

**DOMESTIC IMPLEMENTATION OF THE ROME STATUTE OF THE INTERNATIONAL
CRIMINAL COURT: A COMPARATIVE ANALYSIS OF STRATEGIES IN AFRICA**

**Dissertation submitted in partial fulfilment of the requirements of the degree LLM
(Human Rights and Democratisation in Africa)**

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DECLARATION

I, Benson Chinedu Olugbuo, hereby declare that this work is original and the result of my own effort. It has never on any previous occasion been presented in part or whole to any Institution or Board for the award of any Degree.

I further declare that all secondary information used has been duly acknowledged in the work. I am responsible for any error whatever the nature, in this work.

Student

Signed.....

Date.....

Supervisor

Signed.....

Date.....

DEDICATION

To the memory of my late kid sister, Adaku Olugbuo

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LIST OF ABBREVIATIONS

ACHPR	African Charter on Human and Peoples Rights
Art	Article
ASPA	American Service-members' Protection Act
BIAs	Bilateral Immunity Agreements
CAP	Chapter
CAT	Convention Against Torture
CICC	Coalition for the International Criminal Court
COE	Council of Europe
CORNELL INT'L LAW J.	Cornell International Law Journal
DOC	Documents
DRC	Democratic Republic of Congo
EU	European Union
FLA. J. INT'L LAW	Florida Journal of International Law
HRW	Human Rights Watch
ICC	International Criminal Court
ILC	International Law Commission
ICCLR	International Centre for Criminal Law Reform and Criminal Justice Policy
ICRC	International Committee for the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for Yugoslavia
MICH. J. INT'L LAW	Michigan Journal of International Law
NCICC	Nigerian Coalition on the International Criminal

	Court
NWLR	Nigerian Weekly Law Report
OAU	Organisation of African Unity
Res	Resolution
SADC	South African Development Community
Sec	Section
UK	United Kingdom
UN	United Nations
UNESCO	United Nations Economic, Social and Cultural Organisation
USA	United States of America
VA J. INT'L LAW	Virginia Journal of International Law
WTR LAW & CONTEMP. PROBS	WTR Law and Contemporary problems

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CHAPTER ONE

1 INTRODUCTION

1.1 Background of the study

[The ICC] promises, at last, to supply what has for so long been the missing link in the international legal system: a permanent court to judge the crimes of gravest concern to the international community as a whole - genocide, crimes against humanity and war crimes

Kofi Annan, Secretary-General, United Nations UN Millennium Summit 6-9 September 2000

On 17 July 1998, a total of 120 states voted to adopt the Rome Statute of the International Criminal Court (Rome Statute)¹ in a UN sponsored conference in Rome. The International Criminal Court (ICC or 'the Court') has jurisdiction to try people accused of such international crimes as genocide, crimes against humanity, war crimes and aggression.² The Court has power to provide redress to victims and survivors of these crimes and some argue that the mere presence of the ICC has a deterrent effect on future dictators and their collaborators.³ Also the Court has potential to advance the rule of law internationally, for example, by obliging States Parties to investigate and prosecute those indicted, thus strengthening the ability of national jurisdictions to bring to justice perpetrators of these heinous crimes.⁴

¹ The Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/99 (July 17 1998).

² Art 5(2) of the Rome Statute provides that '[t]he Court shall exercise jurisdiction over the crime of aggression once a provision is adopted [...] setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime [...].' See Kittichaisaree (2001) 206.

³ Human Rights Watch (HRW) 'Making the International Criminal Court Work: A Handbook for Implementing the Rome Statute' <http://www.hrw.org/campaigns/icc/docs/handbook_e.pdf> [Accessed 23 July 2003]. See also Boot (2002) 29.

⁴ Ellis (2002) 15 *Fla. J. Int'l Law* 215 at 223.

With the entry into force of the Rome Statute in July 2002⁵ and the election of judges⁶ and Prosecutor⁷ of the Court in 2003, there is need for States Parties to the Rome Statute to enact laws to incorporate the crimes defined in the treaty. Currently, 92 States are Parties to the treaty.⁸ The success of the ICC will depend not only on widespread ratification of the Rome Statute but also on States Parties' compliance with obligations under the treaty. For almost every state this will require some change in national law in accordance with existing laws and proceedings in a given legal system.⁹

The experience of most States Parties to the treaty is that the Rome Statute will require some form of domestic implementing legislation, even if this is not the normal practice of the state. There is need for co-operation between the Court and State Parties on the administration of justice.¹⁰ For the Court to function properly the immunity of its personnel should be guaranteed¹¹ and provisions in national constitutions that are incompatible with the Rome Statute¹² should be amended to bring them in conformity with the provisions of the treaty.¹³

⁵ Art 126 of the Rome Statute provides that '[t]his Statute shall enter into force on the first day of the month after the 60th day following the date of the deposit of the 60th instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations.'

⁶ 18 Judges were elected in February 2003. Amongst them Fatoumata Dembele Diarra (Mali), Akua Kuenyehia (Ghana) and Navanethem Pillay (South Africa) are from Africa
<http://www.un.org/law/icc/elections/results/judges_results.htm> [Accessed 23 July 2003].

⁷ Mr. Luis Moreno Ocampo (Argentina) was elected Prosecutor of the International Criminal Court on 21 April 2003 <http://www.un.org/law/icc/elections/results/prosecutor_results.htm> [Accessed 23 July 2003].

⁸ As of 5 September 2003, 92 countries have ratified the Rome Statute of the ICC. Out of them 22 are African Countries, 23 are from Europe (non EU countries), 18 are from Latin America and the Caribbean, 15 are EU member States, 12 are from Asia and the Pacific, 1 is from North America, 1 is from the Middle East. The 22 African countries include Benin, Botswana, Central African Republic, Democratic Republic of Congo, Djibouti, Gabon, Gambia, Ghana, Guinea, Lesotho, Mali, Malawi, Mauritius, Namibia, Niger, Nigeria, Senegal, Sierra Leone, South Africa, Tanzania, Uganda and Zambia < <http://www.icc-cpi.int/php/statesparties/allregions.php>> [Accessed 7 October 2003].

⁹ HRW (n 3 above) 3.

¹⁰ See Art 88 of the Rome Statute.

¹¹ See Art 48 of the Rome Statute.

¹² See Art 27, 77 and 89 of the Rome Statute.

