

## CHAPTER 6: BUILDING LEGAL ARCHITECTURE, HUMAN CAPACITY AND POLITICAL WILL

*The process to import the core international crimes of genocide, crimes against humanity and war crimes into national criminal law is an issue of critical importance to the emerging system of international criminal justice. The architecture of this system rests on the principle of complementarity, which provides that the International Criminal Court may have to investigate and prosecute cases that are not dealt with genuinely by national criminal justice systems. This entails a two-fold requirement of national preparedness to deal with core international crimes.*

*First, states should have some institutional capacity to investigate and prosecute genocide, crimes against humanity and war crimes cases within the national jurisdiction. If there are insufficient resources to have a separate unit for such crimes, then the state should facilitate that some members of the criminal justice system develop expertise in this area through suitable competence building measures, including training and access to specialised electronic resources.*

*Secondly, states should develop legislative capacity to prosecute and adjudicate core international crimes cases before national courts. This includes provisions in national criminal law explicitly criminalising genocide, crimes against humanity and war crimes.*

### MORTEN BERGSMO<sup>1</sup>

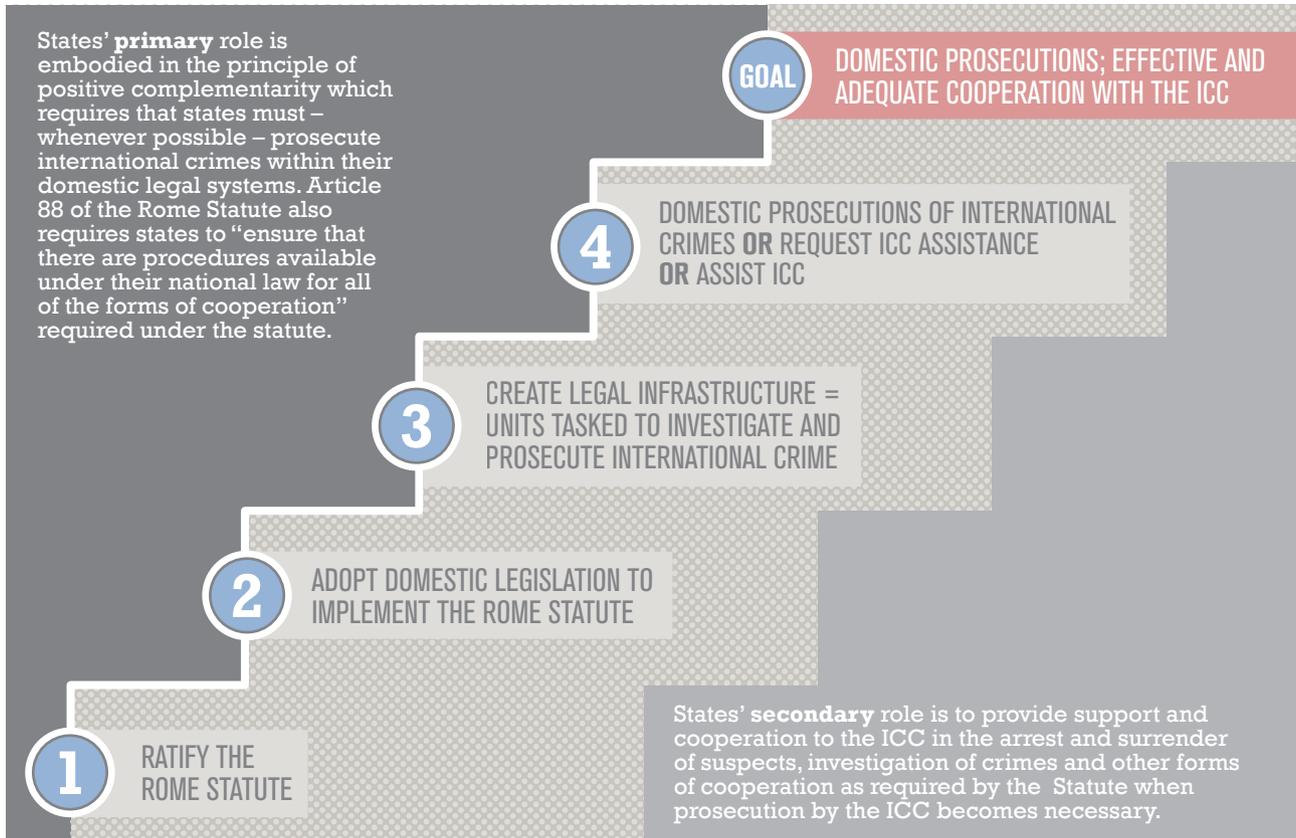
Under the Rome Statute, states are required to play both **leading** and **supporting** roles.

To perform these functions it is preferable, and in some cases imperative, for states to pass implementing legislation – domestic laws – giving effect to their obligations under the Rome Statute.

- Such legislation is imperative in dualist states that require legislation as a matter of domestic law in order for international norms to be applied domestically.
- Implementing legislation is preferable in monist states as, although international norms are automatically applicable within these legal systems, such legislation makes cooperation with the court more efficient and effective.

