FEATURE

AN ACT OF TRANSFORMATION

The incorporation of the Rome Statute of the ICC into national law in South Africa

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The Rome Statute of the International Criminal Court is a multilateral international agreement or treaty. All states have the right to become parties to it. When a state does ratify or accede to it, it incurs international obligations to the other State Parties to the agreement. State Parties must ensure that their domestic laws enable them to comply with its international obligations. Failure adequately to provide for the international obligations is not only undesirable internationally but also domestically. The South African Parliament has incorporated the Rome Statute into national (municipal) law by passing the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002. This is a commendable step in ensuring that its international obligations are met. Unfortunately, it appears that the scheme of arrest and surrender to the ICC provided for in the South African legislation to give effect to the Rome Statute is somewhat defective. There is no provision for any competent authority, whether a court or the executive branch of government, to issue an order of surrender. This defect should be remedied as soon as possible.

Introduction

The International Criminal Court (ICC) came into operation on 1 July 2003. It has been widely supported throughout the world and more particularly in Africa and the Southern African region. This reflects the fact that international, regional and national communities are of the view that individuals who commit the crimes of genocide, war crimes and crimes against humanity should be prosecuted for their conduct, and impunity for those crimes should be avoided.

The ICC has been set up through a multilateral treaty known as the Rome Statute of the International Criminal Court ("the Rome Statute"). The object and purpose of the Rome Statute is to put in place effective arrangements to prevent impunity for the crimes over which it will have jurisdiction. The ICC was established to ensure that individuals subject to the jurisdiction of a State party to the Rome Statute who are suspected of committing the crimes of genocide, war crimes and crimes against humanity are subjected to proper investigation and, if a sufficient case exists, are prosecuted, and, if found guilty are duly punished for their conduct. An important element in the scheme of the ICC is that if national criminal justice processes are adequate to ensure investigation, prosecution and punishment in respect of the relevant crimes, they should be used. This notion, called 'complementarity', is expressed in the preamble and in

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Articles 1 and 17 of the Rome Statute. The preamble states:

> 'the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions'

If there is a risk that a suspect will avoid investigation and prosecution, then the ICC is calculated, in principle, to fill the gap. The main purpose is not international prosecution as such. It is the prevention of impunity. States are given the first opportunity to exercise criminal jurisdiction. Individuals who are guilty of the serious crimes, which are subject to the jurisdiction of the ICC, must take responsibility for their conduct and not be shielded by states that are unwilling or unable to investigate and prosecute them.

The Rome Statute is a multilateral treaty and like any international agreement must be considered in both international law and in the domestic law of the respective State Parties to the treaty. Thus, for some states, ratification of, or accession to, the Rome Statute may well cause them to become bound on the international plane and thus incur international obligations *vis-à-vis* other State parties to the Rome Statute whilst at the same time no domestic legislation is in place giving force and effect to the international obligations so undertaken. State parties may thus find themselves willing but not able to satisfy their international obligations.

International law applied locally

There are two main approaches to the subject of the relationship between international law in the form of treaties and international obligations incurred in respect of such agreements on the one hand and municipal law on the other. The first, the *monist* school maintains that international and municipal law are to be regarded as manifestations of a single conception of law. Monists thus argue that municipal courts are obliged to apply rules of international law directly without the need for any act of transformation of the provisions of the international agreement by the legislature into national (municipal) law. For them, international law is immediately incorporated into municipal law without any act of adoption or transformation once the State becomes a party to the international agreement or treaty.

Dualists, the second school, on the other hand view international law and municipal law as completely different systems of law. This has the result that domestic courts may only apply international law, and specifically treaties, if, and only if, those treaties have been transformed into municipal law by legislation. The classic formulation of this position is reflected in the dictum by the Appellate Division of the Supreme Court in South Africa in *Pan American World Airways Incorporated v SA Fire and Accident Fire Insurance Company Ltd*[1], where CJ Steyn CJ stated:

> '…in this country the conclusion of a treaty, convention or agreement by the South African government with any other government is an executive and not a legislative act. As a general rule, the provisions of an international instrument so concluded, are not embodied in our municipal law, except by legislative process…In the absence of any enactment giving [its] relevant provisions the force of law, [it] cannot affect the right of the subject.'