¹³ International Centre for Criminal Law Reform and Criminal Justice Policy (ICCLR) 'International Criminal Court: Manual for the Ratification and Implementation of the Rome Statute' March 2003

Several countries in Europe and America have incorporated the provisions of the Rome Statute in their respective national laws and in the process issues regarding the compatibility of the Rome Statute to national constitutions were brought to the fore.¹⁴ These issues are the obligation to surrender to the ICC with a constitutional prohibition on extradition of a state's own national, constitutional immunities with duties to arrest and surrender under the Statute, domestic provisions on sentencing with the statutory provisions on penalties provided by the Rome Statute, amnesties and statutes of limitation provided in various African countries and exception to the *ne bis in idem* rule amongst others¹⁵

Thus far, South Africa is the only African country that has adopted an implementing legislation domesticating the Rome Statute.¹⁶ Other African countries such as Congo DRC, Ghana, Nigeria and Senegal have draft bills.¹⁷ There is therefore the need for African countries that are State Parties to the treaty to positively confront the above challenges while incorporating the provisions of the Rome Statute into national law.

1.2 Hypothesis and research questions

The study will aim at answering the following pertinent questions with regards to the implementation of the Rome Statute in Africa:

- a) Whether African States Parties to the Rome Statute will need to enact national laws to fulfill their treaty obligations?
- b) What potential does the Rome Statute have for placing controls on dictators and potential human rights abusers in the continent?

<http://www.icclr.law.ubc.ca/Publications/Reports/ICC%20Reports/Manual_2nd_ed_mar21_03.pdf> [Accessed 23 July 2003].

¹⁴ These include Australia, Azerbaijan, Canada, Finland, Germany, New Zealand, Norway, Switzerland and United Kingdom.

¹⁵ See (n 140 below).

¹⁶ Implementation of the Rome Statute of the International Criminal Court Act, No. 27 adopted 18 July 2002 (The South Africa ICC Act).

¹⁷ Coalition for the International Criminal Court 'Ratification and Implementation Toolkit' <<http://www.icc.now.org/resourcestools/ratimptoolkit.html>> [Accessed 23 July 2003].

- c) Does the Rome Statute have constitutional implications for domestic constitutions in Africa and how can they be resolved?
- d) Are there any lessons to be learnt from the different implementation strategies adopted in Africa with regards to human rights protection in the continent?

1.3 Literature review

Several materials have been written on the ICC. These are books by Bassiouni,¹⁸ Lee¹⁹ and Triffterer²⁰ amongst others. The CICC has a website with materials on the ratification and implementation of the Rome Statute.²¹ The ICC²², The Council of Europe²³, The United Nations²⁴, HRW²⁵, Amnesty International²⁶, Lawyers Committee for Human Rights²⁷, No Peace Without Justice²⁸, Parliamentarians for Global Action²⁹ all have websites with information on the ICC, which will be relevant for the study. Most of the statutes that have been passed into law by some State Parties such as Australia, Canada, France, New Zealand and the United Kingdom will also serve as source material.³⁰

¹⁸ Bassiouni (ed) (1998) 793.

¹⁹ Lee (ed) (2001) 857.

²⁰ Triffterer (ed) (1999) 1295.

²¹ CICC (n 17 above).

²² The website of the International Criminal Court in The Hague, Netherlands
<<http://www.icc-cpi.int/index.php>> [Accessed 5 May 2003].

²³ COE <<http://www.legal.coe.int/criminal/icc.>> [Accessed 2 May 2003].

²⁴ UN <<http://un.org/lawicc/index.html>> [Accessed 5 May 2003].

²⁵ HRW <<http://www.hrw.org/campaigns/icc/index.htm>> [Accessed 2 May 2003]

²⁶ Amnesty International <<http://www.amnesty.org/icc.htm>> [Accessed 5 May 2003].

²⁷ Lawyers Committee for Human Rights <http://www.lchr.org/international_justice/icc/icc.htm> [Accessed 2 September 2003].

²⁸ No Peace Without Justice <<http://www.npwj.org/modules.php?name=Sections&op=listarticles&secid=9>> [Accessed 2 September 2003].

²⁹ Parliamentarians for Global Action <http://www.pgaction.org/prog_inte.asp> [Accessed 2 September 2003].

³⁰ ICCLR (n 13 above).

With regards to domestication of the Rome Statute in Africa, Maqungo³¹ discussed the incorporation of the Rome Statute into national law in South Africa while Nsereko³² was concerned with the issues affecting implementation of the treaty within the Southern African region. Jessberger and Powell³³ considered the impact of the Rome Statute on the South African legal system with regards to developments in international criminal justice system. Ngonji³⁴ discussed the possible impact of the ICC on human rights in Africa. In the study he recommends that African states should put in place necessary laws and other mechanisms required for courts to exercise criminal jurisdiction over international crimes through the adoption of the principle of universal jurisdiction.

Excluding the above, other studies place emphasis on the implementation of the Rome Statute outside Africa. This study will aim at providing an up to date assessment of the implementation of the Rome Statute in Africa and the challenges faced by different legal systems in domesticating the Rome Statute.

1.4 Limitations of proposed study

The proposed study is limited by the scarcity of materials on implementation strategies in Africa. Amongst the countries that have implementation laws, only the South African law is cited.³⁵ Most people are also not well informed about the potentials of the ICC in bringing to justice those who commit genocide, war crimes and crimes against humanity in Africa. The study will therefore add to the ongoing debate on the use of international instruments in the promotion and protection of human rights in Africa.

³¹ Maqungo 'Implementation of the Rome Statute into National Law' paper presented at the Workshop for Women in Africa entitled, 'Gender Justice & the International Criminal Court' on 24 – 26 August 2000 Cape Town, South Africa organised by the Women's Caucus for Gender Justice and the Law, Race and Gender Justice Research Unit of the University of Cape Town.

³² Nsereko (2000) 169.

³³ Jessberger and Powell (2001) 14 *South African Journal of Criminal Justice* 344 at 349.

³⁴ Ngonji (2001) unpublished LLM dissertation, University of the Western Cape.

³⁵ See (n 17 above).

1.5 Summary of chapters

The first chapter is an introduction. It sketches the background of the study and reviews the materials that will be used for the study. It focuses on several hypothesis and research questions that the study is set out to answer. It highlights the dearth of materials on the implementation of the Rome Statute in Africa. The second chapter analyses the ICC and the emerging international legal system. It discusses the complementarity principle of the Rome Statute and analyses the crimes under the jurisdiction of the Court. The effect of the bilateral immunity agreements signed by States Parties to the Rome Statute with the United States of America is also highlighted.

The third chapter deals with the ICC and international approaches to the implementation of the Rome Statute. This involves discussions on compatibility of the Rome Statute with national constitutions. Approaches adopted by states with regards to specific issues of implementation will also come into focus followed by discussions on the amendment of constitutions and purposive interpretation as adopted by various States Parties to the Rome Statute.

