

CASE STUDY 2: SOUTH AFRICA – COMPLEMENTARITY IN THE COURT ROOM: THE ZIMBABWE TORTURE DOCKET

South Africa was the first African country to adopt implementing legislation in respect of the Rome Statute when it passed the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 (ICC Act). In addition to this, specialised units were established within the NPA and the police service to investigate and prosecute these crimes. However, it took ten years and significant CSO pressure culminating in a court order before South African authorities opened their first investigation into crimes under the ICC Act.

South Africa can be characterised as a country that is able to dispense international criminal justice. It has

- A suitable legislative framework;
- Specialised prosecuting and investigating units; and
- An experienced and established judiciary that enjoys safeguards to protect its independence.

In light of the domestic regime for the prosecution of international crimes under South Africa's ICC Act, and the specialised units established to implement it, CSOs were rightly eager to assist the government in its aim to bring "persons who commit such atrocities to justice ... in a court of law of the Republic in terms of its domestic law where possible".³ This is not just limited to acts committed in South Africa or by its citizens, as the object of the ICC Act included enabling the prosecution of any person accused of having committed a crime in the Republic and beyond its borders in certain circumstances. To this end, section 4 of the ICC Act provided for the exercise of universal jurisdiction by South African courts under certain circumstances.

Background

In March 2008 SALC **compiled and hand-delivered a docket containing evidence of acts of torture committed in Zimbabwe** to the PCLU, the unit in the NPA responsible for direction and management of investigations in terms of the ICC Act.⁴ The alleged torture occurred on 28 March 2007 following a raid on Harvest House, the headquarters of the opposition Movement for Democratic Change. SALC alleged that the torture was systematic, and took place as part of an attack against the civilian population, pursuant to a state policy: the hallmarks of crimes against humanity.⁵ The docket named senior security and government officials that it alleged bore individual criminal responsibility for these crimes under the doctrine of superior responsibility.⁶ According to the docket, these individuals frequented South Africa regularly on official and on personal business. On this basis SALC requested the National Director of Public Prosecutions (NDPP) to investigate, and if necessary prosecute, these crimes under section 4 of the ICC Act on the basis of limited universal jurisdiction.⁷

The response from the NPA was initially constructive. Upon receiving the docket, the head of the PCLU alerted the acting NDPP, who is given the power to decide whether or not to institute prosecutions for international crimes by the ICC Act. Following an initial assessment of the docket, the PCLU raised concerns regarding the issue of "gravity". Once again SALC intervened, providing an expert legal opinion on the issue to assuage the PCLU's concerns. As a result, the PCLU recommended that an investigation be undertaken into the allegations presented by SALC, and suggested that the police service be contacted in order to do so.

Organisations: Southern Africa Litigation Centre; Zimbabwe Exiles Forum; Lawyers for Human Rights

Countries: South Africa; Zimbabwe

Initiative: Challenging the decision of South Africa's investigating and prosecuting authorities not to investigate crimes against humanity committed in Zimbabwe

Issues Addressed: South Africa's obligation to investigate and prosecute international crimes; the threshold for triggering investigations; overcoming political unwillingness through litigation; providing practical and substantive content to the obligation to investigate and prosecute

Status: The case has been taken on appeal to the Supreme Court of Appeal; however, argument will be limited to narrow grounds relating to the interpretation of specific provisions of the ICC Act

However, the NDPP stalled and in June 2009, after eventually consulting the police, informed SALC that an investigation would not be undertaken. In reaching this decision, the NDPP accepted the police's reasons for not initiating an investigation: that there were difficulties in ascertaining the identity of the deponents and verifying the content of their statements; that there were questions around the legality of witness cooperation procedures involving SALC; that evidence could only be obtained using espionage in violation of Zimbabwe's sovereignty; that the docket relied on mere allegations; and, finally and instructively, that the proposed investigation had implications for relations with Zimbabwe.