Many states do not currently have the necessary legal frameworks for the prosecution of international crimes, which burdens the ICC as it creates difficulties for states, particularly dualist ones, in undertaking such prosecutions. The adoption of domestic legislation is therefore key to the functioning of the ICC as a court of last, rather than first, resort.

The existence of implementing legislation has also proved vital as a pressure point for civil society in South Africa and Kenya to ensure their governments cooperate with requests for arrest and surrender of ICC suspects and the initiation of domestic proceedings, as the legislation creates a specific legal and political avenue through which to pressure states to adhere to these obligations.



Given this, it is no surprise that to date, implementing legislation has been a key focus area of civil society. Unfortunately, African states' enthusiasm for ratifying the Rome Statute has not carried over into the adoption of implementing legislation and only a handful of African countries have adopted domestic legislation to give effect to cooperation obligations, or complementarity, or both.

Notably, in the countries that have adopted implementing legislation – such as South Africa, Kenya, Uganda, Mauritius, the DRC and Senegal – CSOs have been instrumental in the drafting and adoption process. It is not enough only to have implementing legislation; its specific provisions need to be well drafted.

The existence of implementing legislation has also proved vital as a pressure point for civil society in South Africa and Kenya as it creates a specific legal and political avenue through which to pressure states to cooperate with requests for arrest and surrender of ICC suspects and the initiation of domestic proceedings.

Here too civil society is active. At present, there are a number of CSOs working towards getting implementing legislation adopted in a number of other African states.

In this section, the existing African implementing legislation will be discussed briefly – focusing on the role that CSOs have played in the drafting and adoption of this legislation. Where applicable, special consideration will be given to the manner in which the implementing legislation has given effect to the cooperation and complementarity obligations of states parties. Thereafter, the way forward will be discussed along with some lessons learnt.

Creating an environment conducive to the realisation of the principle of complementarity requires political will in the state concerned.

A state that has not signed the Rome Statute or implemented its provisions into domestic law is not prohibited from dispensing international criminal justice. Under the principle of **universal jurisdiction** it is accepted that in the context of core international crimes, a state is entitled to exercise jurisdiction absent the traditional bases of jurisdiction (such as territoriality and nationality).

“I have learnt, among other things, that the weaknesses in national accountability mechanisms undermine efforts at promoting international criminal justice. Ultimately, African countries need to strengthen national accountability mechanisms.”

**Ibrahim Tommy**  
**Centre for Accountability and Rule of Law, Sierra Leone**

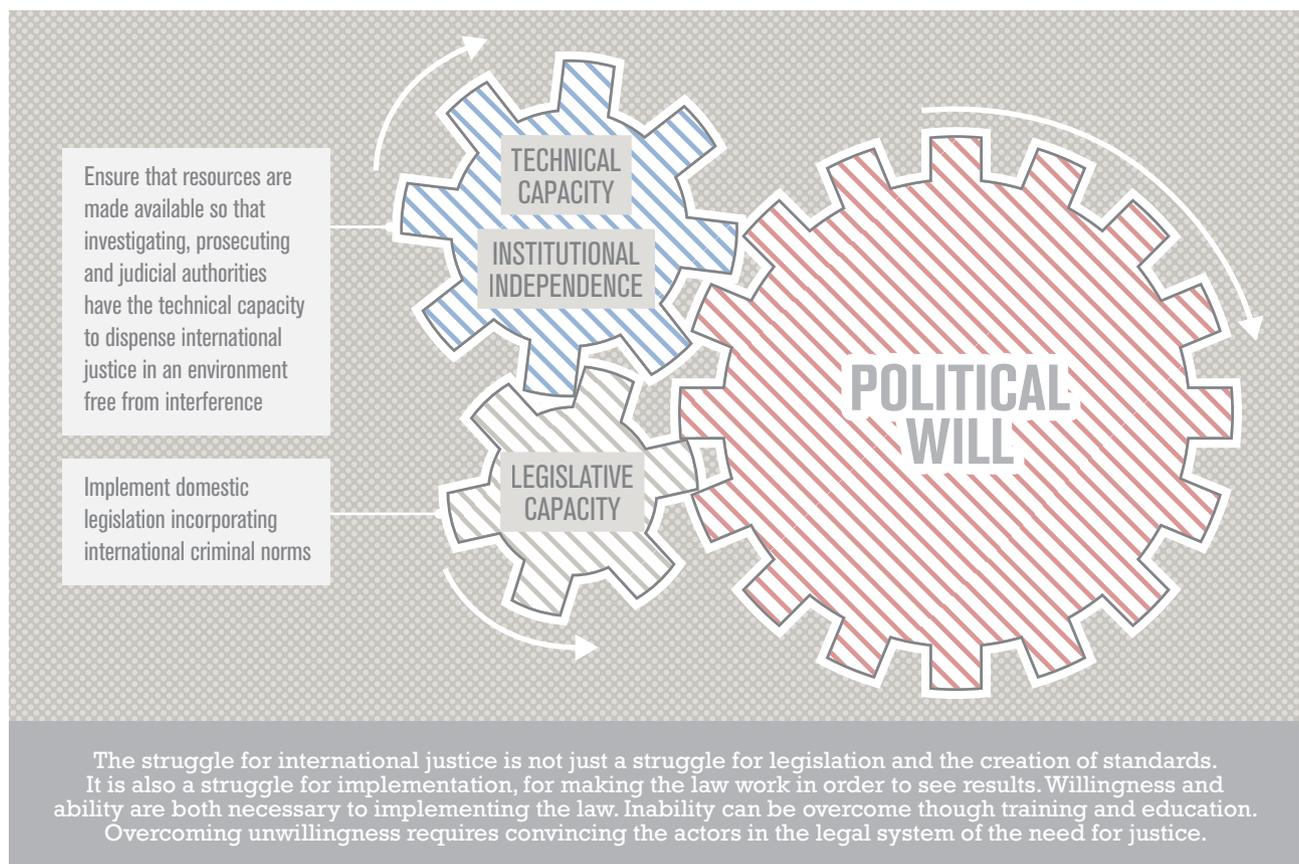
However, the international consensus is that the principle of universal jurisdiction over international crimes is **an option, not an obligation on states.**<sup>2</sup>

