apartheid.

An important question has arisen regarding the National Director's powers in terms of section 37 of SAIA. That section is to the effect that, in relation to the ICC, the National Director may commence a prosecution regarding offences against the administration of justice only at the request of the ICC. This raises the further question whether the ICC is a "court" in terms of South African law, specifically the constitution.[40] The latter envisages a judicial system comprising, *inter alia*, "any other court *established* or *recognised* in terms of an Act of Parliament…."[41]

In the case of the ICC, it seems that what SAIA does is to recognise it as a court, but it does not confer on it the full attributes of a court established by an Act of

[39] See *AZAPO supra* at paragraph 22 of the judgment.

[40] See Act 108 of 1996, section 166 (e).

[41] *Ibid* (emphasis added).

Parliament.[42] This, it appears, is why the National Director may not commence prosecutions under section 37 of SAIA absent a request from the ICC. In other words, the authority of the ICC can only be invoked in South Africa on an *ad hoc* basis and with the help of South African authorities. It is submitted that this position is reminiscent of a State acting as an organ or agent of the ICC. If, despite having in place the substantive provisions to be able to prosecute,[43] the "request" of the ICC is yet required before that can be done, then it may fairly be said that, as regards these offences, South Africa is an agent of the ICC.

Earlier in this thesis the point was made that criminal law is based on national traditions and values.[44] Under SAIA, the offences against the administration of justice seem to be based rather on the Rome Statute. However, it is envisaged that South Africa will "lend" her legal procedures to the ICC for purposes of prosecuting these offences. This may be distinguished from the position as regards the "core crimes" of genocide, war crimes and crimes against humanity: These offences will be prosecuted by South Africa on her own behalf, but subject to the supervision of the ICC.

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[42] In terms of section 7 (1) of SAIA, the ICC "has such rights and privileges of a South African court of law in the Republic as may be necessary to enable it to perform its functions". However, as distinct from the rights and privileges of a South African court, the ICC does not have the *powers* of such a court.

[43] That is, the crimes enumerated under section 37 (c) of Act 27 of 2002.

[44] See Chapter one, page 2 above.

5.3 The Potential for the Use of Complementarity in Other Areas of International Law

The principle of complementarity seems to be of use only in the application of international criminal law. Used principally to enforce *jus cogens* norms against the wanton abuse of human rights,[45] the principle's utility in the enforcement of international law would appear to be circumscribed. Being a "concept in evolution",[46] it is possible that some may, in time, hold the view that the concept of *jus cogens* should apply to other areas of international law. In the same manner, complementarity, *jus cogens*'s surrogate, may be touted as a panacea for the ills that afflict other areas of international law.

As discussed earlier, one of the major challenges of international law is the application of its tenets on the domestic scene. It seems that a norm of international law will be more readily accepted on the domestic scene if its violation would, in all likelihood, never be condoned by the State concerned. This may be as a result of the genuine conviction that such a norm ought to be observed internally. It may equally, however, be out of the realization that the State has no option but to give effect to the norm if it is to earn the respect of other States.

As regards *jus cogens* norms specifically, the crucial but unclear issue relates to their identification.[47] There is no shortage of candidate norms that have been proposed for this label, a matter that has led some to muse that its actual utility is

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[45] See S Kirchner "Relative Normativity and the Constitutional Dimension of International Law: A Place for Values in the International Legal System?" (2004) 5 (1) *German Law Journal* 47 at 50.

[46] *Op cit* at 51.

[47] See Starke *op cit* (Chapter two, note 2 above) at 56. See also A Damato "It's a Bird, It's a Plane, It's *Jus Cogens*!"(1991) 6 *Connecticut Journal of International Law* 1.

doubtful.[48] Nevertheless, it has been argued that the concept is absolutely indispensable to the development of international law, and that the real task is to work out a generally acceptable formula for ascertaining its content. In this regard, therefore, clear criteria ought to be evolved to guide those whose task it is to apply such norms.

This uncertainty notwithstanding, it is clear that the concept of *jus cogens* is not commonly associated with international commercial matters or international maritime law, for instance. These aspects of international law appear to have a relatively tenuous link to human rights, hence the apparent lack of grounding in *jus cogens* norms. This, however, does not detract from the importance of these areas of international law.

Given the close relationship between *jus cogens* and the principle of complementarity, it is unlikely that the latter will be employed in areas other than international criminal law, as a means of enforcing international law. The sanction of loss of jurisdiction over a matter in which a State otherwise has jurisdiction is problematic as it is under the Rome Statute.[49] There seems to be no reason to expect that States will agree to such an intrusive system[50] in areas other

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[48] Examples of the tendency to rely on *jus cogens* norms are: discussions leading to the Draft Code of Offences Against the Peace and Security of Mankind 102 s. U.N. Doc A/CN 4/404 (1987); and negotiations for the inclusion of the concept of the "common heritage of mankind" in the United Nations Convention on the Law of the Sea, UN Doc. A/Conf. 62/122 (1982). However, *jus cogens* norms are derived from values that are fundamental to international law, rather than "fortuitous or self-interested choices of nations". See *Alvarez-Machain V. United States*, No. 99-56762.