It is the first time a South African court has considered the ICC Act and, although it did not involve a prosecution under the ICC Act, it nonetheless will significantly alter the international criminal justice landscape in South Africa. In fact, the decision may well overshadow the inaugural prosecution under the ICC Act (when it takes place) as it sets out in detail how the ICC Act operates.

The refusal by the NDPP to open an investigation meant that **South Africa was able but unwilling** to launch a domestic prosecution. Unsatisfied with the NDPP's decision, SALC launched a legal challenge in the North Gauteng High Court in December 2009 on the grounds that the decision not to pursue the matter was irregular and unlawful under South Africa's administrative justice principles and contrary to the rule of law.

In its application, SALC asked the Court to set aside the decision not to open an investigation and to order that the matter be remitted to the authorities for them to reconsider the decision. They were joined, as second applicant, by another CSO, the Zimbabwe Exiles Forum

(ZEF). The respondents cited in the matter were the NDPP (First Respondent), the director of the PCLU (Second Respondent), the director general of Justice and Constitutional Development (Third Respondent) and the National Commissioner of Police (Fourth Respondent).

Asked why SALC and ZEF decided to pursue this case, and specifically litigate the issues, Nicole Fritz, the executive director of SALC said:

"International criminal justice is best pursued at the national level. South Africa's adherence to its international obligation to investigate and prosecute persons accused of international crimes is an essential component of responsible and good governance and respect for the rule of law. It serves to ensure that perpetrators of international crimes committed in South Africa and abroad will face justice and that South Africa will not be a safe haven for perpetrators of these crimes."

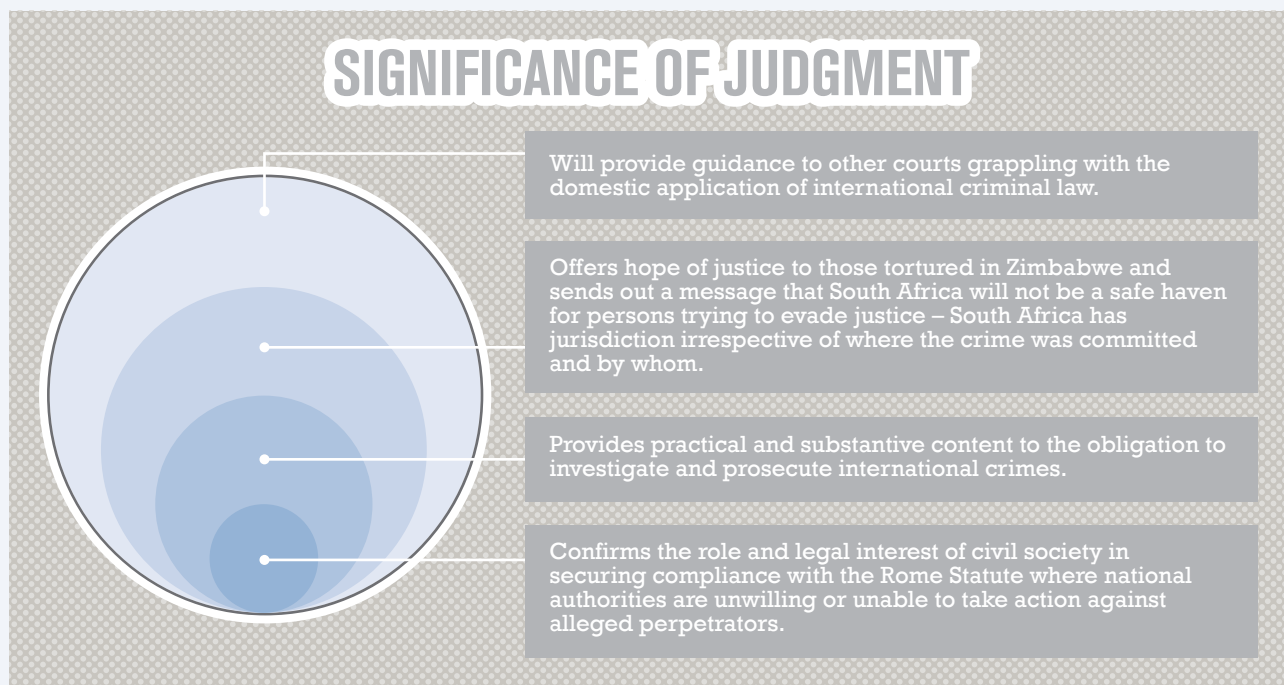
Strategic litigation is a tool that can shape jurisprudence and set a precedent applicable to hundreds of other cases, both in South Africa and beyond. It can provide practical and substantive content to international obligations, ensure respect for the rule of law, test the independence of courts and ultimately, contribute to the creation and maintenance of an environment conducive to the promotion, protection and realisation of human rights within a variety of contexts.

