South African Institute of Race Relations NPC

Written Representations

to the Speaker of the National Assembly

regarding the

Implementation of the International Convention on the

Suppression and Punishment of the Crime of Apartheid Bill, 2025

14 December 2025

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1 Introduction

Mr Imraan Ismail-Moosa, MP (Al Jama-ah Party), acting in accordance with section 73(2) of the Constitution of the Republic of South Africa, 1996 ("the Constitution"), has given notice (Notice 3599 of 2025) in the Government Gazette, No 53662 of 14 November 2025, of his intention to introduce the Implementation of the International Convention on the Suppression and Punishment of the Crime of Apartheid Bill, 2025 ("the Bill"), in Parliament. An explanatory summary of the Bill has been published in accordance with Rule 276(1)*(c)* of the National Assembly Rules.

In this notice, Mr Ismail-Moosa has invited interested parties and institutions to submit written representations on the proposed Bill to the Speaker of the National Assembly within 30 days: ie, by 14 December 2025.

These written representations are made by the South African Institute of Race Relations NPC ("the IRR"), a non-profit organisation formed in 1929 to oppose racial discrimination and promote racial goodwill. Its current objects are to promote democracy, human rights, development and reconciliation between the peoples of South Africa.

2 Approval by the Committee on Private Members' Legislative Proposals

Since the Bill is a private member's bill, it must be approved by the Committee on Private Members' Legislative Proposals ("the Committee") before it can be formally read in Parliament and referred to the relevant portfolio committee in the National Assembly. The role of the Committee is to ensure that any proposed private member's bill is *necessary and constitutional,* as well as *practicable* and *desirable*. If it fails the overall desirability test, the proposed bill may not proceed to Parliament.

3 Is the Bill necessary?

South Africa has already acceded to the Rome Statute of 1998, which establishes the International Criminal Court ("the ICC") and gives it jurisdiction over the most serious crimes of the greatest concern to the international community as a whole. These include the apartheid crime against humanity.

3.1 The significance of the Rome Statute

In the words of the Supreme Court of Appeal ("the SCA") in the *Al Bashir* case in 2016 (see below): "The Rome Statute affirms that these crimes must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international co-operation". Towards this end, the Rome Statute confers jurisdiction on national courts to prosecute these crimes, as well as on the ICC to try them and convict their perpetrators.[1]

[1] *Minister of Justice and Constitutional Development v The Southern African Litigation Centre* [2016] ZASCA 17, para. 1.

The SCA added: "It is a matter of pride to citizens of this country that South Africa was the first African state to sign the Rome Statute. It did this on 17 July 1998 and ratified it on 27 November 2000. It incorporated it into the domestic law of South Africa, in terms of s 231(4) of the Constitution, by enacting the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 ("the 2002 ICC Act").[2]

The importance of the Rome Statute is reflected in its Preamble, the SCA went on. Against the background of "the millions of children, women and men who had been victims of unimaginable atrocities" in the 20th century, the treaty aimed to ensure that the "most serious crimes of concern to the international community as a whole" would no longer go unpunished. It sought to achieve this by "ensuring their effective prosecution…by taking measures at the national level and by enhancing international cooperation". This would "put an end to impunity for the perpetrators of these crimes" and thereby contribute to their prevention.[3]

Towards these ends, all states that had ratified the Rome Statute were obliged to "exercise their criminal jurisdiction over those responsible for international crimes". In addition, the ICC had been established under the treaty as an independent and permanent institution, and had been given jurisdiction over all "the most serious crimes". The ICC was intended to be "complementary to national criminal jurisdictions". Its jurisdiction extended to all "state parties and their nationals", as well as to non-party states that either accepted its jurisdiction or whose alleged crimes against humanity were referred to the ICC Prosecutor by the Security Council.[4]

The Rome Statute clearly sets out all the key elements of the apartheid crime in Article 7 of the treaty. Under this provision, the crime of apartheid requires "inhumane acts" of a kind similar to "murder, extermination, enslavement, deportation,…torture, rape, sexual slavery…[and] persecution". Inhumane acts of this gravity must also be committed "in the context of an institutionalised regime of systematic oppression and domination by one racial group over any other racial group(s) and…with the intention of maintaining that regime".[5] All these requirements (and various others too) must be fulfilled before the crime of apartheid can be proved.

The Rome Statute has been signed and ratified by some 125 states. It is widely seen as an exemplary international instrument which commands broad support within the international community.

3.2 Implementation of the Rome Statute in South Africa

South Africa has not only signed and ratified the Rome Statute but has also adopted legislation to domesticate it and make its provisions enforceable within the country. As earlier noted, this has been done via the Implementation of the Rome Statute of the International Criminal Court Act of 2002 ("the 2002 ICC Act"). The 2002 ICC Act already gives South Africa external jurisdiction to investigate and prosecute apartheid crimes against humanity committed outside

[2] Ibid.
[3] Ibid, para. 54.
[4] Ibid, Preamble, paras. 54 – 56.
[5] Rome Statute, Article 7(1), (2)(h).

its own borders provided one or more additional jurisdictional requirements – among them, the presence of the alleged perpetrator within the country – are fulfilled.[6]

That the 2002 ICC Act both empowers and requires South Africa to enforce the provisions of the Rome Statute against alleged perpetrators likely to enter South Africa or already within the country has already been demonstrated by two important cases: *National Commissioner of the South African Police Service* v *Southern African Human Rights Litigation Centre and another*[7] and *Minister of Justice and Constitutional Development* v *Southern African Litigation Centre*.[8]

In the former case (colloquially known as the *"Zimbabwe Torture Docket"* case), the Southern African Human Rights Litigation Centre ("the SALC") submitted to the Priority Crimes Litigation Unit of the National Prosecuting Authority ("the NPA") a dossier documenting the alleged torture of members of the Movement for Democratic Change ("the MDC") by Zimbabwean officials in Zimbabwe. The SALC, together with the Zimbabwe Exiles' Forum ("the ZEF"), requested that the NPA investigate these crimes, as they believed the NPA and the South African Police Service ("the SAPS") had a duty to do so under the 2002 ICC Act. When the SAPS declined to do so, the SALC and the ZEF applied to the North Gauteng High Court in Pretoria for an order setting aside its decision not to investigate. The High Court granted this order, while subsequent appeals by the SAPS were dismissed by both the Supreme Court of Appeal ("the SCA") and the Constitutional Court.[9]

When the matter came before the Constitutional Court, it ruled (in a unanimous judgment handed down in 2014) that "the SAPS must investigate the complaint because under the Constitution, the ICC Act and South Africa's international law obligations, the SAPS has a duty to investigate the crime against humanity of torture allegedly committed in Zimbabwe". The Court also found that "the duty to investigate international crimes is limited" to instances in which "the country in which the crimes occurred is unwilling or unable to investigate"; conducting an investigation is "reasonable and practicable" for the SAPS; it is "likely that the accused will be present in South Africa at some point"; and the investigation can be conducted "exclusively within South Africa". All these tests were satisfied in this instance – often helped by the proximity of the two countries.[10]

In practice, however, the investigation the SAPS was thus instructed to conduct seems to have fizzled out and has not resulted in any prosecution under the 2002 ICC Act. This is not because of deficiencies in the Rome Statute or the 2002 Act. Rather, it suggests an absence of political will on the part of the African National Congress (ANC) to investigate and prosecute members of a fraternal liberation movement for torture as a crime against humanity.