There has been a reluctance to assert universal jurisdiction in the absence of national legislation. State practice demonstrates that because international law permits the exercise of universal jurisdiction but does not prescribe its mechanisms, without national legislation the investigating, prosecuting and judicial

authorities have no framework to guide, constrain or stipulate the mechanics of investigations and prosecutions. National legislation is also an opportunity to give concrete content to universal jurisdiction principles and so helps to ensure that prosecutions adhere to international standards applicable to the investigation and prosecution of international crimes. A legislative framework also enables states to address any deficiencies in their capacity and expertise as it can create the mechanisms necessary to hold credible investigations and prosecutions.

The regime created by the Rome Statute can assist states to avoid these difficulties. It is the blueprint for a legal framework that defines the crimes, their elements and modes of liability, and it sets procedural thresholds for investigations and prosecutions that meet internationally accepted fair trial standards.

The Rome Statute’s international endorsement means that an agreed upon and uniform international criminal justice framework exists for those states that have ratified it.





**Legislation:** Implementation of the Rome Statute of the International Criminal Court Act, 27 of 2002.

### ICC Cooperation Provisions

Section 8 requires South Africa to refer any requests from the ICC for the arrest and surrender of a person wanted by the ICC to the director general of justice and constitutional development with the necessary documentation to satisfy a local court that there are sufficient grounds for the surrender of the person to The Hague.<sup>3</sup> The director general must then forward the request to a magistrate to endorse the ICC warrant of arrest for execution in any part of the Republic.<sup>4</sup>

### Immunity Provisions

There are no specific provisions relating to immunity in respect of cooperation with the ICC. Section 4(2)(a) states that notwithstanding “any other law to the contrary, including customary and conventional international law, the fact that a person [...] is or was a head of state or government, a member of a government or parliament, an elected representative or a government official [...] is neither – (i) a defence to a crime; nor (ii) a ground for any possible reduction of sentence once a person has been convicted of a crime.”

### Domestic Prosecution Provisions

Section 4(1), which holds 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 the incorporation of the Rome Statute crimes through a schedule confirm that international crimes are deemed to be crimes in South Africa.<sup>5</sup> There are four grounds upon which South African courts can exercise jurisdiction over international crimes: if the perpetrator is a South African citizen or ordinarily resident in South Africa; if the crime was committed against a South African citizen or person ordinarily resident in the country; and if the perpetrator is present in South Africa after the commission of the crime.<sup>6</sup>



**Legislation:** International Crimes Act, 2008.

### ICC Cooperation Provisions

Requests for assistance must be communicated to the minister of justice or the attorney general, depending on the nature of the request.<sup>7</sup> The procedure to be followed for urgent requests is also set out.<sup>8</sup>

### Immunity Provisions

Section 27(1) confirms that the official capacity of a person shall not constitute a ground for refusing or postponing the execution of a request for cooperation with the ICC, holding that a person is ineligible for transfer to the ICC or another state wishing to prosecute him/her or holding that a person is not obliged to provide the assistance sought. However, section 27(1) is subject to section 115, which allows for the minister to postpone cooperation in respect of requests *involving conflict with other international obligations*.<sup>9</sup> The Act excludes article 27 of the Rome Statute in its entirety from the list of *General Principles of Criminal Law* contained in Part 3 of the Rome Statute that apply in such circumstances, which is remarkable as nowhere else in the Act is the question of immunity addressed as far as domestic prosecutions are concerned.