Fritz believes that this case raised:

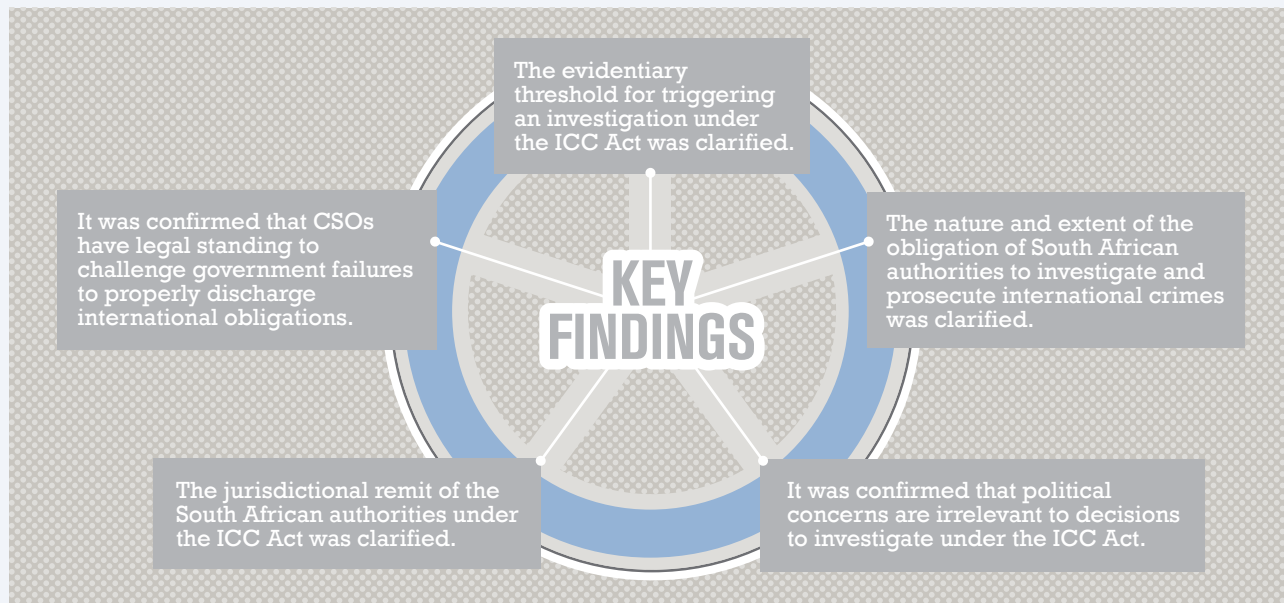
"critical issues that South African courts had, for the most part, not yet had the opportunity to engage with. Expert, skilled and considered litigation will enable Southern Africa not only to join other jurisdictions globally that are also grappling with issues around the domestic prosecution of international crimes, but will place Southern Africa at the helm of such efforts. This litigation and the accompanying advocacy will also provide guidance to other civil society [organisations] seeking to promote international criminal justice in the region."

SALC & Another v NDPP & Others⁸ : The Judgment's Significance and Key Findings

The North Gauteng High Court handed down judgment on 8 May 2012, finding that the decision taken by the NDPP to refuse SALC's request for an investigation was unlawful and inconsistent with the Constitution, and therefore invalid. In light of South Africa's international law obligations as recognised by the Constitution, the Court ordered the police's Priority Investigation Unit (in cooperation with the NPA) to "do the necessary expeditious and comprehensive investigation of the crimes alleged in the torture docket".⁹ Having done so, the NPA must then decide whether or not to institute a prosecution.