In the second case (widely dubbed the *Al-Bashir* case), the SCA found that South Africa had acted unlawfully in "failing to take steps to arrest and detain, for surrender to the ICC, the President of Sudan, Omar Hassan Ahmad Al Bashir, after his arrival in South Africa on 13 June 2015 to attend the 25th Assembly of the African Union". This, said the court, was "inconsistent

[6] Section 4(3)(c), Implementation of the Rome Statute of the International Court of Justice Act of 2002.
[7] National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and another, [2014] ZACC 30, Paras 77, 78, 80, 81.
[8] Minister of Justice and Constitutional Development v Southern African Litigation Centre, [2016] ZASCA 17.
[9] Ibid, Media Summary, p. 1. https://www.saflii.org/za/cases/ZACC/2014/30.html.
[10] Ibid.

with South Africa's obligations in terms of the Rome Statute and section 10 of the Implementation Act" (in other words, the 2002 ICC Act). In reaching this conclusion, the SCA rejected the government's argument that President Al Bashir was entitled to immunity as a head of state. The normal rules of diplomatic immunity, as contained in South Africa's Diplomatic Immunities and Privileges Act (DIPA) of 2002, had been overtaken and qualified by its 2002 ICC Act, under which such immunity no longer barred arrest, prosecution or conviction for a crime against humanity.[11]

This ruling confirmed the effectiveness of the Rome Statute and the 2002 ICC Act in authorising the arrest of an alleged perpetrator of crimes against humanity in the Darfur region of the Sudan. It did so, moreover, even though South Africa would have preferred a different outcome.

3.3 The Rome Statute versus the 1973 Apartheid Convention

The Rome Statute is the premier international convention against crimes against humanity of various kinds. South Africa has already ratified it and domesticated its provisions via the 2002 ICC Act. That the Rome Statute and the 2002 ICC Act offer effective ways for South Africa to proceed against international crimes against humanity has already been confirmed by both the *Zimbabwe Torture Docket* case and the *Al Bashir* case.

By contrast, the International Convention on the Suppression and Punishment of the Crime of Apartheid of 1973 ("the 1973 Convention")[12] lacks the stature of the Rome Statute. It has been ratified by fewer states (110, according to Mr Ismail-Moosa) and has never secured the support of major Western democracies. For South Africa to use this Bill to domesticate the 1973 Convention, in addition to the Rome Statute, is entirely unnecessary.

Mr Ismail-Moosa suggests that the 1973 Convention is superior to the Rome Statute because it deals solely with "the crime of Apartheid as a stand-alone crime".[13] This is an unconvincing argument, as many treaties and laws – and the Constitution itself – are not weakened or made ineffective because they deal with more than one issue. That the Rome Statute covers various crimes against humanity is in fact a strength in that it increases the number of cases likely to come before the ICC, which in turns helps to develop its jurisprudence and build up a body of precedent.

At the same time, for South Africa to have two overlapping implementation statutes in place for the apartheid crime against humanity will open the door to a host of technical legal challenges as to why one statute has been chosen over another as the basis for proceedings in a particular case. Since there are differences in the elements of the crime, the necessary intent, the penalties and the extent to which those "abetting" or "supporting" the commission of the crime may be punished, prosecutions under the 1973 Convention, in particular, will generally become bogged down by the need to resolve preliminary objections and questions around issues of this

[11] Minister of Justice and Constitutional Development v The Southern African Litigation Centre, op cit, order, para. 102.
[12] G.A. res. 3068 (XXVIII)), 28 U.N. GAOR Supp. (No. 30) at 75, U.N. Doc. A/9030 (1974), 1015 U.N.T.S. 243, entered into force July 18, 1976.
[13] Ismail-Moosa MP, I, 'Notice of intention to introduce a private member's bill and invitation for comment, 2025', Notice 3599 of 2025, Government Gazette No 54662, 14 November 2025, p.3.

kind. This too confirms that the Bill is unnecessary – and could in fact complicate and delay prosecutions.

The domestication of the 1973 Convention is thus being pursued for other reasons. The main reason seems to be the difficulty of proving Israel, or other Western democracies, guilty of the apartheid crime under the strict provisions of the Rome Statute. However, weakening the well-established rules to facilitate the targeting of pre-selected states is not a legitimate purpose for the government to pursue by means of the Bill. It also confirms that the Bill is not necessary but is simply being enacted to enable South Africa to engage in illegitimate "forum shopping" (see *section 5.1*, below). That this is the most likely reason for the Bill also erodes the country's international standing and could generate many other risks (see *section 5*, below).

4 Is the Bill constitutional?

The Bill is too vague to pass constitutional muster under South Africa's doctrine against vagueness of laws. The Constitutional Court has clearly established the principle that vagueness undermines the rule of law – the supremacy of which is guaranteed by Section 1(c) of the Constitution – and is thus a fatal flaw.

4.1 The doctrine against vagueness of law

The Constitutional Court has laid down various tests for vagueness. In 2005, in *Affordable Medicines Trust* v *Minister of Health*,[14] Judge Sandile Ngcobo set out the key criteria, stating: "The doctrine of vagueness is founded on the rule of law... It requires that laws must be written in a clear and accessible manner. What is required is reasonable certainty and not perfect lucidity."[15]

A law is thus regarded as unconstitutionally vague if it fails to give citizens sufficiently clear notice as to what is permitted and what is prohibited. As Judge Ngcobo went on to state in the *Affordable Medicines* case, "the law must indicate with reasonable certainty to those who are bound by it what is required of them so that they may regulate their conduct accordingly".[16]

In addition, a law must give adequate guidance to officials charged with implementing it as to what is prohibited and what is permitted. If the relevant wording is ambiguous and open to interpretation in different ways, then different officials will inevitably come to different conclusions on essentially the same set of facts.[17] This makes for arbitrary and unequal enforcement, which is also contrary to the rule of law.