Many African States follow a similar position to that of South Africa.[2] Most, although not all, Anglophone states follow the dualist approach. A few do not. Thus for example, Article 144 of the Namibian Constitution of 1990 provides that "Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia." Most Francophone States follow an approach of direct incorporation and there is thus no need for any act of transformation into municipal law.

For States that follow the dualist position becoming a party to the Rome Statute requires an act of transformation so that obligations undertaken may lawfully be given effect to. Thus, for example once South Africa had ratified the Rome Statute, it, being a dualist State, was required to enact legislation bringing its provisions into its municipal law.

Until it had done so, courts in South Africa could have no regard to the provisions of the Rome Statute and the South African authorities would not have been entitled to act in terms of its provisions. Thus unless crimes against humanity, war crimes and genocide were crimes under South African law prior to incorporation of the Rome Statute a person could not lawfully be charged and convicted of any of these crimes in a South African Court. Similarly, prior to incorporation, a request by the ICC for the surrender or transfer of a person to it could not be acted upon in South Africa without some other source of power to do so.[3]

South African implementation

On 18 July 2002, some 17 days after the Rome Statute entered into force and the existence of the ICC became a reality, the South African Parliament passed the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002. ("The Implementation Act").[4] The Implementation Act was adopted with the object of creating a framework to give effect to the provisions of the Rome Statute in the law of South Africa. South Africa, having lodged its instrument of ratification and the Rome Statute having coming into force, incurred international obligations in respect of the investigation and prosecution of crimes against humanity, war crimes and genocide and to assist the ICC whenever necessary.

Appropriately, the entire Rome Statute is attached to the Implementation Act as a schedule and "Rules" are defined to mean the Rules of Procedure and Evidence referred to in Article 51 of the Rome Statute. This allows South African Courts to have regard to the relevant substantive and procedural provisions.

Criminalisation of the most serious crimes

In South Africa, prior to the enactment of the Implementation Act, conduct constituting the crimes of genocide, crimes against humanity and war crimes may have been tried and punished as ordinary crimes such as murder, rape and robbery. However the specific crimes mentioned may not have been tried in the Courts of South Africa because they were not crimes under the common law and were not statutory crimes. It was therefore necessary for Parliament to enact a law, which made such conduct a crime under the laws of South Africa and to specify the conduct that constituted the crimes. This was done by causing the three crimes to be defined in the definition section in the Implementation Act with reference to the definitions contained in the Rome Statute. Section 1 of the Implementation Act defines a "crime" to mean the crime of genocide, crimes against humanity and war crimes. A "war crime" is defined to mean any conduct referred to in Part 3 of the Rome Statute. The introduction of these most serious crimes onto the law books in South Africa is to be welcomed. Prosecutors and courts in South Africa are now in a position to investigate, prosecute, try and sentence those persons guilty of the appalling conduct that gives rise to these crimes.

It appears, *prima facie,* that the essential and relevant elements of the Rome Statute and the ICC have been incorporated into South African law. South Africa should thus be in a position to comply with its international obligations in respect of the ICC.

However, closer scrutiny reveals that there may be difficulties incorporating provisions concerning requests by the ICC for assistance and co-operation. Chapter 4 of the Act is headed 'Co-operation With and Assistance to Court In or Outside South Africa'. It consists of sections 8 to 32, which are divided into two parts. Part 1 (sections 8 to 13) deals with the arrest of persons and their surrender to the ICC while part 2 (sections 14 to 32) deals with judicial assistance to the ICC. Part 2 is primarily concerned with assistance in the areas of obtaining of evidence, examination of witnesses, searches and seizure and the registration of restraint orders in respect of assets and registration fines or compensatory orders. It is part 1, concerning the surrender or transfer of a person to the ICC, which may give rise to difficulties.