This is a landmark decision. It is the first time a South African court has considered the ICC Act and, although it did not involve prosecution under the ICC Act, it nonetheless will significantly alter the international criminal justice landscape in South Africa. In fact, the decision may well overshadow the inaugural prosecution under the ICC Act (when it takes place) as it sets out in detail how the ICC Act operates.



The Legal Standing of Civil Society to Bring Challenges of this Nature

The respondents argued that SALC and ZEF did not have sufficient interest to bring this matter before a court and lacked locus standi (standing).

Under South African law an individual organisation can bring a matter before a South Africa court – even if they are not directly affected by the issue at hand – provided that the determination of the issue would be in the public interest and the matter is being brought on behalf of persons that cannot act in their own name.

The Judge was unequivocal in his ruling. He held that SALC and ZEF:

“[D]o not have to be the ‘holders’ of any human rights themselves. They certainly have the right, given their attributes, to request the state, in the present context, to comply with its international obligations on behalf of those who cannot do so, and who are the victims of crimes against humanity.”¹⁰

The Court appreciated that international crimes invoked unique considerations and an understanding of the context in which the crimes were being considered:

“The magnitude of the crisis in Zimbabwe and the failure on the part of Zimbabwean authorities to introduce any ameliorating or reforming measures has required that SALC consider a variety of initiatives in support of human rights and public interest law defenders.”¹¹

The Judge further noted that to deny SALC and ZEF standing would:

“[L]ead to the untenable situation that it would deny victims of international crimes standing in South African proceedings, and would shield decision-makers, like the Respondents, from accountability when faced with making decisions regarding prosecutions of international crimes that had occurred outside South Africa. This would make a mockery both of the universal jurisdiction principle endorsed by Parliament when enacting the ICC Act, as it would render the legislative provisions redundant, as well as the principle of accountable governance to which the Constitution commits South Africa. This could not have been the intention of the legislators or of the Constitution drafters.”¹²

The Judge ultimately concluded that:

“[A] number of groups are affected by the impugned decision nl. the Applicants’ rights to have the decision made lawfully and in accordance with constitutional and statutory obligations has been infringed, the victims of the torture who had been denied the opportunity to see justice done, and the general South African public who deserve to be served by a public administration that abides by its national and international obligations. The public clearly has an interest in a challenge to the manner in which public officials discharge their duties under the relevant legislation.”¹³

The Nature and Extent of the Obligation on the South African Authorities to Investigate and Prosecute International Crimes

The Court was keen to underscore South Africa’s obligations in respect of prosecuting international crimes, under both national and international law:

“The ICC Act ... goes beyond ‘normal’ jurisdictional requirements. In the context of the purpose of that Act, the Act requires that a prosecution be enabled as far as possible. Seen holistically therefore, all the mentioned provisions place an obligation on South Africa to comply with its obligations to investigate and prosecute, crimes against humanity ... and it is in the public interest that the State does so. In the context of the Act it is not decisive that the crimes contemplated by that Act were not committed in South Africa.”¹⁴

There is no suggestion that this obligation is limited to crimes that took place on a state’s territory. Rather, the **duty** is to exercise jurisdiction **where possible** when the jurisdictional requirements are met.

This is not the first time South African courts have considered the international obligation to prosecute such crimes under certain circumstances¹⁵; it is, however, the first time a South Africa court considered South Africa's obligations under the Rome Statute. This decision represents the boldest and broadest statement in respect international criminal law obligations to date.

The Threshold for Investigations

The Court also clarified the requisite threshold for the initiation of an investigation under the ICC Act, namely whether "a reasonable basis exists" for opening an investigation. This is the same threshold that applies to an initiation of an investigation by the prosecutor of the ICC. In doing so the court distinguished between the various processes and legal thresholds relevant to investigations and prosecutions.