Where the relevant rules are vague and uncertain, moreover, this makes it difficult for citizens to know whether or not the law has been fairly applied to them. To cite the Constitutional Court in the *Dawood* case: "Where broad discretionary powers are conferred, there must be some constraints on the exercise of such power so that those who are affected by the exercise of the

[14] Affordable Medicines Trust and others v Minister of Health and another, [2005] ZACC 3.
[15] Ibid, para. 108.
[16] Ibid, citing R v Jopp and Another 1949 (4) SA 11 (N) at 13 – 14.
[17] Land Access Movement of South Africa and Others v Chairperson of the National Council of Provinces and Others, 2016] ZACC 22, para. 4, footnote 6.

broad discretionary powers will know what is relevant to the exercise of those powers or in what circumstances they are entitled to seek relief from an adverse decision."[18]

This need was confirmed in the *Janse van Rensburg* case, where the Constitutional Court said: "Where a wide discretion is conferred upon a functionary, guidance should be provided as to the manner in which those powers are to be exercised."[19] Also relevant is the Constitutional Court ruling in 2025, in *Democratic Alliance* v *Minister of Home Affairs*. Here, the DA challenged the validity of legislation that "caused South African citizens to lose their citizenship automatically if they voluntarily acquired citizenship in another country, unless they had prior permission from the Minister of Home Affairs".[20]

Here, the Constitutional Court cited the *Dawood* test with approval and went on to say: "The impugned provision…cannot pass constitutional muster. First,…the section does not address the question why there is automatic loss of citizenship in the first place. Second, Section 6(2) affords the Minister broad, unchecked power without any guidelines as to how the Minister's decisions are to be made. This is untenable, given the infringement of citizenship as a fundamental right."[21]

In the criminal law context, it is particularly important that laws should be specific as to what they prohibit. Under this "specificity" doctrine, criminal statutes must clearly and precisely define the conduct that constitutes a crime. This prevents arbitrary application of the law and allows individuals to know in advance what conduct is unlawful.[22] What might be termed a "fair notice" requirement also demands that criminal law should not be retrospectively applied[23] – and that it should not impose a higher penalty than applied at the time an accused pleaded to a charge.[24] As the Constitutional Court said in *Masiya* v *Director of Public Prosecutions* in 2007, "one of the central tenets underlying the common-law understanding of legality is that of foreseeability – that the rules of criminal law are clear and precise so that an individual may easily behave in a manner that avoids committing crimes".[25]

In addition, where there is ambiguity in a penal statute, South African courts apply the rule of *in poenalibus causis benignius interpretandum est* (in penal matters, the more benign or lenient interpretation must be adopted). This was confirmed by the Appellate Division of the Supreme Court in 1992 in a judgment that turned largely on the ambiguous meaning of the words "in public". Here, the court referred to the established common law rules and said: "[What also] points to the necessity for a restrictive interpretation of [the clause] is that it is a penal provision, breach of which may render an offender liable to [various] punishments,…including discharge from…employment." It went on to describe the *benignius* principle as "a just and

[18] Dawood and Another v Minister of Home Affairs and Others, [2000] ZACC 8, para. 47.
[19] *Janse van Rensburg and Another* v *Minister of Trade and Industry and Another* [2000] ZACC 18, para. 25.
[20] Democratic Alliance v Minister of Home Affairs and Another [2025] ZACC 8, para. 1.
[21] Ibid, paras 51 – 53.
[22] South African Liquor Traders Association and Others v Chairperson Gauteng Liquor Board and Others [2006] ZACC 7; Savoi v NDPP [2014] ZACC 5; President of the Republic of South Africa and Another v Hugo, para. 102.
[23] Veldman v Director of Public Prosecutions [2005] ZACC 22, para. 37; Masiya v Director of Public Prosecutions and Another, [2007] ZACC 9, para. 56.
[24] Veldman, op. cit., paras 37, 39.
[25] Masiya, op. cit., para. 52.

sound one" which confirmed that, "where the language is obscure or ambiguous, the court should give the benefit of the doubt in favour of the defendant or of the accused."[26]

4.2 The vague provisions of Article II

However, the wording of the 1973 Convention – which is now to be domesticated and made part of South African law via the Bill – is often unclear and imprecise, as illustrated by the following extract from Article II:[27]

> For the purpose of the present Convention, the term "the crime of apartheid", which shall include similar policies and practices of racial segregation and discrimination as practised in southern Africa, shall apply to the following inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them:...
>
> (c) Any legislative measures and other measures calculated to prevent a racial group or groups from participation in the political, social, economic and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group or groups, in particular by denying to members of a racial group or groups basic human rights and freedoms, including the right to work, the right to form recognized trade unions, the right to education, the right to leave and to return to their country, the right to a nationality, the right to freedom of movement and residence, the right to freedom of opinion and expression, and the right to freedom of peaceful assembly and association;..."

According to Article II, "the crime of apartheid...shall apply" to "any legislative measures and other measures calculated to prevent a racial group...from participation in the political, social, economic and cultural life of the country". But how is "participation" to be interpreted? Does it mean *equal* participation or *any* participation? If the latter, does this mean that *all* participation must have been prevented? Since this is likely to be difficult to show, will *any* limitation on participation suffice and amount to an "inhuman act"? In addition, how is the "cultural life" or the "social life" of the country" to be interpreted?

None of these questions is easily answered. Yet adequate clarity and precision is particularly important when those accused of the apartheid crime are liable on conviction to a penalty as serious as life imprisonment.

To take another example, how is "full development" in Article II to be interpreted? Does it require economic parity between racial groups? Since this is impossible in practice to achieve – given the number and range of relevant variables – does the failure to achieve it through legislative and other measures provide sufficient evidence of an "inhuman act" committed in order to dominate and oppress a racial group? If some legislative and other measures have in fact helped to extend the life expectancy and literacy of a racial group, is that a sufficient defence? If

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[26] Hira and Another v Booysen and Another, [1992] ZASCA 112, pg. 21.

[27] Article II (c), International Convention on the Suppression and Punishment of the Crime of Apartheid, G.A. res. 3068 (XXVIII)), 28 U.N. GAOR Supp. (No. 30) at 75, U.N. Doc. A/9030 (1974), 1015 U.N.T.S. 243, entered into force July 18, 1976.

not, how much more must be done to meet the criterion of "full development"? Or to show that an "inhuman act" has been committed with the necessary "purpose" to dominate and oppress?

Take also the references to "domination" and "oppression". These are essentially political terms, not legal ones. Hence, incorporating them into a criminal statute, to be enforced through prolonged imprisonment in many instances, is likely to raise considerable difficulties in understanding what they mean and in avoiding their arbitrary and unequal application.