### Domestic Prosecution Provisions

Section 8 provides that “[a] person who is alleged to have committed an [international crime] ... may be tried and punished in Kenya for that offence” if certain jurisdiction prerequisites are met. These include if the alleged crimes were committed in Kenya, the perpetrator or victim was a Kenyan citizen, or the person is present in Kenya after commission of the offence. Section 7 incorporates most of the *General Principles of Criminal Law* contained in Part 3 of the Rome Statute, “with the necessary modifications” for the purposes of domestic prosecutions under the Act and gives these General Principles precedence over the relevant Kenyan laws.



UGANDA

**Legislation:** International Criminal Court Act of 2010.

**ICC Cooperation Provisions**

Sections 21 and 22 state that requests for assistance shall be made to the minister of justice who shall consult with the ICC without delay if there is or may be a problem with its execution.

**Immunity Provisions**

Section 25 provides that the official capacity of a person is not an excuse for refusing or postponing a request. However, section 25 is subject to section 24, which provides that if the “[J]ustice Minister is of the opinion that the circumstances set out in article 98 of the [Rome] Statute apply to a request for provisional arrest, arrest and surrender or other assistance, he or she shall consult with the ICC and request a determination as to whether article 98 applies”. The Act explicitly excludes article 27 from the *General Principles of Criminal Law* incorporated from the Rome Statute into the domestic prosecution regime.

**Domestic Prosecution Provisions**

Section 18 provides for the domestic prosecutions of international crimes committed after the date the act came into effect (25 June 2010), and on Ugandan territory, or outside Uganda when the alleged perpetrator or victim is a citizen or permanent resident, the person is employed by Uganda or the person is present in Uganda after the commission of the offence.

Note: In 2008, before this Act was enacted, the Ugandan government established a War Crimes Division within the High Court for the purpose of prosecuting international crimes. In addition, special units were established within the Uganda Police Force and the Directorate of Public Prosecutions



MAURITIUS

**Legislation:** The International Criminal Court Act, 27 of 2011.

**ICC Cooperation Provisions**

Section 11 states that ICC arrest warrants are to be communicated to the attorney general who will pass them on to a judge to be endorsed, without exception. Section 13 prohibits the attorney general from postponing the execution of a request for arrest and surrender at any time before the surrender of the person, “unless the request would interfere with an investigation or prosecution in Mauritius involving a different offence from that for which surrender is requested.”

**Immunity Provisions**

Section 6(1) of the Act provides that official capacity shall not be “a defence to an offence ... nor a ground for a reduction of sentence for a person convicted of an offence.”

**Domestic Prosecution Provisions**

Section 4 of the Act empowers Mauritian courts to prosecute international crimes when the perpetrator or one of the victims is a citizen or ordinary resident of Mauritius, or when the perpetrator is “present in Mauritius after the commission of the crime”.



SENEGAL

**Legislation:** An amendment to its Penal Code and an amendment to its Procedural Code, 2007.



BURKINA FASO

**Legislation:** An amendment to its Penal Code and an amendment to its Procedural Code, 2008.

**Immunity Provisions**

Article 7 states that official capacity – including that of head of state – is irrelevant for the purposes of prosecutions. Article 14 states that such crimes do not prescribe, nor are amnesties permitted in respect of them.

**Domestic Prosecution Provisions**

The legislation provides the basis for prosecuting Rome Statute crimes (as well as crimes under the Geneva Conventions and its Additional Protocols).

## Getting More Implementing Legislation Drafted

Ensuring that the remaining African states parties to the Rome Statute adopt implementing legislation is crucial. At present, such legislation is in the pipeline in Benin,<sup>10</sup> Botswana, Burundi,<sup>11</sup> the CAR, the Comoros,<sup>12</sup> the DRC, Gabon,<sup>13</sup> Ghana,<sup>14</sup> Lesotho,<sup>15</sup> Madagascar,<sup>16</sup> Namibia,<sup>17</sup> Nigeria,<sup>18</sup> Republic of Congo<sup>19</sup> and Sierra Leone.<sup>20</sup> In most of these countries, domestic and international CSOs have been vital in promoting and supporting this process. However, the existence of draft bills is by no means a guarantee that such legislation will be forthcoming. One need only consider the marathon attempt by civil society to get such legislation adopted in the DRC to see the unpredictable and difficult challenges it faces in this regard.<sup>21</sup>

The DRC first introduced draft implementing legislation for the Rome Statute in 2002, in order to “integrate the norms of the Statute of the International Criminal Court into Congolese applicable law following the ratification of March 30, 2002”.<sup>22</sup> The draft involved the adoption of a number of legislative amendments and additions relating to the penal code and procedure, the judiciary, as well as introducing a cooperation regime with the ICC. Throughout the drafting process international and domestic CSOs were involved, prompting Amnesty International to praise “the transparency and consultation with civil society with which the government has drafted this legislation”.<sup>23</sup> So thorough was the process that there were a number of versions (in 2002, 2003 and 2005).<sup>24</sup> In 2005, the government adopted the draft bill and it was sent to the president of the National Assembly for consideration and adoption. Unfortunately, the project stalled in 2006 with the dissolution of parliament. The Bill was re-introduced into parliament in 2008 with a number of amendments addressing the concerns of civil society, including the removal of the death penalty and the removal of the defence of superior orders.<sup>25</sup> However, despite continued efforts to finalise the law – including a parliamentary vote in November 2010 declaring the Bill admissible and sending it to the National Assembly for deliberation – the implementing legislation remains in its final stages, allegedly because of a lack of support from the military.<sup>26</sup>

### Bringing the Rome Statute Home

The reasons for the delay, or in the case of some states refusal, to adopt implementing legislation are numerous.