[49] See note 60 *infra.*

[50] Compare this view with that expressed by Bergsmo *op cit* (note 18 above) at 99, to the effect that complementarity does not compel States to do anything, since the obligations thereunder are premised on the *aut dedere aut judicare* principle. It is, however, respectfully submitted that

than international criminal law. The move towards true "judicial globalization"[51] is therefore not going to be as rapid as one might hope, given that no real effort to address States' concerns over loss of sovereignty has been made. State consent is not an answer to this concern, especially when it is not accompanied by judicial acculturation to the idea that judicial competencies are henceforth to be conditional upon "effective" exercise.

It is suggested that complementarity would be effective were it based on the "socialization" of States towards a system in which the powers of national courts are to be subjected to a "global" test. This would be a process in which the State's capacity to adhere to a treaty regime is given serious consideration. Perhaps more importantly, it would also be a system premised on "soft" rather than "hard" obligations, in order to attract State participation.[52]

For example, when one looks at the regime created by the World Trade Organization (WTO), one sees a regime that did not initially make onerous demands on the part of its adherents. What began as the General Agreement on Trade and Tariffs (GATT)[53] was composed of "soft" obligations, which, though binding on State parties, were not applied rigidly. Moreover, these norms were not backed by a non-reservation clause, such as one finds in the Rome Statute.

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covert compulsion was intended through the "carrot-and –stick" mechanism that is the hallmark of complementarity.

[51] See A Slaughter "Judicial Globalization" (2000) 40 *Virginia Journal of International Law* 1103. This process has been described as the "synergy between national and international judiciaries". *Ibid*, note 1.

[52] See D J Joyner "Bridging the Gap between International Law and Foreign Policy Making" (2003) 31 (3) *Denver Journal of International Law and Policy* 437 at 462. See also J S Martinez "Towards an International Judicial System" (2003-2004) 56 *Stanford Law Review* 429 at 492 to 493.

[53] General Agreement on Tariffs and Trade, October 30, 1947, 55 UNTS 188, as amended, 278 U.N.T.S. 168.

Instead, there was a withdrawal clause in the Agreement.[54] With time, however, these norms ossified into the concrete commitments that now constitute the WTO.

The same may be said of the International Monetary Fund (IMF) system, in that, although deviation by member States is discouraged, the counteractive measures attached to deviation are "administrative" rather than what may be termed judicial sanctions.[55] The IMF applies policy rather than rules in its dealings with member States, and, as such, there is room for capacity enhancement rather than strict conformity.

5.4 Conclusion

On the basis of the foregoing, it may be concluded that SAIA has effected a fundamental change on the South African legal landscape, especially respecting prosecutorial discretion. The common law position regarding such discretion, as depicted by the *Sikumba dictum*,[56] seems to have been altered insofar as the National Director is now required, on a particular issue, to give reasons for his decision. Seemingly, such a requirement is not to be commonly found in the implementing laws of other States.

This is not unconscionable interference with prosecutorial independence; at least not in the sense of seeking to influence prosecutorial policy or decisions in a

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[54] *Op cit*, Article XXI (b) (iii) ["Nothing in this Agreement shall be construed...to prevent any Contracting Party from taking any actions which it considers necessary for the protection of its essential security interests...taken in time of war or other emergency in international relations...."].

[55] Heiskanen *op cit* (Chapter one, note 69 above) at 238. See also J Gold "The 'Sanctions' of the International Monetary Fund" (1972) 66 AJIL 737 at 738 to 739.

[56] See note 31 above.

certain direction. However, it remains a unique position of the law, which perhaps is an indication of the seriousness with which international crime is regarded in South Africa. It is submitted that such a provision of the law can only be explained on the basis that the crimes concerned really hit at the core of international peace and security. However, in contradistinction to Judge Sidhawa's *dictum* in the *Tadic* case,[57] there is a conviction that national courts should first try these crimes before an international tribunal tries them.[58]

The provision of reasons for the refusal to prosecute would appear to be geared towards ensuring that a finding by the ICC that South Africa is unable or unwilling to prosecute does not occur too easily. This is in line with the basic goal of complementarity, which is that States should always be able to prosecute crimes of international concern. In fact, the basic motivation for States implementing the Rome Statute is that they should always be able to do so. Once the Central Authority has received the National Director's reasons for declining to prosecute, and the same are subsequently communicated to the ICC,[59] South Africa would in effect be waiving its right to prosecute.[60] The ICC can then take over the specific case concerned. As indicated earlier, a dynamic involving

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[57] See chapter two, page 33 above.

[58] This conviction is premised on the maxim *aut dedere aut judicare.* See chapter two above.

[59] In terms of section 5 (5) of Act 27 of 2002 (SAIA) the Central Authority must forward the National Director's decision to the Registrar of the ICC.