Uncertain wording of this kind contradicts the doctrine against vagueness of laws. Where the rules contained in a criminal statute are this ambiguous and imprecise, citizens cannot know what is permitted and what is prohibited, while prosecutors are likely to interpret the vague criteria in different ways at different times. Though decisions on conviction are for judges to make, the fair notice requirement must also be met – while judges need clear and certain rules as the foundation for their judgments if they are to uphold the rule of law and so comply with Section 1(c) of the Constitution.

The essence of the problem is that a criterion such as "preventing full development" is an inherently hazy one. It does not provide a sound foundation for criminal liability – and especially not in the particularly serious context of an international crime against humanity. Hence, it cannot simply be incorporated into a criminal statute, as the Bill seeks to do, without infringing both the general doctrine against vagueness of laws and the specificity rule in criminal law.

4.3 The vague provisions of Article III

Other provisions in the 1973 Convention are also far too vague. These include Article III, which makes it possible to convict a wide range of countries, banks, businesses, other organisations and individuals of the apartheid crime against humanity merely because they are seen to have "encouraged" legislative or other measures falling within the wide scope of Article II – or have "cooperated" in the adoption of discriminatory laws.

Article III provides:[28]

> International criminal responsibility shall apply, irrespective of the motive involved, to individuals, members of organizations and institutions and representatives of the State, whether residing in the territory of the State in which the acts are perpetrated or in some other State, whenever they:
>
> (a) commit, participate in, directly incite or conspire in the commission of the acts mentioned in article II of the present Convention;
>
> (b) directly abet, encourage or co-operate in the commission of the crime of apartheid.

Again, much of the wording used here is far too vague. Will a country, for example, that has sold arms to an alleged apartheid state for use by it in self-defence be held criminally liable for having "participated" in the adoption of legislative measures that "prevent the full development" of a racial group? Will its motive – to assist in self-defence – be entirely discounted, even though there is little or no evidence that its "purpose" was to "co-operate in" the domination and oppression of that group? Will the doctrine of "fair notice" effectively be overlooked in these

[28] Article III, ibid.

circumstances? And how will the *in poenalibus causis benignius interpretandum est* rule be applied in the context of wording as uncertain as this?

In what circumstances, moreover, will a bank that has lent money to an alleged apartheid state be seen as having "participated" in the adoption of legislative measures that "prevent the full development" of a racial group? Must it have made this loan in the same year as a particular legislative measure was enacted for its "participation" to be established? If it had made the loan three years beforehand, would that suffice for conviction? What if the period were four or five years?

How are the CEOs of relevant banks, for example, to know what conduct is permitted and what is prohibited? What if their purpose in extending a loan was not to "prevent full development" for a racial group but rather to engage in their core business, which is to generate income from interest-bearing loans? What if their purpose was also to facilitate development for the racial group in question, even if the projects their loans helped to finance were unlikely to give rise to "full" development, whatever that might mean?

How, in short, are terms such as "encourage" or "co-operate" to be interpreted in this context? And how are either prosecutors or judges to apply such vague rules in a manner that is neither arbitrary nor discriminatory – and so complies with the rule of law?

5 Is it practicable and desirable for South Africa to enact the Bill?

It is neither practicable nor desirable for South Africa to enact the Bill, as its adoption could have many negative consequences for the country. Some of the key risks are set out below.

5.1 Retrogressive forum shopping

The Rome Statute, as earlier noted, has been ratified by 125 countries and is widely regarded as the premier convention for countering crimes against humanity of various kinds. The Rome Statute is also buttressed by the ICC established under its terms. The availability of this international court reduces the need to rely on domestic prosecutions, which may be difficult and costly to mount and yield outcomes widely criticised as partisan and flawed. Instead, the ICC provides a legitimate mechanism for the investigation of crimes against humanity and a respected international forum for their prosecution, adjudication and punishment.

As earlier noted, the definition of the apartheid crime against humanity in Article 7 of the Rome Statute is far clearer and more certain than that under the 1973 Convention. Under the Rome Statute, the crime of apartheid requires "inhumane acts" of a kind similar to "murder, extermination, enslavement, deportation,…torture, rape, sexual slavery…[and] persecution". Inhumane acts of this gravity must also be committed "in the context of an institutionalised regime of systematic oppression and domination by one racial group over any other racial group(s) and…with the intention of maintaining that regime".[29] The certainty that this wording provides is further reinforced by Article 22(2) of the Rome Statute, which states that "the

[29] Rome Statute, Article 7(1), (2)(h).

definition of a crime [under the Statute] shall be strictly construed and not extended by analogy." [30]

By contrast, the 1973 Convention is primarily a political instrument that was adopted during the Cold War period and lacks necessary precision. It has yet to be accepted by most Western nations, partly because the wording of Article II is so vague. In addition, under the imprecise terms of Article III, it seeks to extend liability for the apartheid crime inordinately widely to banks, businesses, political parties, non-governmental organisations, sporting organisations and individuals that might be seen as having "encouraged" the adoption of legislative measures that "prevent full development" for a racial group.

The Rome Statute has no equivalent provisions. Hence, it is not surprising that the Rome Statute has greater legitimacy and is the generally accepted convention for curtailing and punishing various crimes against humanity, including the apartheid one. That South Africa is now seeking to rely instead on the 1973 Convention suggests that its real motive is to engage in illegitimate forum-shopping. In a retrogressive move, it wants to move backwards from the modern and universally respected Rome Statute to a controversial treaty from the Cold War era with unconstitutionally vague provisions. It seeks to do so, moreover, because the accepted requirements for culpability under the Rome Statute are much harder to fulfil than those provided by the 1973 Convention. This, as earlier noted, is not a legitimate governmental purpose to pursue.

A useful precedent on the requirements for culpability under the Rome Statute has recently been provided in a separate declaration handed down by Judge Georg Nolte in the International Court of Justice (ICJ) in July 2024. In these proceedings, the ICJ had been asked by the General Assembly to provide an advisory opinion on the legal consequences arising from Israel's "prolonged occupation, settlement and annexation" of the Occupied Palestinian Territory (OPT), as well as its "adoption of related discriminatory legislation and measures". In its July 2024 opinion, the ICJ declared that Israel's presence in the OPT was unlawful and must end "as rapidly as possible".[31] The ICJ also found that Israel's policies and practices in the West Bank and East Jerusalem "treated Palestinians differently from settlers" and "maintained a near-complete separation…between the settler and Palestinian communities". On this basis, the court concluded that Israel's "legislation and measures constitute a breach of Article 3" of the International Convention on the Elimination of All Forms of Racial Discrimination ("ICERD").[32] Article 3 of ICERD prohibits "segregation and apartheid" but fails to define either of these terms.