The fourth chapter will discuss implications of the Rome Statute for domestic constitutions in Africa. The discussion will focus on immunity from prosecution granted to heads of state and government by constitutions, the surrender of persons to the ICC and sentencing of persons convicted by the Court with regards to their relationship in the implementation of the Rome Statute in Africa. The fifth chapter will be a comparative analysis of implementation strategies adopted by South Africa, Nigeria and Democratic Republic of Congo (DRC). There will an analysis of the relationship between the Rome Statute and African human rights system. The last chapter is the conclusion with recommendations and arguments on the need for a comprehensive domestic implementation strategy of the Rome Statute in Africa.

CHAPTER TWO

2 THE INTERNATIONAL CRIMINAL COURT AND THE EMERGING INTERNATIONAL LEGAL SYSTEM

2.1 An overview of the international criminal court

The concept of establishing a permanent international criminal court was born out of the conviction that there should be no impunity for perpetrators of crimes considered by the international community to be of a very serious nature. While the Court has roots in the early 19th Century, the story best begins in 1872, when Gustav Moynier, one of the founders of the International Committee of the Red Cross, proposed a permanent court in response to the crimes of the Franco-Prussian War.³⁶ The next call was after First World War with the Treaty of Versailles of 28 June 1919. The framers of the treaty envisaged an *ad hoc* international court to try the Kaiser and German war criminals. After the Second World War, the Allies also set up the Nuremberg and Tokyo tribunals to try Axis war criminals.³⁷

In 1947, the UN General Assembly requested the International Law Commission (ILC), to begin to codify the principles of international law that emerged from the Nuremberg Tribunal.³⁸ The Convention on the Prevention and Punishment of the Crime of Genocide also envisaged the establishment of an international penal tribunal to try persons accused of crimes under the treaty.³⁹ However efforts to create a permanent court were delayed for decades by the cold war and refusal of governments to accept international

³⁶ See CICC 'History of establishment of the International Criminal Court' <<http://www.iccnw.org/documents/iccbasics/History.pdf>> [Accessed 7 October 2003]. See also Hall (2001) 458.

³⁷ Lee (2002) 185.

³⁸ General Assembly Res. 174, U.N. GAOR, 2nd Ses., U.N. Doc. A/519 (1947). See also Leanza (1999) 7.

³⁹ See Art 6 of the Convention on the Prevention and Punishment of the Crime of Genocide, adopted 9 December 1948, 78 U.N.T.S. 277, 28 I.L.M. 763 (entered into force 12 January 1951) [hereafter Genocide Convention].

legal jurisdiction. However the first draft statute for establishing an ICC was completed in 1950.⁴⁰

The end of the cold war in 1989 brought a dramatic increase in the number of peacekeeping operations and a world where the idea of establishing a permanent court became more viable. Motivated in part by an effort to combat drug trafficking, Trinidad and Tobago resurrected the proposal for an ICC. This led the General Assembly of the UN to ask the ILC to prepare a draft statute for the establishment of an international criminal court.⁴¹ Gross human rights violations such as genocide, crimes against humanity perpetrated in the former Yugoslavia and Rwanda led the Security Council to establish Ad Hoc Tribunals in 1993⁴² and 1994⁴³ respectively. The successful establishment of the ICTY/R helped to spur on the efforts for the establishment of the ICC.⁴⁴

The ILC presented the final draft statute on the ICC to the General Assembly of the UN in 1994 and recommended that a conference of plenipotentiaries be convened to negotiate a treaty on the establishment of a permanent court. A Preparatory Committee was later appointed whose draft was submitted to the Diplomatic conference in Rome. This resulted in the adoption of the Rome Statute of the ICC in 1998. The conference was bedevilled with several drafting complexities that almost jeopardised the adoption of the treaty. According to Kirsch:

[t]he negotiating process in Rome was highly decentralized. The draft statute submitted by the Preparatory Commission was a rich document, but could hardly serve as an actual basis for negotiations if the goal was to conclude a statute in five weeks. It was simply too complex, with a myriad of options and sub-options. One cannot negotiate with a text that contains some 1,400 square brackets, representing so many points of disagreement.⁴⁵

⁴⁰ Report of the International Law Commission on Questions of International Criminal Jurisdiction, U.N. GAOR, 5th Session, U.N. Doc. A/CN.4/5/1950.

⁴¹ CICC (n 36 above).

⁴² See S/Res/827 of 25 May 1993.

⁴³ See S/Res/955 of 8 November 1994.

⁴⁴ Lee (n 37 above) 192.

⁴⁵ Kirsch (2001) 64 *WTR Law & Contemp. Probs.* 3 at 5.

The Rome Statute was however adopted by a majority of 120 votes on the eve of the 50th year celebration of the adoption of the Universal Declaration on Human Rights. The establishment of the ICC is seen as the culmination of a series of international efforts to replace a culture of impunity with a culture of accountability.⁴⁶ The Rome Statute has irrevocably changed the face of international criminal law in a profound way. Seen in its best light, it represents the triumph of idealism over hard, and often discouraging, reality. Moreover, some proponents argue that the provisions of the Rome Statute embody a widespread aspiration towards a genuine and enforceable rule of law.⁴⁷

2.2 The principle of complementarity

The main feature of the ICC is the complementarity of its jurisdiction to national criminal jurisdictions.⁴⁸ Complementarity refers to the principle that the ICC can gain jurisdiction only when domestic legal systems are unwilling or genuinely unable to carry out an investigation or prosecution of an accused individual.⁴⁹ Unlike the ICTY/R Statutes, the ICC gives preference to domestic courts if they are capable of conducting fair trials.

The principle of complementarity thus assigns primary responsibility for the enforcement of the prohibition of genocide, crimes against humanity and war crimes to national criminal jurisdictions while providing for certain standards that they have to meet.⁵⁰ The preamble⁵¹ and specific provisions of the Rome Statute⁵² provides for complementarity between the Court and national jurisdictions. The affirmation of the complementarity character of the ICC jurisdiction implies the idea that the primary responsibility in repressing serious crimes of international concern falls on national criminal tribunals.⁵³

As long as a national criminal jurisdiction is able and willing to genuinely investigate and prosecute the matter which has come to the Court's attention, the Court does not have jurisdiction. This is in furtherance of the provision in the Rome Statute which affirms that

⁴⁶ Kirsch (1999) 32 *Cornell Int'l Law J.* 437 at 442.

⁴⁷ Newton (2000) 41 *Va J. Int'l Law* 204 at 205. See also Conso (1999) 3.

⁴⁸ Benvenuti (1999) 21.

⁴⁹ Ellis (n 4 above) 215 at 221.