The South African prosecuting authority persistently maintained that the evidence SALC and ZEF submitted was not sufficient for a prosecution. The CSOs, however, were asking for an investigation.

The ICC Act, like many domestic Acts, is silent on investigations, and in the course of oral argument SALC relied on the ICC's Kenya Authorisation Decision in which the ICC highlighted the different evidentiary burdens relevant to different stages of the investigatory and prosecutorial process. In terms of article 53 of the Rome Statute, an investigation should proceed if there is "a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed".

Finding that the respondents "had confused different thresholds for different steps that had to be taken in terms of the Statute",¹⁶ the Court gave substance to an aspect that the ICC Act was silent on but that is essential to its efficacy and fulfilling the purpose and object of the ICC Act:

"Article 53 of the Rome Statute only required that a reasonable basis existed for the decision whether or not to initiate an investigation. It was common cause in the present proceedings that the standard was met ... The sufficiency of material for prosecution purposes was therefore not the proper threshold that was required, and accordingly, the question ought to have been: Is there enough information to warrant an investigation in terms of the applicable law? The answer has to be, yes, and First Respondents have conceded that [the] Respondents had therefore laboured under an error of law in that context."¹⁷

More broadly, this finding is significant in that it brings clarity to the process of triggering an investigation under the ICC Act in the future, clarity that will be welcomed by other litigants looking to use the ICC Act.

The Jurisdictional Remit of South Africa's Investigating and Prosecuting Authorities

The most significant aspect of the decision was the Court's handling of the issue of jurisdiction, which formed a large part of the respondents' "defence". The fulcrum of the parties' jurisdiction submissions was the proper meaning to be ascribed to section 4(3)(c) of the ICC Act, which states that "[i]n order to secure the jurisdiction of a South African court ... any person who commits [an ICC] crime outside the territory of the Republic, is deemed to have committed that crime within the territory of the Republic if that person, after the commission of the crime, is present in the territory of the Republic".

The respondents argued that this provision established a so-called conditional universal jurisdiction regime in terms of which South Africa could not exercise jurisdiction in any form over crimes until the accused was present in the Republic, and that the absence of jurisdiction on the part of South African courts vitiated the jurisdiction of the police to investigate the torture docket, the two being co-extensive.

The applicants responded that section 4(3)(c) merely conditioned the exercise of enforcement jurisdiction¹⁸ by the courts on the presence of the accused. They argued that South Africa's prescriptive jurisdiction¹⁹ was provided for by section 4(1) of the ICC Act which states that "[d]espite anything to the contrary in any other law in the Republic, any person who commits a [international] crime, is guilty of an offence" and so was not conditional on the presence of the

accused. This reading of the two provisions meant that South African courts did have jurisdiction over the offence. Furthermore, and in any event, the competence of the police to investigate crime was not territorially limited.

Although the point could have been made more clearly, the Court in substance accepted the applicants' submission that section 4(3)(c) of the ICC Act relates to the exercise of enforcement jurisdiction, noting:

*"[The Applicants' Counsel was] ... correct in submitting that s4 (3) of the ICC Act dealt with the jurisdiction of the court to try someone after an investigation. [Counsel for the applicants] submitted that Fourth Respondent's argument was absurd: it would mean that if a suspect was physically present in South Africa then an investigation could continue. If they then left, even for a short period, the jurisdiction would then be lost. If they then re-entered South Africa, an investigation would continue. I agree that this does amount to an absurdity. One does not know what would have occurred if an investigation had been ordered, it was not simply an open and shut case. Section 4 (3) was concerned with a trial. The ICC Act was silent on an investigation, but in my view it is logical that an investigation would have to be held prior to a decision by the First Respondent whether or not to prosecute. I am therefore of the view that Fourth Respondent's argument on the meaning of s4 (3) of the ICC Act cannot be upheld."*²⁰

Through this passage the Court put paid to the argument that the universal jurisdiction regime under the ICC Act is "conditional". In doing so it arguably accepted in substance the distinction made in the applicants' papers between prescriptive and enforcement jurisdiction. In form the Court accepted (and conflated) elements of the applicants' two arguments, drawing a distinction between the investigation of crimes and the trial proper and noting that the former is not limited by the requirement of presence while the latter is.