Extradition, transfer or surrender

The ICC will obviously have to rely on the national authorities of the State Parties to the Rome Statute to secure the attendance of accused individuals. Trials *in abstentia* are not

permitted by the ICC Statute.[5] For the ICC to have any meaningful effect, adequate procedures must be in place to bring guilty persons before the ICC. Because of the principle of complementarity, the issue of the arrest and surrender of a person found, for example in the territory of South Africa, only arises in the event of South Africa being either unwilling or unable to investigate and prosecute the person. Article 59 of the Rome Statute deals with arrest and what is termed "surrender" proceedings in the custodial State. It is should be mentioned that during the negotiations leading up to the adoption of the Rome Statute, three different terms were considered for the act of delivery of a person to the ICC. *Extradition*,[6] the traditional method of securing the presence of fugitives to stand trial or serve a sentence was not acceptable to certain States because of constitutional restrictions on the extradition of nationals.[7] The concept of *transfer*, where the person sought is merely arrested and sent to the ICC was rejected because the usual safeguards contained in the extradition process concerning the curtailment of liberty were absent.[8] As a compromise the term *surrender* was adopted in the Rome Statute.[9] This compromise has unfortunately found its way into the Implementation Act.

In South Africa requests by foreign states for the extradition of a person are dealt with by the various authorities in terms of the provisions of the Extradition Act 67 of 1962 ("the Extradition Act"). The process essentially consists of the minister of justice receiving a request and determining whether the extradition process should proceed. If the process does continue a hearing is held before a magistrate's court. The court only determines whether the person is extraditable. It does not decide on the issue of extradition itself. A negative finding on this issue is final whereas in the event of a positive finding the executive branch of government, in the form of the Minister of Justice, is then required finally to decide whether an extradition (or surrender) order should be made.[10] The Extradition Act makes it clear that it is the minister, and only the minister, who has been given the power to issue an order of surrender in the context of a request for extradition.

The process of dealing with requests by the ICC for the surrender of a person set out in the Implementation Act is similar, but not identical, to the extradition process set out in the Extradition Act. The surrender provisions do however have significant differences from those relating to extradition. This is the result of an attempt by Parliament to streamline the process and thus make it quicker and easier to surrender a person to the ICC compared to that of extradition to a foreign state. An examination of the surrender provisions in the Implementation Act indicates that the attempt may not have been successful.

Arrest and surrender provisions

A request from the ICC for the arrest and surrender of a person is to be referred to the director general of the Department of Justice. The director general shall immediately forward the request to a magistrate who must endorse the warrant of arrest for execution in any part of South Africa. The endorsement of the warrant of arrest does not appear to be the issue of an order of surrender to the ICC. This is confirmed by the existence of other provisions of the Implementation Act because there are further steps necessary after such endorsement. The next step provided for is a hearing before a magistrate, just like in the case of extradition. The hearing is 'with a view to the surrender of that person'.[11] The magistrate holding the inquiry is to consider the evidence adduced and must establish three issues.

The first issue is whether the warrant applies to the person in question; second, whether the person has been arrested in accordance with the procedures laid down by domestic law, and third, whether the rights of the person have been respected. If the magistrate is satisfied that the three requirements have been complied with he or she must issue an order *committing* the person to prison pending his or her surrender to the ICC. ("a committal order") It is important to note that section 10(5) of the Implementation Act provides that the magistrate does not issue an order of surrender but rather an order of *committal* to prison.

