

**International Criminal Court Questionnaire/Annex - Implementing
Legislation for States Parties (Reference ICC-ASP/S/PA/07)**

Question 1

The Republic of South Africa has domesticated the Rome Statute of the International Criminal Court (Rome Statute) in terms of the Implementation of the Rome Statute of the International Criminal Court Act, Act No. 27 of 2002, which came into operation on 18 July 2002.

Part B

Question 5

South Africa was among the drivers for a strong and independent International Criminal Court. This positive position towards the idea of a permanent body of international criminal justice was also mirrored by how the issues were handled inside the country. To facilitate early ratification, an interdepartmental committee was established under the direction of the Department of Justice and Constitutional Development. South Africa ratified this international instrument on 10 November 2000, and the Minister of Justice introduced an International Criminal Court Bill by July 2001. In order to help smooth implementation, the Southern African Development Community (SADC), to which South Africa belongs, presented member states with a "Model Enabling Act" in 1999, which incorporated all International Criminal Court-related matters in one statute with the Rome Statute itself appended as a schedule.

Consequently the Rome Statute is annexed to the Implementation of the Rome Statute of the International Criminal Court Act, Act No. 27 of 2002.

Question 6

The core crimes now form part of South African law:

- Section 3(1)(c) of the Implementation of the Rome Statute of the International Criminal Court Act, Act No. 27 of 2002, specifies as one of the objects of the Act *“to provide for the crime of genocide, crimes against humanity and war crimes”*
- Section 4(1) Implementation of the Rome Statute of the International Criminal Court Act, Act No. 27 of 2002, makes it clear that *“Despite anything to the contrary in any other law of the Republic, any person that commits a crime, is guilty of an offence ...”*

Section 1 of the Implementation of the Rome Statute of the International Criminal Court Act, Act No. 27 of 2002, deals with the definitions, and *inter alia*:

“crime” means the crime of genocide, crimes against humanity and war crimes;

“genocide” means any conduct referred to in Part 1 of Schedule 1;

“a crime against humanity” means any conduct referred to in Part 2 of Schedule 1;

“a war crime” mean any conduct referred to in Part 3 of Schedule 1;”

The drafters of the Implementation of the Rome Statute of the International Criminal Court Act, Act No. 27 of 2002, incorporated the Rome Statute’s definitions of the 3 core crimes directly into South African law through Schedule 1 appended to the Act:

- Part 1 of Schedule 1 follows the wording of Article 6 of the Rome Statute (Genocide)
- Part 2 of Schedule 1 follows the wording of Article 7 of the Rome Statute (Crimes against Humanity)

- Part 3 of Schedule 1 follows the wording of Article 8 of the Rome Statute (War Crimes)

However, nowhere in the Implementation of the Rome Statute of the International Criminal Court Act, Act No. 27 of 2002, is there a specific referral to Article 9 of the Rome Statute on the Elements of the Crimes. However, it is the opinion of South African authors¹ that nothing prevents a South African court from having regard to the Elements of the Crime were it to be involved in the domestic prosecution of one of the core crimes.

Question 7

The Implementation of the Rome Statute of the International Criminal Court Act, Act No. 27 of 2002, sets in place a comprehensive cooperative scheme for South Africa vis-à-vis the ICC. The Preamble specifically mentions:

“To provide for a framework to ensure the effective implementation of the Rome Statute of the International Criminal Court in South Africa; to ensure that South Africa conforms with its obligations set out in the Statute; ...; to provide for the arrest of persons accused of having committed the said crimes and their surrender to the said Court in certain circumstance; to provide for the co-operation by South Africa with the said Court; ...”

Chapter 4 of the Implementation of the Rome Statute of the International Criminal Court Act, Act No. 27 of 2002, details cooperation with and assistance to the ICC in or outside South Africa, in particular:

- *Part 1: Cooperation with Court: Arrest of persons and their surrender to Court*
- *Part 2: Judicial Assistance to Court*

¹ Brandon B. & Du Plessis M., The Prosecution of International Crimes (A Practical Guide to Prosecuting ICC Crimes in Commonwealth States), 2005, Commonwealth Secretariat, p.197

Section 14 mirrors Article 93(1) of the Rome Statute and specify areas of cooperation and judicial assistance.—

“The relevant competent authorities in the Republic must, subject to the domestic law of the Republic and the Statute, cooperate with, and render assistance to, the Court in relation to investigations and prosecutions in the following areas:

- (a) The identification and whereabouts of persons or the location of items;*
- (b) the taking of evidence, including testimony under oath, and the production of evidence, including expert opinions and reports necessary to the Court;*
- (c) the questioning of any person being investigated or prosecuted;*
- (d) the service of documents, including judicial documents;*
- (e) facilitating the voluntary appearance of persons as witnesses or experts before the Court;*
- (f) the temporary transfer of persons in custody for purposes of identification or for obtaining testimony or other assistance;*
- (g) the examination of places or sites, including the exhumation and examination of grave sites;*
- (h) the execution of searches and seizures;*
- (i) the provision of records and documents, including official records and documents;*
- (j) the protection of victims and witnesses and the preservation of evidence;*
- (k) the identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third parties; and*
- (l) any other type of assistance which is not prohibited by law, with the view to facilitating the investigation and prosecution of crimes within the jurisdiction of the Court.”*

The Regulations (Government Notice No. R1089, 16 August 2002) issued under the Implementation of the Rome Statute of the International Criminal Court Act, Act No. 27 of 2002, further prescribes cooperation with the ICC in relation to summonses, transfer of prisoners, restraint orders and confiscation orders.

South Africa also cooperates outside the mutual assistance context e.g.:

- The President can at the request of the ICC and by proclamation in the Government Gazette, declare any place in the Republic to be the seat of the ICC (Section 6)
- Privileges and immunities for the ICC officials are also catered for (Section 7)

Consequently, the Government of South Africa takes seriously its obligation to fully cooperate with the ICC in the form of extradition of suspects, legal assistance in investigations and obtaining evidence. Although provision is also made for the enforcement of sentences of the ICC, this is regulated by agreement between Member States and the ICC.

Question 8

Section 1 of the Implementation of the Rome Statute of the International Criminal Court Act, Act No. 27 of 2002, defines “*central authority*” as the “*Director-General: Justice and Constitutional Development*”.

Furthermore, Regulation 2 of the Regulations (Government Notice No. R1089, 16 August 2002) issued under the Implementation of the Rome Statute of the International Criminal Court Act, Act No. 27 of 2002, determines:

“A request sent to the Central Authority by the Court shall, unless the contrary is proved, be deemed to constitute the authorization of the Court to the Government of the Republic

to act on behalf of the Court in any proceedings under the (ICC) Act”

Section 8(1) of the Implementation of the Rome Statute of the International Criminal Court Act, Act No. 27 of 2002, provides for the referral of a request for arrest and surrender to the Central Authority without specifying the mode/channel of referral. Taking past practice between South Africa and the Court into account, it is accepted that the diplomatic channel is the channel of communication, thus between the Embassy of the Republic of South Africa to the Kingdom of the Netherlands and the Court.