*"Chapter 2 of this Act deals with jurisdiction of South African courts in respect of crimes, and makes a crime against humanity a crime under South African domestic law. Section 4(1) has no requirement of presence."*²¹

Looking forward, irrespective of which interpretation one adopts, the decision does provide the South African police with extensive power to investigate international crimes the world over, without setting out any mechanism for determining which crimes should be selected (hence the suggestion of the "anticipated presence" standard by the applicants). In this regard it is worth mentioning that the effect of this construction of section 4 of the ICC Act will not only be felt in South Africa as Mauritius recently adopted implementing legislation in respect of the Rome Statute that contains a very similar provision on universal jurisdiction.²²

The Relevance of Political Concerns

The Court was unmoved by the respondents' argument regarding the political implications of the proposed investigation for relations between South Africa and Zimbabwe and between their respective security clusters. While it did not go so far as to rule that such considerations were wholly irrelevant to prosecutions under the ICC Act, it agreed with the applicants that they were premature at the investigatory phase.

*"In my view it is clear that when an investigation under the ICC Act is requested, and a reasonable basis exists for doing an investigation, political considerations or diplomatic initiatives, are not relevant at that stage having regard to the purpose of the ICC Act."*²³

Beyond the value of the decision for the Zimbabwe Torture Docket Case, these aspects of the decision will contribute significantly to the prosecution of international crimes under the ICC Act in the future. What is more, the Court praised the CSOs' efforts in preparing the torture docket and defended them against the unfortunate attacks levelled against them by the State.

*"[The] Applicants' bona fides were attacked, they were accused of publicity seeking, and almost reprimanded for daring to place an undue burden, which was an obvious waste of time, on them. These attacks herein were in my view unfortunate and unjustified, as they did not address the real crux of the case nl. whether the Respondents' response to the torture docket had been performed with due respect for the enabling law applicable to the functions, and with the respect for the values of the Constitution and South Africa's international law obligations."*²⁴

On this basis, the Court ordered the State to pay the costs of the court application. This support – both in principle and practice – for coordinated CSO litigation of this nature will encourage similar actions in the future.

The Significance and Impact of the Decision

- It underlines that South Africa's adherence to its international criminal law obligations is in the public interest.
- It provides content to South Africa's obligations in relation to international crimes in terms of the Rome Statute and ICC Act.
- It affirms that South Africa will not be a safe haven for perpetrators of international crimes irrespective of where the crime is committed or the nationality of the perpetrator .
- It holds out the strongest prospect yet of Zimbabwean officials having to account for their crimes, given the culture of impunity that prevails in Zimbabwe.

The impact of the Zimbabwe decision was almost immediate. In August 2012, South Africa opened its first investigation into international crimes under the ICC Act. What is more, it did so on the basis of universal jurisdiction, in respect of a former head of state, former Madagascan president Marc Ravalomanana, who is currently in exile in South Africa. The investigation was opened following the submission of a docket by the Association of the Martyrs of Antananarivo Merrina Square in respect of alleged crimes against humanity committed in Madagascar in 2009. According to the NPA, the docket raised a reasonable suspicion that crimes against humanity may have been committed. This investigation will be managed and directed by the NPA's PCLU, but carried out by the police's Directorate for Priority Crimes Investigation.

The decision to initiate the investigation was clearly influenced by the Zimbabwe decision. The NPA's announcement makes it clear that the applicable standard for the opening of an investigation is whether there is "reasonable suspicion" that crimes against humanity have been committed. The use of a "reasonable suspicion" test rather than the "reasonable basis" test endorsed by the High Court in the Zimbabwe Torture Case – is regrettable, but it remains to be seen whether there is any practical difference between the two evidential standards.