⁵⁰ Kleffner (2003) 1 *Journal of International Criminal Justice* 86 at 87.

⁵¹ See the Preamble the Rome Statute para. 10.

⁵² See Art's 1, 12 - 15, 17 and 18 of the Rome Statute.

⁵³ Benvenuti (n 48 above) 21.

'the most serious crimes of concern to the international community must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation'.⁵⁴

The primacy of national jurisdictions in the prosecutions of those accused of committing genocide, war crimes and crimes against humanity is not novel to the ICC but is consistent with the repression of crimes in international law, whereby the primary responsibility for punishing crimes lies with states even in cases where the 'international nature' of the crimes urges the creation of international mechanisms for repression.⁵⁵

The inherent fundamental role of national jurisdictions, even in the case of creation of international jurisdictions is clear from the experiences of both the First and Second World Wars trials of war criminals. Also, The Genocide Convention⁵⁶ while criminalising the crime of genocide and other crimes against humanity adds credence to the principle of complementarity by providing that '[States] Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislations to give effect to the provisions of the Convention and in particular, to provide effective penalties for the persons guilty of genocide and any other acts enumerated in the Convention.'⁵⁷

Another important step in the assumption by states of strong responsibilities in repressing crimes against humanitarian values is represented by the four Geneva Conventions of 1949,⁵⁸ subsequently supplemented by Additional Protocol I and II of 1977.⁵⁹ These instruments of international humanitarian law deal with issues that are of vital importance for the safeguard of human dignity during armed conflicts.⁶⁰

⁵⁴ Preamble to the Rome Statute, para 4.

⁵⁵ El-Zeid (2002) 23 *Mich. J.Int'l Law* 869 at 870.

⁵⁶ See (n 39 above).

⁵⁷ See Art 5 of the Genocide Convention.

⁵⁸ See Art 49 of the Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949; Art 50 of the Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949; Art 129 of the Convention (III) relative to the Treatment of Prisoners of War, 12 August 1949 and Art 146 of the Convention (IV) relative to the Protection of Civilian Persons in Time of War, 12 August 1949.

⁵⁹ Art 86 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977 and Art 6 of the Protocol

It should also be noted that both the Convention on the Suppression and Punishment of the Crime of Apartheid (Apartheid Convention)⁶¹ and the Convention against Torture and Other Cruel Inhuman and Degrading Treatment or Punishment (CAT)⁶² provides indirectly for the principle of complementarity. The Apartheid Convention obliges States Parties to adopt legislative, judicial and administrative measures to prosecute, bring to trial and punish persons on their territory accused of acts of apartheid.⁶³ The CAT on the other hand imposes heavier responsibilities to States Parties by providing for universal jurisdiction and states that each State Party shall take measures as may be necessary to establish its jurisdiction over individuals who commit the crime of torture.⁶⁴ However, it should be noted that unlike the ICC, the ICTY/R have both concurrent and priority jurisdictions over national jurisdictions.⁶⁵

The Rome Statute however provides for the circumstances under which the Court will have jurisdiction to entertain cases. The first exceptional circumstance is where a State Party is 'unable' to prosecute a person for a crime within the jurisdiction of the ICC.⁶⁶ Article 17(3) of the Rome Statute provides that:

[i]n order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

The more complex exception is where a State Party is perceived to be unwilling to prosecute a person for a crime within the jurisdiction of the ICC. History has shown that some States prefer to allow perpetrators of atrocities to avoid any kind of responsibility for their actions. Therefore, in order to prevent one of these perpetrators from escaping justice, the ICC has the power to override national authorities at a certain point.⁶⁷ This

Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.

⁶⁰ Benvenuti (n 48 above) 28.

⁶¹ UN General Assembly res. 3068 (XXVIII) 30 November 1973.

⁶² UN General Assembly res. 39/46 of 10 December 1984

⁶³ Art IV (b) of the Apartheid Convention of 1973.

⁶⁴ These include the territorial, nationality and protective principles of jurisdiction. See Art 5(1) of CAT.

⁶⁵ See Art 9 of the ICTY Statute of 1993 and Art 8 of the ICTR Statute of 1994.

⁶⁶ See Art 17(1) (b) of the Rome Statute.

⁶⁷ Lee (n 37 above) 194.

can only be reached after series of procedures have been followed as outlined in various parts of the Statute. In particular, the Rome Statute sets out the factors the Court will consider when determining the unwillingness of a State to prosecute. These factors include situations where:

- (a) the proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court [...];
- (b) there has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
- (c) the proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with intent to bring the person concerned to justice.⁶⁸

It can be argued that Article 17(2) provides the ICC with very limited grounds for determining that a State is unwilling to prosecute or investigate a particular perpetrator. The State may decide not to prosecute a person and argue against the admissibility of a case where in fact there is nothing to show that the State is willing to prosecute the individual concerned. However the principle of complementarity gives States Parties the opportunity to bring their laws in conformity with the provisions of the Rome Statute, thereby allowing the States to prosecute those who commit genocide, crimes against humanity and war crimes. It is only where such States are unwilling or unable to prosecute offenders that the ICC will have jurisdiction to entertain such cases.

2.3 Crimes under the Rome Statute

The crimes under the jurisdiction of the Rome Statute are the crimes of genocide, crimes against humanity, war crimes and the crime of aggression.⁶⁹ The definition of crimes over which the ICC has jurisdiction reflects widely accepted international norms, based on existing treaties on international humanitarian law and customary international law.⁷⁰

⁶⁸ Art 17 (2) of the Rome Statute.

⁶⁹ Art 5 of the Rome Statute.

⁷⁰ ICCLR (n 13 above) 117.

In the early phases of the discussions on the creation of the ICC, treaty-based crimes⁷¹ formed the focal point of the deliberations. However during the work of the Preparatory Committee on the Establishment of an International Criminal Court such an approach found less support and was discarded.⁷² The main reason for excluding the treaty crimes was that not all the conventions providing the basis for such treaty crimes have found sufficient international acceptance and thus could not be considered as reflecting customary international law.⁷³ However the inclusion of the crimes of terrorism and drug trafficking were made contingent on the adoption of generally acceptable definitions before inclusion in the list of crimes within the jurisdiction of the Court.⁷⁴

2.3.1 The crime of genocide

The Rome Statute provides for the definition of the crime of genocide.⁷⁵ The definition of the crime of genocide agrees with the definition in Article 2 of the Genocide Convention.⁷⁶ The definition of genocide is also replicated in the ILC Draft Code Against the Peace and Security of Mankind⁷⁷, and the Statutes of the ad hoc Tribunals for the former Yugoslavia⁷⁸ and Rwanda.⁷⁹

The Assembly of States Parties recently adopted the Elements of Crimes in accordance with Article 9 of the Rome Statute.⁸⁰ The Elements of Crimes are supplementary in relation to the Rome Statute. In some cases the Elements of Crimes will assist the Court in clarifying how the general principles of criminal law should be applied to a specific

⁷¹ Treaty based crimes not included in the Rome Statute are Terrorism, Drug trafficking and Crimes against UN personnel amongst others. See U.N. Doc A/AC.249/1997/L.5, 16 - 17. See also Draft Statute of the ILC, (1994) 2 Y.B.I.L.C., Part 2, 38.