Broadly speaking, they fall into two categories: states that are unwilling to do so (often for domestic political reasons); and states that are unable to do so for lack of capacity or technical expertise. In addition, a few states argue that implementing legislation is unnecessary as the provisions of the Rome Statute are self-executing.<sup>27</sup>

In the future, civil society must continue to address both the states that are unwilling to enact such legislation, as well as those that have not been able to do so yet. In some instances this reticence on the part of states is based on misunderstandings regarding the ICC, such as the reach of its temporal jurisdiction over past crimes, which can be addressed through dialogue. In other instances it is based on more complex political dynamics that require concerted and targeted lobbying from civil society, both domestically and internationally.

Assisting those states that are willing to adopt such legislation but suffer from a lack of resources or expertise is more straightforward but is not without its own challenges. CSOs’ difficulties in providing this assistance is compounded by the fact that there has been no single approach for states to follow in adopting implementing legislation, nor is there universal agreement as to what it should entail.

The CICC has provided some advice in respect of the process to be followed:

*“While there is no single best methodology for drafting implementing legislation, any implementation process should be transparent and inclusive. Prior successful efforts have involved the use of government inter-ministerial committees and included close consultation with civil society.*

*Even more so than with ICC ratification efforts, implementation efforts must take place at least in part at the grass-roots level. National and local groups must have ownership in the implementation process, as the process itself is dependent upon country-specific legal and political circumstances that nationals will best understand. Even where direct involvement in drafting is not possible, these groups' advocacy efforts will be instrumental to the passage of strong and effective legislation. Moreover, the groups must understand the legislation so that they can play a role in its application should cases arise in their respective countries under one of the ICC crimes, or should the ICC make a cooperation request.”<sup>28</sup>*

Even once the will and capacity exists to adopt such legislation, there are challenges as to what it should look like. There are a number of different examples from which to choose (see textbox), with the recently revised Commonwealth Model Law perhaps being the most favoured.<sup>29</sup> Among those African states that have adopted implementing legislation, there have been two main versions: for example, Uganda followed the Kenyan model, while Mauritius relied heavily on the South African one. Looking ahead, the AU's Model Law on Universal Jurisdiction may also be a source of guidance in this regard.<sup>30</sup>

In terms of the content of the implementing legislation, two key issues have to be addressed. The first is whether the “positive complementarity” regime will provide for the exercise of universal jurisdiction (such as in South Africa). The second, more contentious issue is what role immunity will play in the prosecution of international crimes domestically, and in complying with cooperation requests from the ICC. The existing African implementing legislation is contradictory (or ambivalent) on the issue; however, the AU has taken the position that immunity should continue to apply when it comes to cooperation requests from the ICC. In contrast, the most recent version of the Commonwealth Model Law includes a provision that removes such immunity when the state concerned is a state party, or is the subject of a Security Council referral.<sup>31</sup>

## The National Implementing Legislation Database

One important tool available for civil society insofar as the drafting and adoption of implementing legislation is concerned is the National Implementing Legislation Database (NILD). Initially, the database was used as a tool for the Human Rights Law Centre at the University of Nottingham, which was training individuals responsible with drafting ICC-related legislation in a number of countries. Through this process it became clear that “[f]or many States, the lack of resources, personnel and international criminal law expertise, combined with the fact that the ICC may not be a top priority, impacts on the speed and quality of the adoption of legislation”, as a result there was a need for “precise, accurate legal information to be easily accessible to those who are considering implementation”.<sup>32</sup>

Today, the NILD contains:

- A comprehensive catalogue of all official versions of national ICC implementing legislation, broken down to fine-grain decompositions (“spans”), which have been “tagged” with corresponding keywords selected from a list of approximately 800 purposely designed keywords;
- A list of key state attributes, which impart a broader picture of particular state choices; and
- Legal analysis of those provisions that are of particular interest either because they are wider or narrower than the relevant ICC Statute provision, or because they introduce new concepts or notable aberrations.

According to one of its creators:

“The NILD aspires to map emerging trends in implementation through the breakdown and analysis of existing legislation, enabling the identification of the requisite standards for the enactment of effective national implementing legislation. It aims to provide guidance to States that have yet to engage in the implementation process, materialising the complementarity promise, assisting NGOs in targeting their advocacy campaigns and serving multiple research purposes.”<sup>33</sup>

## The Next Step: Building the Institutional Architecture, Human Capacity and Political Will

In the case of African states that have adopted implementing legislation, the next step is to build the institutional architecture and human capacity to carry out the various tasks required by it. While there is an obvious need for further ratification and domestication of the Rome Statute by Southern African countries as well as for relevant law reform, these steps alone do not give effect to actual state compliance with international law obligations. Once again, civil society has an important role to play. In some countries, the capacity building needs are immense.