The provision in the Implementation Act dealing with the removal of persons, section 11(1), refers to any person in respect of whom

an order to be *surrendered* has been given under section 10 (5). Section 10 (5) does not refer to "an order to be surrendered." No other section refers to an order to be surrendered. Thus it appears that the scheme of arrest and surrender to the ICC provided for in the South African legislation to give effect to the Rome Statute is somewhat defective. There is no provision for any competent authority, whether a court or the executive branch of government, to issue an order of surrender. Accordingly, the Implementation Act does not properly, or at all, provide the South African authorities with the necessary power to respond to a request for surrender by the ICC. This anomaly is explained by the attempt to utilize only parts of the extradition process without a full consideration of the effect of leaving out the other parts. This is probably as a result of the attempt to reflect the compromise on the issue of extradition in South African law. Because of this, South Africa may not be able to comply with its obligations to assist the ICC in securing the attendance of a person before it. This anomaly should be corrected as soon as possible.

Conclusion

The importance of preventing persons who are guilty of the most serious crimes obtaining impunity cannot be denied. States are to be commended for having enthusiastically embraced the concept of international justice for the most serious crimes. Good intentions and political will are however not sufficient. There must be precision and care in effecting the appropriate tools to give effect to those intentions. States parties to the Rome Statute of the International Criminal Court, which adopt a dualist approach to international law in the form of treaties, must take whatever legislative steps are required to bring the provisions of the Rome Statute into municipal law. However, in doing so, care must be taken that such incorporation is done properly. It is of little assistance to humankind for states to pay lip service to global ideals by becoming parties to international treaties and then being unable to give effect to their provisions because of technical reasons. This allows the guilty to get off if they have clever lawyers. Other than the guilty, the only beneficiaries of these technical hitches are the lawyers who may are paid handsomely to advance the technical points. It is imperative that these issues be considered and, where necessary, legislation must be enacted and amended if appropriate.

Notes

1. 1965 (3) SA 150 (A) at 161 C – D; The modern position is similar and is reflected in section 231(4) of the Constitution of the Republic of South Africa Act 108 of 1996.
2. See T Maluwa 'The incorporation of international law and its interpretational role in Africa: an exploratory survey' (1998) 23 South African Yearbook of International Law 45.
3. There is no constitutional or legislative provision which empowers the authorities in South Africa to request extradition. The Extradition Act 67 of 1962 provides only for requests to South Africa. The ICC is not mentioned at all in the Extradition Act. In most States the exercise of any power by the executive authorities must be made in terms of a power granted by the Constitution or legislation. Responses by the South African authorities to requests by the ICC must be based on some constitutional or legislative authority.
4. South Africa had lodged its instrument of ratification on 10 November 2000. See Max du Plessis '*Bringing the International Criminal Court home – the implementation of the Rome Statute of the International Criminal Court Act 2002*', 16 South African Journal of Criminal Justice' (2003) 1.
5. Article 63 of the ICC Statute provides that the accused shall be present during the trial.
6. The process of extradition is a bilateral event between two sovereign states. One sovereign state surrenders an individual situated in its territory in response to a request for extradition by another sovereign state. The purpose of surrender is to ensure that the sought-after individual (fugitive) stands trial or serves a sentence in the requesting state. Extradition is the surrender by one state, at the request of another state, of a fugitive who is either accused or convicted of a crime by the requesting state.
7. States with a civil law tradition (such as Germany, France, Spain and Italy) as opposed to a common law tradition do not as a rule ever extradite their own citizens.
8. Indeed Justice Goldstone, writing for the entire Constitutional Court in South Africa, stated in *Geuking v President of Republic of South Africa* 2003 (3) SA 34 (CC) that: "Extraditing a person, especially a citizen, constitutes an invasion of fundamental human rights. The person will usually be subject to an arrest and detention, with or without bail, pending a decision on the request from the

foreign State. If surrender is ordered, the person will be taken in custody to the foreign State."

9. See A Cassese, P Gaeta, J Jones (eds) *The Rome Statute of the International Criminal Court: A Commentary* (2002) vol II at 1676 – 1702.
10. Section 11 of the Extradition Act. In certain limited circumstances a magistrate's court may make an order of surrender. That is when the requesting State is one of a few States in Africa and there is an extradition agreement in force to that effect.
11. Section 10 of the Implementation Act.