

THE UNIVERSAL JURISDICTION OF SOUTH AFRICAN CRIMINAL COURTS AND IMMUNITIES OF FOREIGN STATE OFFICIALS

E Kayitana*

SUMMARY

Under the "complementarity" regime of the *Rome Statute of the International Criminal Court* (ICC), the jurisdiction of the ICC is secondary to the jurisdiction of domestic courts. States Parties, not the ICC, have the primary responsibility of investigating and prosecuting international crimes. The ICC acts only when States are "unable" or "unwilling" to prosecute. As a State Party, in order to give effect to the complementarity principle, South Africa enacted the *Implementation of the Rome Statute of the International Criminal Court Act 27* of 2002, which determines the modalities of prosecuting perpetrators of the crimes of genocide, crimes against humanity and war crimes in South African courts.

The *Implementation Act* also provides that South African courts will have jurisdiction over these crimes not only when they are committed on the territory of South Africa but also when they are committed outside the Republic. By granting South African courts jurisdiction over a person who commits a crime outside the Republic when that person is later found on South African territory, without regard to that person's nationality or the nationality of the victims, the *Implementation Act* empowers South African courts with universal jurisdiction over international crimes.

This paper seeks to determine whether and to what extent foreign State officials, such as foreign heads of State, heads of government and ministers of foreign affairs, can plead immunity when they are accused of international crimes before South African courts when exercising their universal jurisdiction in terms of the *Implementation Act* and in accordance with the complementarity regime of the Rome Statute. In other words, the article endeavours to determine whether

* Evode Kayitana. LLB (National University of Rwanda); LLM (UNISA); LLD (NWU/Potchefstroom). Lecturer in Law, University of Rwanda. Email: ekayitana@yahoo.fr. The author is highly indebted to Prof PG du Toit for his guidance in writing this article and the author is a post-doctoral fellow at NWU/Potchefstroom Campus.

international law rules regarding immunities of State officials may or may not limit the ability of South African courts to exercise universal jurisdiction over international crimes committed in foreign States.

KEYWORDS: universal jurisdiction; complementarity; *Rome Statute; Implementation Act*; immunity *ratione personae*; immunity *ratione materiae*; international crimes.