Investigating and prosecuting serious international crimes on any basis of jurisdiction can be costly, time-consuming and complex, requiring a significant amount of experience and expertise of all authorities involved. Political willingness of governments is needed to provide the necessary resources and to create an environment that is conducive to successful prosecutions. In Africa, overburdened and under-resourced judicial systems, combined with skill shortages, make any prosecution of serious international crimes very challenging.

**Mauritius** – the most recent African state to adopt implementing legislation – listed the following needs when asked what it needed to ensure more effective cooperation with the ICC:

“Legal training and non-legal technical expertise and assistance to the police force, relevant government departments, prosecuting authorities and members of the Judiciary as regards their respective involvement (in particular, cooperation requests and judicial assistance, arrest and surrender requests, investigation and collection of evidence, protection of witnesses and victims as well as their participation in proceedings, prosecution of international crimes, and enforcement of sentences). Dissemination of information to government and non-governmental organisations as well as to the public generally so as to enable them to cooperate without delay with the authorities.”<sup>34</sup>

**These provide indicators of where civil society, in partnership with governments, can lend its assistance.**

This process has already begun in some countries, providing an opportunity for lessons to be learnt. For example, in 2003, after the adoption of implementing legislation, South Africa created a specialised unit within the National Prosecuting Authority (NPA) for the prosecution of international crimes, the Priority Crimes Litigation Unit (PCLU).<sup>35</sup> In addition, specialised units within the police service are tasked with assisting the PCLU: specifically, the Crimes Against the State (CATS) unit, located within the Directorate for Priority Crimes Investigation, performs the investigative function under the direction of the head of the PCLU.<sup>36</sup> In Uganda, the institutional framework to prosecute international crimes was established in 2008 in the form of a specialised division of the High Court: the International Crimes Division (ICD).<sup>37</sup> The ICD consists of five judges, a registrar and six prosecutors, supported by five investigators.<sup>38</sup>

These institutions in South Africa and Uganda face numerous challenges. In South Africa, the political environment has made the initiation of prosecutions in some cases difficult, while Uganda’s ICD has challenges in respect of resource-availability. One challenge that both South Africa’s PCLU and Uganda’s ICD continue to face is skills development. In this instance, CSOs can and have played a vital role in training the members of these specialised units. In South Africa, since 2008, the ISS has trained members of the South African prosecuting authority and the police service and members of Uganda’s ICD in the investigation and prosecution of international crimes. However, much remains to be done in these and other countries, and civil society involvement will continue to be crucial.

Last but not least, CSOs will have to ensure that political will is created among key actors to ensure that their countries support the prosecution of international crimes and cooperate fully with the ICC. In this regard litigation is an effective tool in tackling political unwillingness. Courts are therefore a useful tool for compelling governments to comply with their international and domestic obligations, but an equally important role for CSOs is to garner support for international criminal justice initiatives among domestic political actors.