South African Government Appeals Zimbabwe Torture Case

In 2013, the Supreme Court of Appeal will hear the NPA's application for leave to appeal the decision of the High Court. The appeal is, however, limited to specific questions relating to the issue of jurisdiction, and irrespective of the outcome most of the key findings of the High Court will remain intact.

Lessons Learnt

This initiative and the outcome (the judgment) demonstrate the different roles civil society can embrace (either individually or collectively). It shows that civil society can, through a variety of initiatives, bring about unprecedented results through the novel use of litigation.

LESSONS LEARNT

Collecting Evidence

CSOs are often witness to or are in the vicinity of the commission of human rights violations and are in a position to report on the situation by:

- Collecting information (speaking to witnesses and victims);
- Documenting events;
- Identifying perpetrators;
- Collecting and preserving evidence; and
- Obtaining corroborative testimony.

Monitoring Compliance with Rome Statute and International Law Obligations

- Even if litigation does not materialise, collecting evidence, engaging with law enforcement officials and following up on enquiries allows civil society to monitor compliance and assess the officials' appreciation and understanding of obligations assumed in terms of the Rome Statute and international customary law, and their ability to adhere to those obligations.

Approaching/Engaging with Relevant Government Officials

- Civil society can bring matters that trigger a country's international criminal law obligations to the attention of the authorities responsible for taking further action.
- Evidence of international crimes, especially those committed outside the country in question, may not have reached the relevant authorities. Civil society therefore plays an important reporting function by ensuring that national authorities are aware when persons accused of international crimes are within its jurisdiction.

Litigation as a Tool for Securing Principled Support for International Justice

Strategic litigation:

- Provides a legal avenue that allows civil society to address political unwillingness;
- Provides practical and legal content to obligations that are relatively new in most legal systems;
- Specifies the ambit of the duties of investigating and prosecuting authorities and identifies legal thresholds that trigger the exercise of these duties;
- Creates precedents that will contribute to and inform future investigations and prosecutions by creating certainty; and
- Provides the judiciary with an opportunity to engage with international criminal law and to determine how it should be applied domestically.

CHALLENGES

Litigation is Expensive and Time Consuming

- Litigation is a tool that can bring about meaningful results; however, it will not be appropriate in all situations. Litigation is also extremely costly and time consuming.
- Case selectivity is therefore important and identifying cases that will address issues that are relevant beyond an individual case is an important consideration.

A Decision Relevant Beyond South Africa?

Although legal systems and frameworks vary from country to country, an initiative of this nature would not be limited to South Africa. In a number of countries in Africa situations that invoke international criminal considerations could benefit from increased engagement and pressure by civil society, and litigation if viable. Below are some examples where similar initiatives could be launched to challenge government inaction:

Kenya

Following post-election violence in 2008, Kenya was referred to the ICC. But no domestic prosecutions in terms of Kenya's domestic Rome Statute Act have been undertaken yet against those responsible for the election violence. This failure places Kenya in breach of its obligations in terms of both its international and domestic law obligations. Although it has been reported that a specified war crimes division will be set up within the judiciary, the continued failure of Kenya to ensure justice is done may warrant the initiation of legal proceedings to ensure that investigations and prosecutions commence.

Nigeria

In November 2012, the ICC released a report detailing its findings regarding alleged crimes against humanity committed in Nigeria. The report concluded that a reasonable basis existed to believe that the Boko Haram had committed crimes against humanity. The ICC prosecutor, Fatou Bensouda, on a visit to Nigeria, indicated that she hoped the country would take domestic action against the perpetrators. Civil society has the potential to ensure that Nigeria abides by its obligations by putting pressure on the Nigerian authorities to initiate domestic prosecutions.²⁵

Zambia

A slightly different scenario is the recent refusal of the Zambian government to extradite a number of genocide suspects to Rwanda. The Zambia government justified this decision on the ground that Zambia did not have an extradition agreement with Rwanda. Zambia, however, is party to the Great Lakes Pact and its Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes Against Humanity which provides that in respect of war crimes, crimes against humanity and genocide and in the absence of an extradition agreement, the Protocol serves as a sufficient legal basis for extradition.²⁶