Judge Nolte took issue with this finding, indicating that the Rome Statute – with its clear rules on the apartheid crime – was the appropriate convention to apply. In addition, its "core definition of apartheid comprised three elements", all of which had to be fulfilled. First, there had to be the necessary "relationship between racial groups". Second, there had to be the necessary *actus*

[30] Rome Statute, Article 22(2); see also Joshua Kern, 'Uncomfortable truths: how HRW errs in its definition of Israeli apartheid: what is missing, and what are the implications?' EJIL Talk! Blog of the European Journal of International Law, 7 July 2021: https://www.ejiltalk.org/uncomfortable-truths-how-hrw-errs-in-its-definition-of-israeli-apartheid-what-is-missing-and-what-are-the-implications/

[31] International Court of Justice, Advisory Opinion, Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, 19 July 2024, paras. 1, 265, 267. 186-20240719-adv-01-00-en.pdf.

[32] Advisory opinion, para. 228.

reus: "the commission of inhumane acts" of a sufficient gravity and scale. Third, there had to be the necessary intention (*mens rea*) to establish and maintain "an institutionalized régime of domination and oppression (*dolus specialis*)".[33] Given the "exceptional gravity" of the apartheid crime, all three elements had to be clearly proven by "evidence that was fully conclusive", he noted.[34] In addition, the ICJ could "only find that a state had the required *dolus specialis* of apartheid" when its intention to oppress and dominate was "the only reasonable inference" that could be drawn from its conduct and "other inferences were clearly implausible".[35]

In the OPT, however, an intention on the part of Israel to oppress and dominate was not the only reasonable inference that could be drawn. Israel might be acting for security or other purposes and "there was insufficient information to draw a definite conclusion". Hence, "the Court's reasoning under Article 3 of ICERD could not be interpreted as [a] finding that Israel's conduct amounted to apartheid."[36]

As Judge Nolte's declaration indicates, the Rome Statute makes it difficult to convict Israel – with its evident security concerns – of the apartheid crime. It also makes it difficult to find credible evidence of the apartheid crime in alleged "systemic" race discrimination in the United States or other Western democracies. By contrast, the 1973 Convention regards the mere adoption of legislation that supposedly "prevents full development" as warranting conviction. This convention also includes wide-ranging and vague rules imposing criminal liability on those who have merely "supported" or "encouraged" such legislative measures. On this basis, it allows many banks and a host of other entities to be convicted of the apartheid crime on an indirect and tenuous basis.

The contrast makes it clear that South Africa is engaged in illegitimate forum shopping. It knows it cannot obtain its key objectives – the conviction and isolation of Israel for its alleged apartheid crimes – under the Rome Statute, so it is resurrecting and domesticating the 1974 Convention in order to achieve this goal. The US and other Western democracies are also likely to be targeted under the Bill, whereas no attempt will be made to hold China responsible for laws and policies seemingly aimed at domination and oppression in Tibet. That South Africa is seeking to lower the bar for prosecution and conviction via the Bill – and then to apply the new rules in a selective and partisan way – will further erode its already crumbling moral stature. This will also intensify perceptions of it as a "rogue state".

5.2 The "rogue state" risk

Adoption of the Bill will put South Africa in breach of at least four core principles of international law and international diplomacy. The first is the principle of complementarity. Under this long established principle of international law, national courts (in Israel, say) have the primary right to investigate and prosecute their own nationals for crimes committed within their borders. Hence, a foreign court (in South Africa, say) or an international court (the ICC) may step in only if

[33] Nolte Declaration, Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, International Court of Justice, 19 July 2024, para. 11: 192-20240524-ord-01-02-en.pdf
[34] Nolte Declaration, para. 12, citing Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I), p. 129, para. 209.
[35] Nolte Declaration, para. 12, citing Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment, I.C.J. Reports 2015 (I), p. 67, para. 148.
[36] Nolte Declaration, para. 15.

the national state is "unable or unwilling" to mount a credible investigation and prosecution. (That this is the established international rule – and that South Africa must respect it too – was confirmed by the Constitutional Court in the *Zimbabwe Torture Docket* case, as earlier described.)

Under the Bill, by contrast, South Africa is seeking to give its domestic courts an overriding and external jurisdiction to investigate and prosecute apartheid crimes committed outside its borders (in Israel, say), provided only that an Israeli official is present within its borders and can thus be arrested and brought before a domestic court. Moreover, South Africa is likely to use the "legislative measures" provisions in Article III to prosecute a visiting Knesset member, for example, for his or her role in adopting legislation such as Israel's Nation State Law of 2018. South African prosecutors will seek to depict this statute as a discriminatory apartheid law, even though the Israeli Supreme Court ruled in 2021 that it must be read in conjunction with Israel's Basic Laws guaranteeing dignity and other human rights – and that it may not be used to discriminate against Arab Israelis.[37] The use of the Bill and of the 1973 Convention in these ways are thus likely to be widely seen as an abuse of the rule requiring complementarity.

Also relevant is the long-standing principle of international comity, which is a doctrine of courtesy and mutual respect between states and their legal systems. Even if a domestic court has a technical right to claim jurisdiction, it will generally decline to exercise it over a matter which is centred in a second country with a stronger interest in regulating it. The domestic court will do so out of respect for the sovereignty of the second country and to prevent a diplomatic rift between the two nations. By contrast, the Bill seeks to empower South Africa to override the comity principle – and its adoption will thus add to perceptions of it as a rogue state.

In addition, the Bill will empower South Africa to overturn other core principles of international law. One such principle is that international law rules derive their binding force from the consent of sovereign states.[38] The second is that ICJ advisory opinions and General Assembly resolutions, unlike Security Council resolutions, are not binding on member states under the Charter of the United Nations.[39]

Once it has adopted the Bill, South Africa is likely to use it to ride roughshod over these rules. Take, for example, the ICJ advisory opinion of July 2024 declaring Israel in breach of Article 3 of ICERD, which prohibits "segregation and apartheid" within the OPT. This is a weak and unconvincing finding, as Judge Nolte has shown. It also lacks binding effect under the UN Charter. The same applies to the General Assembly resolution of 18 September 2024, which endorsed the ICJ opinion and called on states to help bring an end to Israel's presence in the OPT.[40] If the Bill is enacted, South Africa is likely to use this flawed ICJ opinion to prosecute and convict Israeli citizens present in the country. It will do so under the domesticated provisions of

[37] Joshua Kern and Anne Herzberg, 'Neo-Orientalism: Deconstructing Claims of Apartheid in the Palestinian-Israeli Conflict', March 2022, *NGO Monitor*, p. 44: https://ngo-monitor.org/pdf/NGOMonitor_ApartheidReport_2022.pdf.
[38] Article 34, Vienna Convention on the Law of Treaties, 1969; *North Sea Continental Shelf Cases* (Federal Republic of Germany v. Denmark/Netherlands, https://www.icj-cij.org/case/52.
[39] Articles 65, 10, Charter of the United Nations.
[40] Resolution Adopted by the General Assembly on 18 September 2024, A/RES/ES/10-24, paras. 2, 4. https://docs.un.org/en/A/RES/ES-10/24.

the 1974 Convention, coupled with a clause in the Bill providing that a state against which a ruling has been made by an international tribunal is automatically "an apartheid state".[41]

Prosecutions brought and convictions secured on this flawed foundation would be inconsistent with the four principles of international law identified here. The Bill nevertheless seeks to empower South Africa go to still further – and to use its sovereignty and domestic courts to enforce a different set of rules.