## Endnotes

1. M Bergsmo, M Harlem & N Hayashi (eds) *Importing Core International Crimes into National Criminal Law*, *FICJC Publications No. 1* (2007), 3.
2. J Dugard *International Law – A South African Perspective* 3 ed (2005) 157.
3. Implementation of the Rome Statute Act 27 of 2002 (ICC Act), section 8(1).
4. ICC Act, section 8(2). Notably, the ICC Act is silent on the relevance of immunity in relation to cooperation requests and the relationship between articles 27 and 98. Contrary to implementing legislation in Kenya and Uganda, the ICC Act's immunity provision focuses on the impact of immunity in domestic prosecutions and makes no mention of immunity in relation to cooperation with the ICC. However, in practice the South African government has taken the position that immunity is not a bar to cooperation, as evidence by the belated (and begrudging) revelation that the Bashir arrest warrant had been endorsed by a South African magistrate, is active in the Republic and that Bashir would be arrested should he be present in the Republic.
5. Part 1 of Schedule 1 to the ICC Act replicates the definitions of genocide, crimes against humanity and war crimes in articles 6, 7 and 8 of the Rome Statute, respectively. Importantly, while the ICC Act incorporates the definitions of these crimes into South African domestic law, neither the Act nor Schedule 1 refers specifically to the ICC Elements of Crimes.
6. Sections 4(3)(b) and (d) of the ICC Act respectively. Notably, nationality and active personality jurisdiction may be founded on citizenship or if the person concerned (either the perpetrator or victim respectively) is "ordinarily resident in the Republic".
7. Section 21, International Crimes Act.
8. Section 22, International Crimes Act.
9. Section 115(1), International Crimes Act: "If a request by the ICC for assistance to which this Part applies concerns persons who, or information or property that, are subject to the control of another State or an international organisation under an international agreement, the Attorney General shall inform the ICC to enable it to direct its request to the other State or international organisation." Section 115 expressly refers to article 98 of the Rome Statute and in doing so it arguably adopts an interpretation of the article 27/98 relationship that implicitly rejects the common article 27 waiver argument. Section 115 is by no means perfect; it appears to imperfectly conflate article 98(1) and article 98(2) by referring to requests relating to "persons who, or information or property that, are subject to the control of another State or an international organisation under an international agreement". This is different from article 98(1), which refers to "obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State". What is more, the reference to persons, property or information "subject to the control of another State" is novel and potentially casts the net far wider than traditional immunity *ratione personae*. However, these difficulties aside, section 115 clearly does not distinguish between persons coming from states parties to the Rome Statute, as the article 27 waiver argument requires.
10. The CICC Chart on the Status of Ratification and Implementation of the Rome Statute and the Agreement on Privileges and Immunities (APIC) (CICC Chart), available at [http://www.coalitionfortheicc.org/documents/Global\\_Ratificationimplementation\\_chart\\_May2012.pdf](http://www.coalitionfortheicc.org/documents/Global_Ratificationimplementation_chart_May2012.pdf) states that "[t]he draft (available) is in circulation. It covers both complementarity and cooperation. On June 2008, the President of Benin sought the legal opinion of the Supreme Court. On September 2009, the draft was reviewed and handed over to the government for consideration of the amendments made by the Supreme Court. Once the Council of Ministers adopts the implementation legislation bill, the government will then send the draft bill to the National Assembly for enactment."
11. "Work on the cooperation law is in progress. A new draft of the penal code is before the National Assembly, and the UN is contributing to the drafting of a new Criminal Procedural Code. However, certain improvements to Burundi's Implementation legislation by comprehensively embracing all clauses, including the relevant clauses on complementarity and cooperation, are still necessary." Id.
12. "A draft bill covering complementarity and cooperation resulting from a joint workshop civil society/government held in September 2008 has been adopted by the Council of Ministers. Due to the government's openness, many stakeholders, including AI [Amnesty International] and PGA [Parliamentarians for Global Action], have provided input and observations which have been widely incorporated into the draft. The draft is presently before the Parliament awaiting deliberations, which will lead to the implementation of the draft into law. In December 2011, Parliament adopted the implementation bill. Following administrative matters, the Bill will be transmitted to the President for his concurrence. Previously, a bill on cooperation which was not comprehensive was enacted by Parliament." Id.
13. "Since June-July 2008, there has been a draft bill on Gabon's penal code which has been made available but only covers some aspects of complementarity. Presently, the government has given the go ahead for a review by national and international experts in order to come up with a more comprehensive draft that will cover both complementarity and cooperation clauses. The situation has encountered a stalemate with the important political changes resulting from the death of former President Omar Bongo." Id.
14. "The draft was completed without civil society input and it is currently before the Cabinet for approval before being presented to Parliament for enactment. The draft is not yet available to the public." Id.
15. "A draft implementation bill exists and is in the possession of the Cabinet, but has not yet been made public." Id.
16. "Presently, the government is in the process of gathering information and expertise that would help to complete the implementation process. The government is open to implementation of the [Rome Statute] and working with civil society groups throughout the process. It is believed that the persistent political crisis and rampant human rights violations have played a major role in delaying the completion of the implementation process despite the enthusiasm demonstrated by civil society towards the [Statute]." Id.
17. Namibia has a draft bill that is currently being revised.
18. "The 2006 Rome Statute (Ratification and Jurisdiction) Bill was passed by both houses of the National Assembly but was not harmonized for assent by the President before the end of the last civilian administration in May 2007. The bill is to be resubmitted by the Ministry of Justice." CICC Chart, *supra* note 10.
19. "A draft bill including both cooperation and complementarity provisions has been reviewed by the Supreme Court for improvement and