[60] Another possible interpretation is that the Central Authority, by communicating this decision to the Registrar of the ICC, would in effect be "referring" the case to the ICC in terms of the Rome Statute. However, this would be an anomaly, for the National Director's decision should not necessarily be equated with the State's decision. The National Director has no authority to represent the State in international fora. Perhaps the Act ought to specifically provide for the Central Authority's power to ratify the National Director's decision, whereupon it shall be deemed to be the State's decision.

competing rights is afoot; therefore, it follows that a waiver of such rights is theoretically possible.

However, it is submitted that the above scenario is fundamentally different from what is envisaged by the twin concepts of inability and unwillingness under the principle of complementarity. These are concepts that are so interwoven with the strife situation as to be incapable of precise application in a normal situation where there is no widespread annihilation and emasculation of the institutions of the State. If the machinery of the State is still largely in place, it seems, then an occasion can hardly arise for the ICC to find that a State is unable or unwilling to prosecute. It is suggested that the language of "inability" and "unwillingness" is a result of the influence of the ICTR and ICTY, whose formation, as seen above, was necessitated by particular conflicts. In such situations it is objectively feasible to determine that a State is either unable or unwilling to prosecute. Where the State machinery is in place, an unseemly polemic is likely to ensue about the meaning of these two terms in the particular context.

As for the "carrot-and-stick" mechanism, the extent to which this has contributed towards South Africa's implementation of the Rome Statute has not been conclusively established. The major assumption of this thesis was that radical changes to an implementing State's legal setting are an indication that the State is responding to this "threat". Latterly, however, it has emerged that this may be attributed to "auto-challenge", rather than to any threat *per se.* Therefore, to regard the Rome Statute, and especially the principle of complementarity, as being the creation of an Austinian-type system of restraints to which States respond, is a misplaced notion. The carrot-and-stick mechanism is not of such a quality as to compel compliance by itself. The better view is that the principle of complementarity is a participatory regime, agreed upon by States, by which it is intended to redress some of the shortcomings of the *ad hoc* Tribunals. However,

in the actual implementation of the Rome Statute, the over-bearing nature of complementarity will come to the fore.

Complementarity's purely consensual basis is cause for concern insofar as implementation is concerned. States may readily implement the Rome Statute in their respective legal systems on the basis of their good will. In reality, though, attaining the "ability" and "willingness" thresholds required for the exercise of jurisdiction over cases may prove more difficult, given that the content of the State parties' obligations in this regard remains unclear.[61]

For an international regime to truly inspire a revolution in the national justice system, it ought to have a pervasive effect in the area of law concerned. Complementarity, on the other hand, focuses on a specific event, namely, the prosecution of a case. It presumes that the real malaise afflicting the international criminal justice system is lack of prosecutions. That view may be correct, because, empirically, there are very few prosecutions relative to international crimes that one could point to.[62] Complementarity further assumes that this dearth of prosecutions is due to the wilful and calculated decision of States' prosecution authorities. Perhaps this explains SAIA's approach to prosecutorial discretion. As has been suggested, however, a change in judicial attitudes may be just what is required.

Therefore, while the manner in which South Africa has dealt with the issue of prosecutorial independence is revolutionary, cases may yet wind up in the ICC simply because the South African Judiciary, rather than apply international

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[61] See Newton *op cit* at 44 to 48. See also G Dawns *et al* "Is the Good News about Compliance Good News about Cooperation?" (1996) 50 *International Organization* 379.

[62] Most of these are on going before the ICTR and ICTY.

norms to specific cases, prefer to apply national norms that are at variance with the former. This may, in turn, be construed as "inability" to conduct "effective" trials. This problem is what Professor D'amato refers to as the "macro-micro problem", where the application of international norms is not readily accommodated within the national sphere.[63] As a result, there will be a disjuncture between expectation and reality.

South Africa's strategy with regard to prosecutorial discretion seeks to answer the "unwillingness" concern of the complementarity principle. Inevitably, the "inability" strand of the principle is more uncertain, and its fate lies with the courts, specifically the manner in which they continue to apply the laws discussed above.[64] In this regard, SAIA's impact on the prosecution of international crimes in South Africa is far-reaching, though not all embracing. Few changes have been effected to South Africa's pre-existing "baseline of conduct",[65] save for the innovative nature of prosecutorial accountability now instigated. However, it must be noted that this accountability does not affect the substance of a fair trial, which is the pre-eminent value protected by the principle of prosecutorial independence. Rather, this accountability is "demanded" by an external agency, namely, the ICC, which is not a court in South African law. To this extent, therefore, SAIA does not represent a "costly change" to the *status quo ante*.[66]

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[63] See A D'Amato "International Criminal Law and the Macro-Micro Problem" (1991) 15 *Nova Law Review* 343.

[64] See chapter three above.

[65] See L Heifer "Constitutional Analogies in the International Legal System" (2004) 37 *Loyola of Los Angeles Law Review* 1 at 21.

[66] See K Raustiala "Compliance and Effectiveness in International Regulatory Cooperation" (2000) 32 *Case Western Reserve Journal of International Law* 387 at 408.