South Africa clearly has no power to change the UN Charter or the content of customary international law. It is therefore seeking, it would seem, to use the Bill to empower its domestic courts to treat "soft" or non-binding law as "hard law" within its borders. This will enable South Africa to generate what amounts to a parallel legal system to be used against Israel and other states – as well as the banks, businesses or organisations that allegedly "support" or "cooperate" with them. This will set a dangerous precedent. The more different countries across the globe start treating "soft" law as "hard" law at their own discretion – and in order to advance their own political and ideological interests – the more the international rule of law will break down. This could also feed perceptions of South Africa as a rogue state.

South Africa is also likely to use the Bill to go still further than the ICJ and General Assembly have done. Once the Bill is in place, it is likely to argue, for example, that Israel's Nation State Law is a "legislative measure" that falls within Article II of the 1973 Convention and thus suffices, in itself, to prove Israel's culpability for the apartheid crime *inside* the Green Line marking its current borders. Yet the 2024 ICJ opinion and General Assembly resolution earlier described deal only with Israel's policies and practices in the OPT *beyond* the Green Line. In these circumstances, South Africa will overtly be "making up" the international law it wishes to deploy against Israel and other states, along with the entities it sees as "supporting" them. This will further cement South Africa's status as a rogue state: one that operates outside the agreed rules and helps to break down the accepted legal order.[42]

5.3 Capacity constraints and "blowback" risks

Under the Bill, the National Director of Public Prosecutions ("the NDPP"), as the head of the National Prosecuting Authority (NPA), will be responsible for authorising all apartheid prosecutions in South Africa's domestic courts. Here, the Bill simply assumes that the NPA has the necessary capacity to take on additional prosecutions of this kind. Since this is doubtful in fact, it raises questions as to the practicality of the Bill.

The NPA's capacity to mount effective prosecutions is clearly limited. Its 2023 attempt to extradite the notorious Gupta brothers, believed to be the main architects of corruption and "state capture" under former president Jacob Zuma, collapsed when it failed to submit several essential documents to the relevant authorities. In 2024, moreover – in the words of veteran journalist William Saunderson-Meyer – "the Free State High Court (Bloemfontein) dismissed

[41] Clause 1, Definitions, Implementation of the International Convention on the Suppression and Punishment of the Crime of Apartheid Bill ("the Bill").

[42] Jones v Ministry of the Interior of the Kingdom of Saudi Arabia (Secretary of State for Constitutional Affairs intervening); Mitchell v Al-Dali [2006] UKHL 26, para. 63. Here, Lord Hoffman stated: "It is not for a national Court to 'develop' international law by unilaterally adopting a version of that law which…is simply not accepted by other states." Nor does it matter how "desirable" or "forward-looking" that change might seem

with derision the R25m Estina Dairy Farm corruption case… The judge described the NPA's efforts as 'lackadaisical' and a 'comedy of errors' that failed even the 'barest' evidentiary threshold".[43]

According to the Centre for Development and Enterprise, a civil society organisation, the NPA has "failed to prosecute the individuals implicated in the state capture scandals revealed in forensic audits of the Passenger Rail Agency of SA, Eskom and Transnet, in the Zondo commission reports, and through journalistic investigation".[44] Moreover, as ANC national executive committee member Mathews Phosa points out, "there are 91 ANC people named in the Zondo commission report into state capture who have not been touched".[45]

The NPA says its Investigating Directorate Against Corruption (IDAC) unit has made considerable progress in recent years, having "enrolled 50 cases, declared 133 investigations and partnered with the Asset Forfeiture Unit to obtain freezing and preservation orders amounting to R14.3 billion".[46] Yet, as Mr Saunderson-Meyer also notes, the NPA has long been dogged by "political interference, inadequate budgets, internal sabotage, and poor staff competency"[47] – and it cannot easily overcome these weaknesses. In addition, the nine NDPPs appointed to head the institution since its start in 1998 have often seemed partisan and ineffective, while none has served out a full ten-year term. The current NDPP, Shamila Batohi – who was widely expected to succeed in turning the NPA around – has in practice achieved little in the past eight years.[48]

The NPA's main function is to help counter high levels of violent crime and corrosive corruption within South Africa. This it has signally failed to do: partly because the police are over-burdened and often ineffective and partly because of its own shortcomings. Yet, if the Bill is adopted, the NPA will have to take on the complex additional task of prosecuting apartheid crimes committed far outside South Africa's borders. Where Israel is the target, this is likely to require it to translate and analyse thousands of documents in Hebrew or Arabic, which it will struggle to do. Given the corruption within its own ranks,[49] it may also battle to maintain the confidentiality of its investigations and also of the arrest warrants it will at times need to prepare.

The NPA's evident and still unresolved weaknesses may thus result in considerable embarrassment for South Africa. Its high-profile attempt to extradite the Gupta Brothers in 2023 collapsed, as earlier noted, because of basic errors and missing documents in its application. In June 2025 it failed to follow the correct procedure for extraditing Moroadi Cholota, a former assistant to former ANC secretary-general Ace Magashule, from the US. This error resulted in the charges against Ms Cholota having to be withdrawn. There is thus a considerable risk that

[43] Sanderson-Meyer, W, 'Another dud NDPP loading', Politicsweb, 10 October 2025. https://.politicsweb.co.za/opinion/another www -dud-ndpp-loading.
[44] Bernstein, A, 'Time to rebuild foundations of the SA justice system', Politicsweb, 21 July 2025. https://www.politicsweb.co.za/opinion/time-to-rebuild-foundations-of-the-sa-justice-syst.
[45] Saunderson-Meyer, 'Another dud NDPP loading', op. cit.
[46] Adv Mthunzi Mhaga NPA National Spokesperson, "NPA welcomes the SCA judgment upholding IDAC's appeal in Nulane corruption case", Media Statement 12 June 2025. https://www.justice.gov.za/m_statements/2025/20250612-NulaneCorruptionCase-NPA.pdf.
[47] Ibid.
[48] Bernstein, 'Time to rebulid foundations', op. cit.; Saunderson-Meyer, 'Another dud NDPP loading', op. cit.
[49] Shomolekae, T, 'Batohi tells Parly committee NPA remains vulnerable after state capture', *Polity*, 12 November 2025. https://www.polity.org.za/article/batohi-tells-parly-committee-npa-remains-vulnerable-after-state-capture-2025-11-12/.

any high-profile apartheid prosecution the NPA seeks to mount will similarly disintegrate because of procedural bungling or the loss of essential evidence. This would humiliate South Africa on the world stage.