- amendments on the government request. The draft bill is currently with the government, which will incorporate as appropriate the amendments and observations from the Supreme Court and thereafter send the draft bill to the Parliament for enactment." Id.
20. "Since April 2008, the Minister of Justice has been working on the draft bill which is not yet public. It is expected that the draft will be open to civil society input once finalized and approved by the Cabinet, prior to being transmitted to the Parliament." Id.
  21. As the DRC is a monist country, the Rome Statute was technically implemented on 5 December 2002, the date that it was published in the Government Gazette. However, in a monist system legislative amendments are generally required in order to practically implement the law domestically. For more information see "The Repression of International Crimes by Congolese Jurisdictions", Le Club des Amis du Droit du Congo, available at [http://www.iccnw.org/documents/CAD\\_TheRepressionofInternationalCrimes\\_Dec2010\\_EN.pdf](http://www.iccnw.org/documents/CAD_TheRepressionofInternationalCrimes_Dec2010_EN.pdf).
  22. CICC Chart supra note 10.
  23. Amnesty International, "Democratic Republic of Congo: Parliament must reform and enact International Criminal Court bill", Public Statement, AI Index: AFR 62/002/2006 (3 February 2006) available at <http://www.amnesty.org/en/library/asset/AFR62/002/2006/en/4e5190db-fa0d-11dd-b1b0-c961f7df9c35/afr620022006en.pdf>. During the drafting process concerns were raised regarding the inclusion of the death penalty for genocide and crimes against humanity, the exclusion of certain war crimes contained in the Rome Statute, the inclusion of the defence of superior orders, insufficient pre-trial safeguards, as well as ambiguity in some of the language.
  24. See Amnesty International "Loi Modifiant et Completant Certaines Dispositions du Code Penale, du Code d'Organisation et de la Competence Judiciaires, du Code Penal Militaire et du Code Judiciare Militaire, en Application du Statut de la Cour Penale Internationale, République Démocratique du Congo: Commentaires et Recommandations du Projet de Loi de Juillet 2003 Portant Mise en Oeuvre du Statut de Rome de la Cour Pénale Internationale", AI Index: AFR 62/008/2004 (28 May 2004) and Amnesty International "République Démocratique du Congo: Commentaires et Analyse du Projet de Loi de la RDC Portant Mise en Oeuvre du Statut de Rome de la Cour Pénale Internationale" AI Index: AFR 62/031/2003 (29 September 2003).
  25. While the project is on-going, CSOs have been instrumental in these efforts to draft and adopt implementing legislation in the DRC. As Askin notes "[c]ivil society has played a major role in the effort to pass Rome Statute implementing legislation through the National Assembly. The International Center for Transitional Justice worked in coordination with other NGOs including Avocats sans Frontières and the Coalition for the International Criminal Court (CICC) to draft proposed elements of the legislation and educate parliamentarians about the Rome Statute. PGA has played an educational role and its Congolese membership has provided a core group of MPs from different parties who can push for adoption of the draft law. The United Nations Joint Human Rights Office's 'fight against impunity' unit has also advocated passage of the implementing legislation." K Askin "Putting Complementarity into Practice: Domestic Justice for International Crimes in DRC, Uganda, and Kenya" (2011) Open Society Foundation, 22. available at <http://www.opensocietyfoundations.org/sites/default/files/putting-complementarity-into-practice-20110120.pdf>
  26. The Office of the UN High Commissioner for Human Rights (OHCHR) "Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003" (August 2010), 433-4. In 2011, the DRC government announced that it would establish a Specialised Mixed Court for the Prosecution of Serious International Crimes in the Democratic Republic of Congo from 1990 until 2003. Once again, CSOs were at the forefront of this process. According to the Common Position adopted by local and international CSOs, which welcomed the establishment of the specialised mixed court, the draft statute of the mixed court required certain amendments in order to be truly independent, effective, and credible. These included extending its jurisdiction to crimes that took place after 2003, increased and effective international participation, increasing the role for victims and improving trial rights of accused.
  27. "Government officials in Liberia ... argue that international instruments ratified by Liberia are self-executing and may not require further implementation. There is no hostility vis-à-vis the ICC but the government is not showing willingness to speed up the implementation process." CICC Chart supra note 10.
  28. Id.
  29. Commonwealth Secretariat "Model Law To Implement the Rome Statute of the International Criminal Court" (May 2011), Annex B International Criminal Court (ICC) Statute and Implementation of the Geneva Conventions, available at <http://www.thecommonwealth.org/files/238381/FileName/LMM%2811%2917PICCStatuteandImplementationoftheGenevaConventions.pdf>.
  30. AU Model Law on Universal Jurisdiction (copy on record with author).
  31. Commonwealth Secretariat Model Law supra note 29.
  32. O Bekou, "Building Databases for the ICC Legal Tools Project: Data Structures and the National Implementing Legislation Database", In M Bergsmo (ed) *Active Complementarity: Legal Information Transfer in Criminal Justice for Atrocities* (2011) 153-180.
  33. Id.
  34. Response of Mauritius to "Plan of Action Questionnaire on Implementing Legislation", issued by the Secretariat of the Assembly of States Parties to the International Criminal Court, available at [http://www.icc-cpi.int/Menus/ASP/Sessions/Plan+of+Action/2010+\\_+Plan+of+Action\\_ASP9.htm](http://www.icc-cpi.int/Menus/ASP/Sessions/Plan+of+Action/2010+_+Plan+of+Action_ASP9.htm).
  35. Presidential Proclamation made in terms of section 13(1)(c) of the National Prosecuting Act 32 of 1998 (24 March 2003) A copy of the Proclamation is on file with the author.
  36. "Like the PCLU which has a much broader mandate than just international crimes, the CATS unit is tasked with investigating a range of other serious offences such as acts of terror, offences related to the unlawful use or transfer of firearms and other deadly weapons, organised crime, and acts which may pose a serious threat to the security of the state such as treason and sedition." M du Plessis, A Louw & O Maunganidze "African Efforts to Close the Impunity Gap" (2012) Institute for Security Studies available at <http://www.issafrika.org/pgcontent.php?UID=31915>.
  37. Id.
  38. Id.