⁷² See the Report of the Preparatory Committee on the Establishment of an International Criminal Court, Supp. No 2, U.N. Doc. A/51 Vol. 1, 25.

⁷³ Zimmermann (1999) 98.

⁷⁴ Art 123 of the Rome Statute provides for a review conference after seven years of adoption of the treaty where such matters relating to the list of crimes may be reconsidered.

⁷⁵ Art 6 of the Rome Statute.

⁷⁶ See (n 39 above).

⁷⁷ Art 19 of the Draft Code against the Peace and Security of Mankind. See Report of the International Law Commission on the work of its forty-eight session, 6 May - 26 July 1996, U.N Doc. A/51/10.

⁷⁸ Art 4 of the ICTY Statute of 1993. See also *Prosecutor v Jelusic* Case No. IT-95-10-T 14 December 1999.

⁷⁹ Art 2 of the ICTR Statute of 1994.

⁸⁰ See the ICC Elements of Crimes, U.N. Doc. PCNICC/2000/1/Add.2 (2000).

offence.⁸¹ This development is in contrast with the ICTY/R where the judges develop the Elements of Crimes without the support of further instruments and have made important contributions to the development of international criminal law.⁸² The crime of genocide is held to be of such gravity that the ICTR in the *Kambanda case* stated that:

[t]he crime of genocide is unique because of its element of *dolus specialis* (special intent) which requires that the crime be committed with the intent to destroy in whole or in part, a national, ethnic, racial or religious group as such, as stipulated in Article 2 of the Statute [ICTR]; hence the Chamber is of the opinion that genocide constitutes the crime of crimes, which must be taken into account when deciding the sentence.⁸³

The essence of the definition of genocide is its precise description of the special or specific intent requirement. The offender must intend to destroy, in whole or in part one of the four protected groups.⁸⁴ Criminal behaviour falling short of this definition may still fall within the scope of crimes against humanity, war crimes or ordinary crimes.⁸⁵

Rape and forced pregnancy may also be adjudicated under genocide though not specifically provided for in the Rome Statute.⁸⁶ Despite the absence of a specific reference, the link between genocide and rape has been established by the ICTR. In both *Prosecutor v. Akayesu*⁸⁷ and *Prosecutor v. Musema*,⁸⁸ the ICTR trial chamber convicted the accused persons of genocide based in part on charges of rape. These judgments suggest that acts of forced pregnancy may constitute genocide when the acts are committed with 'the intent to destroy, in whole or in part, a national, ethnical, racial or religious group.'⁸⁹

⁸¹ Fronza (1999) 116.

⁸² As above.

⁸³ *Prosecutor v. Kambanda*, Case No. ICTR 97-23-S, para 16.

⁸⁴ These groups include national, ethnical, racial and religious groups. See Schabas (2000) 102.

⁸⁵ Schabas (1999) 109. See also Nsereko (2000) 125.

⁸⁶ Boon (2001) 32 *Columbia Human Rights Law Review* 625 at 635.

⁸⁷ *Prosecutor v Akayesu* Case No. ICTR-96-4-T.

⁸⁸ *Prosecutor v Musema* Case No. ICTR-96-13-A.

⁸⁹ Art 6 of the Rome Statute.

2.3.2 Crimes against humanity

The Rome Statute provides that for a crime to be recognized as crime against humanity, it must be 'committed as part of widespread or systematic attack directed against any civilian population with knowledge of the attack.'⁹⁰ Since the Second World War, crimes against humanity have been repeatedly recognized in international instruments as part of international law with considerable consistency in their definition.⁹¹ The definition of crimes against humanity contained in Article 7 of the Rome Statute accords with the traditional conception of crimes against humanity under customary international law. The expression 'crimes against humanity' is employed to designate multiple acts of inhumanity committed as part of a widespread or systematic attack directed against a civilian population, in peacetime or wartime.⁹²

The Statute lists eleven acts that could constitute crimes against humanity in the context of such an attack. They include murder,⁹³ extermination,⁹⁴ enslavement,⁹⁵ deportation or forcible transfer of a population,⁹⁶ imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law,⁹⁷ torture,⁹⁸ rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity,⁹⁹ persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other universally recognized grounds,¹⁰⁰ enforced disappearance of persons,¹⁰¹ apartheid,¹⁰²

⁹⁰ Art 7 of the Rome Statute.

⁹¹ See for e.g., Art 1(b) of the 1968 Convention on the Non-Applicability of Statutory Limitations for War Crimes and Crimes against humanity, adopted by G.A res 2391 (XXIII) of 26 Nov. 1968; Art 5 of the ICTY Statute of 1993; Art 3 of the ICTR Statute of 1994 and Art 18 of the Draft Code of Crimes of 1996.

⁹² ICCLR (n 13 above) 118.

⁹³ Art 7 (1) (a) of the Rome Statute.

⁹⁴ Art 7 (1) (b) of the Rome Statute.

⁹⁵ Art 7 (1) (c) of the Rome Statute.

⁹⁶ Art 7 (1) (d) of the Rome Statute.

⁹⁷ Art 7 (1) (e) of the Rome Statute.

⁹⁸ Art 7 (1) (f) of the Rome Statute.

⁹⁹ Art 7 (1) (g) of the Rome Statute.

¹⁰⁰ Art 7 (1) (h) of the Rome Statute.

¹⁰¹ Art 7 (1) (i) of the Rome Statute.

and other inhumane acts of a similar character intentionally causing great suffering or serious injury to body or to mental or physical health.¹⁰³

It should also be noted that crimes against humanity as provided under the Rome Statute is the first comprehensive multilateral definition of crimes against humanity as it clearly goes far beyond what is contained in the Nuremberg, ICTY/R definitions.¹⁰⁴

2.3.3 War crimes

War crimes have been traditionally defined as a violation of the most fundamental laws and customs of war.¹⁰⁵ Article 8 of the Rome Statute defines four categories of war crimes. These are grave breaches under the 1949 Geneva Conventions which apply to international armed conflict,¹⁰⁶ other serious violations of the laws and customs applicable to international armed conflict,¹⁰⁷ violations of Article 3 common to the Geneva Conventions¹⁰⁸ which applies to non-international armed conflict and other serious violations of laws and customs applicable in non-international armed conflict.¹⁰⁹

Article 8 of the Rome Statute provides that '[t]he Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes'. War crimes constitute a traditional category of international crimes and the existence of universal jurisdiction over war crimes is generally recognized. Traditionally, war crimes have been regarded as serious violations of the law applicable to international armed conflict.¹¹⁰

The Rome Statute is considered to advance the development of international humanitarian law by including in the definition of war crimes, serious violations of international humanitarian law committed during non-international armed conflicts.¹¹¹

¹⁰² Art 7 (1) (j) of the Rome Statute.