The same will apply to prosecutions of officials in countries trading with Israel, or the directors of arms suppliers, banks, or other companies accused of "supporting" Israel or "co-operating" with it in its commission of its apartheid crimes. Here, the NPA could find itself up against particularly capable and sophisticated legal teams. Given its limited capacities, it may find it difficult to prevail – while any additional prosecution failures will deepen South Africa's humiliation.

South Africa's intelligence agencies will often need to garner information to help buttress the prosecution's case. Yet the country's intelligence agencies are in disarray, as revealed by the High-Level Review Panel on the State Security Agency (SSA) in 2018[50] and the testimony being put before the Judicial Commission of Inquiry into Criminality, Political Interference, and Corruption in the Criminal Justice System, chaired by Judge Mbuyiseli Madlanga.[51] South Africa's aim might be to bring Israel to book, but Israel has top-notch intelligence services that South Africa cannot match and which could be used to disrupt its plans. Again, the result could be more high-profile failures for South Africa and a weakening of support for it, even among its allies.

5.4 Isolating South Africa from the global economy

The risk here arises from Article III of the Convention. As earlier noted, Article III, read together with the Bill, seeks to impose "criminal responsibility" on states, banks, companies and individuals that have, for example, traded with any apartheid state, lent it money, or otherwise "encouraged" its adoption of legislative measures that "prevent the full development" of a racial group, for example.

As earlier noted, Israel's Nation State Law might be seen as such a measure. A global bank (such as Barclays, Citi or JP Morgan), which has helped provide bond finance to Israel, could thus be seen as having infringed Article III by "supporting" the adoption of this legislative measure. A bank cannot be jailed, of course. However, its directors could be prosecuted and imprisoned under the Bill if any of them were to visit South Africa for meetings with clients here.

Under the global payments system, South Africa's five main banks maintain accounts with major global banks ("correspondent banks") in the US, the United Kingdom (UK), Europe, and Asia to help them make payments in foreign currencies. Hence, if Eskom needs to buy a turbine part from the US, its South African bank (Bank A) will instruct its correspondent bank in New York (Bank B) to make the necessary payment to the supplier in US dollars out of money held for this purpose by Bank B. (This is a simple example, but in many situations South Africa's banks

[50] The Presidency, **'**President Ramaphosa releases Review Panel Report on State Security Agency', 9 March 2019. https://www.thepresidency.gov.za/president-ramaphosa-releases-review-panel-report-state-security-agency.
[51] The Presidency, 'Statement by President Cyril Ramaphosa on the establishment of a Commission of Inquiry into allegations regarding law enforcement agencies, Union Buildings, Pretoria', 13 July 2025. https://www.thepresidency.gov.za/statement-president-cyril-ramaphosa-establishment-commission-inquiry-allegations-regarding-law.

have to rely on a series of correspondent banks to convey and ultimately act on their payment instructions.)

In the Eskom example, Bank A' s payment instruction would be sent to Bank B via the SWIFT network or the Society for Worldwide Interbank Financial Telecommunication. This is a global messaging network which is enormously important to the global payments system because it currently connects more than 11,000 financial institutions across 200 countries and territories.

However, once Bank B knows that, if any of its directors were to visit South Africa, they could be arrested and tried there under the Bill, it may decide to "de-risk" its operations by cutting its correspondent bank ties with Bank A. Unless Bank A can find another US bank willing to act as a correspondent bank, it will battle to pay for the parts that Eskom needs. Finding other correspondent banks is also likely to prove difficult, as all global banks will have the same need to "de-risk" their operations by reducing their exposure to South Africa. The more "de-risking" decisions spread to additional global banks in the US and elsewhere, the more challenging it will become for Bank A to find correspondent banks willing to process foreign payments for it. Bank A will still be able to send payment instructions via the Swift system, but global banks that have severed their correspondent bank ties with it will ignore its messages.

South Africa could try to rely on the alternative payment systems being developed by China and Russia, for example. As yet, however, both are too small to meet its needs. China's Cross-Border Interbank Payment System reportedly now includes 4,900 banking institutions in some 189 countries, but is still much smaller than the SWIFT network. It also generally uses Renmimbi (Yuan),[52] not the US dollars in which most of South Africa's trade takes place. Russia's System for Transfer of Financial Messages is a Russian equivalent of the SWIFT system, and was developed by the Central Bank of Russia after sanctions were imposed on Moscow in 2014 over its assumption of power in Crimea. In 2024, however, only some 20 countries were connected to the system,[53] which would not be able to meet South Africa's needs.

In this situation, public and private entities in South Africa would increasingly find themselves unable to pay in foreign currencies for necessary goods or services. South Africa's oil imports would significantly diminish, pushing up petrol prices and triggering higher levels of inflation. Great economic damage would be likely to follow. Many businesses would close down, while unemployment and poverty would rise.

If the Bill is adopted, the South African subsidiaries of US, UK, European and Japanese companies might also choose to disinvest for fear that their directors might otherwise be arrested and held criminally liable for their alleged role in "supporting" apartheid crimes in Israel or elsewhere. Such disinvestment would lead to a considerable outflow of capital and skills, which would further damage the economy, increase unemployment, and hurt the poor in particular. The new investment urgently needed to raise South Africa's growth and employment rates c ould dry up too.

[52] Wikipedia, Cross-Border Interbank Payment System. https://en.wikipedia.org/wiki/Cross-Border_Interbank_Payment_System.
[53] Wikipedia, SPFS. https://en.wikipedia.org/wiki/SPFS/.

The immediate intention behind the Bill is clearly to isolate Israel from its Western allies, but its main effect could instead be to cut South Africa off from the global payments system and the wider global economy.

5.5 The risk to ANC support

In the 2024 general election, support for the ANC dropped sharply, from 57% in 2019 to a mere 40%. As ANC secretary general Fikile Mbalula told delegates to the ANC's National General Council meeting in Johannesburg in December 2025: "The ANC can no longer command support; it must now compete for it…with other parties… Voters have demonstrated that they are not captive to the ANC and will 'shop around' for alternatives that better address their conditions: the DA for stability and middle-class interests; the EFF and MK party for alienated and protesting poor communities." In addition, he went on, voter discontent with the ANC "is becoming entrenched. Large sections of the working class and poor no longer believe ANC promises on jobs, housing, and services."[54]

There is also a strong correlation between the ANC's electoral support and the country's growth and employment rates. In 2004, for instance, when the ANC won 69.7% in the national election, its victory was greatly helped by an economic growth rate of around 4.5% and a significant decrease in joblessness to 25%. By contrast, the 17 percentage point fall in the ANC's voter support in 2024 followed a decade of meagre growth (averaging around 0.7% of GDP a year over that period)[55] and an unemployment rate of hovering at around 32% in general and at some 60% among youth aged 15 to 24.[56]

The ANC, said Mr Mbalula in December 2025, can still "restore its hegemony"[57] in the coming local government elections in 2026 and general election in 2029. However, it is unlikely to do so while voter discontent over unemployment, crime, corruption and dysfunctional governance remains so high. The ANC thus has considerable reason to start implementing policies that attract investment, increase growth, expand employment, counter corruption and significantly reduce high levels of murder, rape, extortion and other crimes.

The Bill, however, will make it harder to achieve these goals. At best, it will show that the ANC is more concerned with countering alleged apartheid crimes abroad than in keeping its own citizens safe. With murders totalling 68 deaths a day in 2024/25, according to the most recent annual crime statistics,[58] South Africans are likely to be outraged if the ANC opts to undermine

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[54] Seepe, S, 'ANC's Struggle for Survival Amid Leadership Crisis, Voter Discontent: National General Council 2025', The African 12 December 2025. https://theafrican.co.za/opinion/2025-12-12-ancs-struggle-for-survival-amid-leadership-crisis-voter-discontent/. Njilo, N, 'Time is no longer on our side' – ANC reflects on GNU and declining voter support', Daily Maverick, 8 December 2025. https://www.dailymaverick.co.za/article/2025-12-08-time-is-not-on-our-side-anc-reflects-on-gnu-and-declining-voter-support/.

[55] Endres, J, "Pulling up instead of trickling down: an alternative to BEE", IRR, 26 September 2025. https://irr.org.za/media/john-endres-pulling-up-instead-of-trickling-down-an-alternative-to-bee/.

[56] Maluleke, R, "Quarterly Labour Force Survey (QLFS), Q3, 2025", Powerpoint presentation. https://www.statssa.gov.za/publications/P0211/Presentation%20QLFS%20Q3%202025.pdf/.

[57] Njilo, 'Time is no longer on our side', op. cit.

[58] Cruywagen, V et al, "Decline in murders brings little consolation for victims' families", Daily Maverick, 6 December 2025. https://www.dailymaverick.co.za/article/2025-12-06-decline-in-murders-brings-little-consolation-for-victims-families/.

the fight against crime inside the country by allocating scare resources to probing and prosecuting alleged apartheid crimes supposedly being perpetrated in distant foreign lands.

If the Bill also results in disinvestment, exclusion from the global payment system, collapsing business confidence, a sharp rise in inflation, and an even worse unemployment crisis, voter anger against the ANC is likely to reach new heights. Far from regaining its earlier hegemony, it could see its support decline to 35% or less in 2029.[59] From the ANC's perspective, this is an important consideration: for it might then become a junior partner in future coalitions rather than the dominant force it has been for three decades.

6 The way forward

The Bill is clearly unnecessary, as the Rome Statute and the 2002 ICC Act are already available to South Africa and can be used by it to investigate and prosecute the apartheid crime against humanity in other countries, provided the necessary jurisdictional foundation (such as the presence of the alleged perpetrator in the country) is in place.

In these circumstances, adopting an overlapping anti-apartheid statute is entirely unnecessary and serves no legitimate governmental purpose. The overlap also means that any prosecution brought in South Africa under the Bill is likely to be bogged down by a host of preliminary objections and questions as to why a less credible convention is being used instead of the Rome Statute, which is the modern and widely accepted one.

In addition, the Bill is clearly unconstitutional. Some of its own wording is too vague to pass constitutional muster. Other clauses in it contradict the separation of powers doctrine by seeking, for example, to empower the Committee on Apartheid (to be established by the President) to "declare" a particular state as an apartheid one.[60]

The main problem, however, is that the 1973 Convention the Bill seeks to domesticate is far too vague and uncertain in its meaning. As earlier noted, Articles II and III are impermissibly imprecise in many ways. These Articles clearly contradict South Africa's doctrine against vagueness of laws. They also undermine the rule of law, the "supremacy" of which is a founding value of South Africa's democracy and must be upheld at all times.

The Bill is also impractical and undesirable in many ways. Its adoption would smack of retrogressive and illegitimate forum-shopping on South Africa's part. It would also put South Africa in breach of core elements of international law: from the doctrine of complementarity to the fundamental principle that the rules of international law are based on the consent of sovereign states. The Bill's adoption would thus lead to South Africa's increasing identification as a rogue state: one that operates outside the agreed rules and helps to break down the accepted legal order.

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[59] Staff writer, "New polling from the Social Research Foundation (SRF) puts the ANC and the DA just a few percentage points apart", 20 November 2025. https://dailyfriend.co.za/2025/11/20/anc-da-in-close-contest-for-voter-support-new-poll-shows/. This SRF survey of 1,002 registered voters, conducted telephonically in early November 2025 and with a 4% margin of error, put the ANC's support at 37% and the DA's at 32%. Increased angr and frustration at the ANC could thus reduce its support to 35% or even less.

[60] Clause 1, Definitions, Bill.

The Bill is also impractical, in that the NPA lacks the capacity to mount the sophisticated investigations and high-profile prosecutions it will require. If prosecutions were to fail, this would be embarrassing to South Africa and could reduce its support and its perceived value among its allies. In addition, the additional prosecutions needed will drain the NPA's limited resources and make it even more difficult for it to counter violent crime and corrosive corruption within the country.

The Bill could also result in South Africa's isolation from the global payments system, which would have devastating consequences for its economy. In addition, it could help trigger disinvestment, capital flight, an exodus of scarce skills, and a sharp rise in unemployment rates already at crisis levels.

The Bill could thus diminish the voter support the ANC is still able to muster. The ANC says it wants to regain its "hegemony" in the 2029 general election, but this will not occur if the ANC chooses to undermine the domestic fight against crime by allocating scarce resources to prosecuting alleged apartheid crimes in distant foreign lands. In this situation, angry or dismayed voters could well to turn to other political parties (as is already happening), which could reduce the ANC's electoral support to 35% or less in 2029. This is likely to be a matter of considerable concern to the ANC.

The Committee's task is to decide whether the Bill meets the overall criterion of desirability. There is no good reason for it to reach any such conclusion. On the contrary, there is every reason for the committee to find that the Bill is unnecessary, unconstitutional, impractical and undesirable. By so ruling, it will spare Parliament from having to deal further with the Bill – and safeguard South Africa from the many negative consequences it is likely to bring.

South African Institute of Race Relations NPC **14 December 2025**