¹⁰³ Art 7 (1) (k) of the Rome Statute.

¹⁰⁴ See Art 5 of the ICTY Statute and Art 3 of the ICTR Statute. See Bassiouni (1999) 282.

¹⁰⁵ ICCLR (n 13 above) 120.

¹⁰⁶ Art 8 (2) (a) of the Rome Statute.

¹⁰⁷ Art 8 (2) (b) of the Rome Statute. See ICCLR (n 13 above) 121.

¹⁰⁸ Art 8 (2) (c) of the Rome Statute.

¹⁰⁹ Art 8 (2) (e) of the Rome Statute.

¹¹⁰ Fenrick (1999) 180.

¹¹¹ ICCLR (n 13 above) 123.

The definition includes specific sexual and gender-based offences,¹¹² conscription and enlistment of children under fifteen¹¹³ and attacks against humanitarian personnel as war crimes.¹¹⁴ This Rome Statute also provides that the intentional starvation of civilians as a method of warfare is a war crime.¹¹⁵ It should be noted however that approximately half of the war crimes defined for international armed conflicts are not included in the section on non-international armed conflict.¹¹⁶

2.3.4 The crime of aggression

The crime of aggression is subject to the provision under article 5(2) of the Rome Statute.¹¹⁷ During negotiations for the establishment of the ICC, there was general agreement that the Court would only have jurisdiction if national courts were unable or unwilling to deal with the alleged crime in a fair way.¹¹⁸

Aggression was listed as one of the four core crimes following genocide, crimes against humanity and war crimes. However ICC jurisdiction will not be exercised until there is a consensus on the definition of the crime. Such a provision the Rome Statute reiterates 'shall be consistent with the relevant provisions of the Charter of the United Nations'¹¹⁹ and is expected to take place at a review conference seven years after the entry into force of the treaty.¹²⁰

2.4 The ICC and bilateral immunity agreements

The entry into force of the Rome Statute has been seen as a major achievement in the last decade. Despite the hope that the ICC will be a major deterrent to dictators and those who commit human rights abuses, the efficacy of the ICC to be an effective international legal system is under serious threat of late through the policies of the

¹¹² Art 8 (2) (b) (xxii) of the Rome Statute.

¹¹³ Art 8 (2) (b) (xxvi) of the Rome Statute.

¹¹⁴ Art 8 (2) (b) (xxiv) of the Rome Statute.

¹¹⁵ Art 8 (2) (b) (xxv) of the Rome Statute.

¹¹⁶ ICCLR (n 13 above) 124.

¹¹⁷ See (n 2 above).

¹¹⁸ Ferencz (2000) 58.

¹¹⁹ Art 5(2) of the Rome Statute.

¹²⁰ See (n 74 above).

United States of America.¹²¹ The United States under the Clinton administration signed the Rome Statute on 31 December 2000. However by a letter to the UN Secretary-General dated 6 May 2002, the United States 'unsigned' the Rome Statute thereby withdrawing from the treaty.¹²²

In 2002, the United States government passed the American Service-members' Protection Act (ASPA)¹²³ which was directly targeted a weakening the Court.¹²⁴ The ASPA though subject to Presidential waivers, provides among other things for the use of 'all means necessary and appropriate to bring about the release of any person [...] who is being detained or imprisoned by, on behalf of, or at the request of the International Criminal Court.'¹²⁵

In addition to the above, the United States has taken certain steps to prevent the Court from exercising jurisdiction over US nationals, in particular over diplomatic and military personnel. To that end, it sponsored Security Council resolution 1422 which was unanimously adopted on 12 July 2002 under Chapter VII of the UN Charter. By this resolution the Security Council, purportedly acting under Article 16 of the Rome Statute, requests that the ICC not commence an investigation or prosecution 'involving current or former officials or personnel' from a State that is not a party to the ICC Statute for a renewable 12 months period running from 1 July 2002.¹²⁶ Recently the Council of Europe in recent resolution condemned the Security Council resolution as threat to the ICC and stated that:

[r]esolution 1422 and its renewal constitutes a legally questionable and politically damaging interference with the functioning of the International Criminal Court. Its independence from the

¹²¹ For a background information on the opposition of the establishment of the Court by the US see C Keitner (2001) *UCLA Journal of International Law and Foreign Affairs* 217 - 262; Broomhall (2001) 64 *WTR Law and Contemp. Prob.* 399 - 419; Scharf (2001) 64 *WTR Law & Contemp. Prob.* 67 -117.

¹²² See J Lobe 'Bush 'Unsigned' War Crimes Treaty' AlterNet May 6, 2002
<<http://www.alternet.org/story.html?StoryID=13055>> [Accessed 7 October 2003].

¹²³ American Service-members' Protection Act 2002.

¹²⁴ CICC 'U.S. Bilateral Immunity or so-called 'Article 98' Agreements' See
<<http://www.iccnw.org/pressroom/factsheets/FS-BIAsSept2003.pdf>> [Accessed 7 October 2003].

¹²⁵ See Sec 2008 of the ASPA.

¹²⁶ The US government threatened to veto UN peace keeping operations in several parts of the world if the resolution was not adopted. The Resolution was renewed for another one year period by the UN Security Council by res.1487 on 12 June 2003.

UN Security Council, with regard to the opening of procedures against persons suspected of international crimes, is one of the most important advances in the Rome Statute. Resolution 1422 is legally questionable for two reasons: firstly, it is *ultra vires* in that the legal basis for a Security Council Resolution under Chapter VII of the UN Charter – a present threat to international peace and security – was not present. Secondly, Resolution 1422 violates the Rome Statute (Articles 16 and 27).¹²⁷

The US government has also proposed bilateral immunity agreements (BIAs)¹²⁸ with States Parties and non-State Parties to the Rome Statute under Art 98(2).¹²⁹ The US government is of the view that the BIAs are expressly provided for under of the Rome Statute.¹³⁰ The purport of the BIAs is to prevent the States concerned from transferring through whatever procedure, without the consent of the United States, any ‘current or former Government officials, employers (including contractors), or military personnel or nationals’ of the United States either to the ICC or to a third State or entity with the purpose of eventual transfer to the ICC.¹³¹ The scope of these agreements is intended to be broader than that provided by the Security Council resolution 1422, in terms of the individuals to be included.¹³²

By pursuing its policy of aggressive unilateralism, the Bush administration has successfully limited the Court’s functional jurisdiction over Americans in the short run. The threat to withdraw military aid from countries that fail to sign the BIAs and to wield its Security Council veto illustrates the forceful nature of this approach.¹³³ Several countries have signed the agreement with the United States.¹³⁴ It has also tied its military aid

¹²⁷ COE res. 1336 (2003) [1] of 25 June 2003 para 7.

¹²⁸ As at 9 October 2003 68 countries have signed the BIAs. See B Pisik ‘Amnesty for US citizens boosted’ Washington Times <www.washingtontimes.com/world/20031008-113708-1189r.htm> [Accessed 9 October 2003].

¹²⁹ Art. 98 (2) provides that ‘[t]he Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.’

¹³⁰ See the statement of Ambassador Negroponete, United States Permanent Representative to the UN, 12 July 2002 <http://www.amicc.org/docs/Negroponete_1422.pdf> [Accessed 7 October 2003].

¹³¹ See (n 24 above)

¹³² See Res. 1300 (2002) adopted by the COE which refers to the risks for the integrity of the Rome Statute of the ICC posed by bilateral agreements granting immunity to US citizens

¹³³ Galbraith (2003) 21 *Berkeley Journal of International Law* 683 at 689.

¹³⁴ See (n 128 above).

policy to the signing of the BIAs. Most of the countries that are under pressure to sign the BIAs are under-developed countries that depend on aid and military assistance from the United States.¹³⁵

Several legal scholars have criticized the agreements as a breach of international law while the European Union stated that it 'would be inconsistent with the ICC States Parties' obligations with regard to the ICC Statute and may be inconsistent with other international agreements to which ICC States Parties are parties [...].¹³⁶ It has also been argued that that Article 98(2) applies to agreements that existed at the time of signing or ratification of the Rome Statute. Therefore the BIAs are not within the category of agreements contemplated by the Rome Statute.¹³⁷ It has also been argued that it is inconsistent with the object and purpose of the ICC Statute for a State party to enter into or to apply a bilateral non-surrender agreement if the purpose or effect of doing so would be to provide impunity to a person credibly suspected of having committed a crime within the jurisdiction of the ICC.¹³⁸

Despite the glaring antagonism of the United States government to the effective functioning of the Court, it is obvious that the establishment of the ICC has been welcomed by several countries and is seen as an important step towards ending impunity and improving human rights protection in the 21st century throughout the globe.

¹³⁵ According to the US, several countries would lose the entire US 2004 military assistance, estimated at \$ 89.28 million. Nine African States stand to be affected by the measures. South Africa could lose \$ 7.6 million, Benin \$ 500,000, Kenya \$ 7.1 million, Lesotho \$ 125,000, Mali \$250,000, Namibia \$ 225,000, Niger \$ 200,000, Central African Republic \$ 150,000 and Tanzania \$ 230,000. See '50 Countries Support ICC Despite US Aid Cut Threat' Panafrican News Agency (PANA) Daily Newswire, October 5, 2003.

¹³⁶ European Union Guiding Principles adopted 30 September 2002.

¹³⁷ Prost and Schlunk (1999) 1131.

¹³⁸ J Crawford 'The Rome Statute of the International Criminal Court and bilateral agreements sought by the United States under article 98(2) of the Statute: Joint Opinion' 5 June 2003
<http://www.lchr.org/international_justice/Art98_061403.pdf> [Accessed 7 October 2003].

CHAPTER THREE

3. INTERNATIONAL APPROACHES IN THE IMPLEMENTATION OF THE ROME STATUTE

3.1 Compatibility of the Rome Statute with national constitutions

The compatibility of the Rome Statute with domestic constitutions has been raised in different countries around the world.¹³⁹ The Council of Europe also adopted a report on the constitutional issues raised by the ratification of the treaty amongst its members.¹⁴⁰ These include the immunity of heads of state and government provided in several domestic constitutions,¹⁴¹ surrender of persons to the ICC¹⁴² and sentencing of convicted persons¹⁴³ amongst others.

The irrelevance of official capacity as provided by Article 27 of the Rome Statute was declared incompatible with the domestic constitutions of Belgium,¹⁴⁴ France,¹⁴⁵ and

¹³⁹ The International Committee of the Red Cross 'Report of the issues raised with regard to the 1998 Rome Statute of the International Criminal Court by national constitutions and councils of State' <<http://www.icrc.org/Web/Eng/siteeng0.nsf/d268e7e7eea08ab74125675b00364294/1557c33a5458b830c1256bad0055bf5a?OpenDocument>> [Accessed 16 August 2003] [hereafter ICRC Report].

¹⁴⁰ Council of Europe 'Venice Commission Report on Constitutional Issues raised by the Ratification of the Rome Statute of the International Criminal Court' adopted by the Commission at its 45th Plenary meeting in Venice, 15 –16 December 2000 <<http://www.venice.coe.int/site/interface/english.htm>> [Accessed 12 August 2003]. See also Caflich (2002) 23 *Human Rights Law Journal* 1-12.

¹⁴¹ Art 27 of the Rome Statute. See for e.g., Art 46 of the Constitution of Germany (1949); Art 57, 58 and 96 of the Constitution of Austria (1995), Art's 26 and 68 of the Constitution of France (1958), Art 75 of the Constitution of Georgia (1991); Art 54 and 65 of the Constitution of Czech Republic(1993); Art 130 of the Portuguese Constitution (1976); Art's 83 and 100 of the Constitution of Slovenia (1991) and Art's 80 and 105 of the Constitution of Ukraine (1996).

¹⁴² Art 89 of the Rome Statute. See particularly Art 19 of the Constitution of Germany (1949); Art 36 of the Constitution of Estonia (1992); Art 13 of the Constitution of Georgia (1991) and Art 12 of the Constitution of Czech Republic (1993).

¹⁴³ Art 77 of the Rome Statute. See Art 30 of the Portuguese Constitution (1976).

¹⁴⁴ See Opinion of the Council of State of 21 April 1999 on a legislative proposal approving the Rome Statute on the International Criminal Court. Parliamentary Document 2-239(1999/2000) at 94.

¹⁴⁵ See Decision 98-408 DC of 22 January 1999 (Treaty on the Statute of the International Criminal Court) *Journal officiel*, 24 January 1999 at 1317.

Luxembourg.¹⁴⁶ In Belgium, the Council of State was of the opinion that Article 27 of the Rome Statute was incompatible with the immunity regimes for the king and for the members of Parliament, and the special procedure established for the arrest and prosecution of a member of Parliament or government.¹⁴⁷

The French Constitutional Council also held that Article 27 was contrary to the Constitution which grants immunity to the President, members of the government and Parliamentarians.¹⁴⁸ In the case of Luxembourg, the Council of State was of the view that the provision was an infringement on the immunity granted to the Grand Duke and members of Parliament and the special procedures for the arrest and prosecution of a member of Parliament or government.¹⁴⁹

In a situation where there is an obvious incompatibility with provisions of national constitution, States Parties have adopted different methods. Some have proceeded to amend the constitutions while others have used the interpretative approach to overcome the problem. The following section will discuss the prominent strategies adopted by States Parties in implementing the provisions of the Rome Statute.

3.1 .1 Amendment of constitutions

The amendment of the constitution is one of the strategies adopted by some States Parties to the Rome Statute. In both France and Luxembourg, clauses were added to the constitution to make them compatible with the Rome Statute. The French Constitution was amended by inserting a new article which states that ‘the French Republic may recognize the jurisdiction of the International Criminal Court as provided in the treaty signed on 18 July 1998.’¹⁵⁰ This provision enabled France to subsequently ratify the treaty on 9 June 2000. In the case of Luxembourg the Constitution was amended to include that ‘no provision of the Constitution shall constitute an obstacle to

¹⁴⁶ See Opinion of the Council of State on the draft laws concerning the approval of the Rome Statute on the International Criminal Court 4 May 1999, No. 44.088.

¹⁴⁷ See ICRC Report (n 139 above).

¹⁴⁸ See Art’s 26 and 68 of the French Constitution of 1958.

¹⁴⁹ See ICRC Report (n 139 above).

¹⁵⁰ Constitutional Law No.99-568 of 8 July 1999.

approval of the Rome Statute of the International Criminal Court [...] and to fulfillment of the obligations arising there from under the conditions set out in that Statute.¹⁵¹

The amendment of the constitution can be said to be the most effective way of dealing with the incompatibility of the domestic constitutions with the Rome Statute. However experience has shown that the process of amending the constitution in several countries is complex and requires time and resources. This has resulted in the purposive interpretation of several constitutions to read compatibility into the provisions of domestic constitutions.

3.1.2 Purposive interpretation of constitutions

The purposive or interpretative approach involves a decision or a recommendation by the relevant national authority that a particular interpretation of the constitution would avoid the necessity of amending the constitution, despite what the wording of the constitution would seem to mean at face value. Such decisions or recommendations are taken either by the Constitutional Court, Council of State or a parliamentary body, where the legislature is involved in making the decision whether or not to ratify.¹⁵²

The purposive interpretation also presupposes that the principles provided under the Rome Statute are consistent with domestic constitutions. This implies that it will be difficult to use the constitution to shield one who has committed any of the crimes provided under the Rome Statute. Most European States have been reluctant to amend their constitutions based on the immunity clause found in many constitutions. They argue that a head of state who commits any of the crimes provided under the Rome Statute cannot claim protection under the constitution.¹⁵³

Several countries have used the purposive approach in implementing the Rome Statute. The Costa Rican Supreme Court's opinion on the constitutionality of the Rome Statute is

¹⁵¹ Constitutional Amendment Law of 8 August 2000 amending Art 118 of the Luxembourg Constitution, A-No.83 25 August 2000.

¹⁵² ICCLR (n 13 above) 44.

¹⁵³ ICCLR (n 13 above) 45.

an example. With regards to immunity granted to the President¹⁵⁴ and members of the Parliament,¹⁵⁵ the Supreme Court was of the view that given the nature of the crimes contemplated in the Statute, the constitutional provisions cannot be considered as sacrosanct as to impede the proceedings of the ICC.¹⁵⁶ The same approach was also adopted by Ecuador¹⁵⁷ and Norway.¹⁵⁸

Though the arguments above seem plausible, it is also a known fact that it is the custodians of the will of the people who commit these heinous crimes against humanity. Former Heads of States like Adolf Hitler, Pol Pot, Idi Amin, Sani Abacha, Saddam Hussein, Slobodan Milosevic, Charles Taylor etc. committed several human rights atrocities while in power as heads of states under the guise of presidential immunity. It is therefore argued that in view of experiences of the past, one of the best ways to protect the rights of the citizenry is to ensure the conformity of the provisions of national constitutions with the Rome Statute.

This can be achieved through the amendment of the constitution. It is also of crucial importance that the interpretative approach is not used to defeat the purpose of the Rome Statute. The availability of an effective and independent judiciary that will be able to interpret the provisions of the constitution without interference from the executive will also go a long way in protecting the rights of the citizenry.

3.2 Specific issues of implementation

Several countries have adopted implementing laws, incorporating the provisions of the Rome Statute.¹⁵⁹ They have also used the opportunity to deal with issues of

¹⁵⁴ Art 110 of the Costa Rican Constitution of 1949.

¹⁵⁵ Art 121 (9) of the Costa Rica Constitution of 1949.

¹⁵⁶ See ICRC Report (n 139 above).

¹⁵⁷ See Report of Dr. Herman Salgado Pesante in the case No.0005-2000-CI on the Rome Statute of the International Criminal Court 21 February 2001.

¹⁵⁸ See Act No. 65 of 15 June 2001 relating to the implementation of the Statute of the International Criminal Court of 17 July 1998 (the Rome Statute) in Norwegian Law.

¹⁵⁹ See International Criminal Court Act No.41 of 2002, entered into force 27 June 2002, Australia; Crimes Against Humanity and War Crimes Act, S.C 2000, c.C-24, assented 29 June 2000 and entered into force 23 October 2000, Canada; Act on the Implementation of the provisions of a legislative nature of the Rome

complementarity and cooperation with the ICC,¹⁶⁰ arrest and surrender¹⁶¹ and incorporation of the crimes under the jurisdiction of the ICC into domestic law.¹⁶² A careful perusal of the enactments reveals that the different approaches have been adopted by States Parties to the Rome Statute in implementing the treaty.

Canada's Crimes Against Humanity and War Crimes Act¹⁶³ was designed to serve two purposes. The first was to implement the Rome Statute through the establishment of a domestic criminal and administrative regime to complement the ICC and to permit Canada to assist and co-operate with the Court. The second purpose was to strengthen Canada's legislative foundation for the prosecution of genocide, crimes against humanity and war crimes.¹⁶⁴

In Australia, the government introduced two Acts to enable ratification of the Rome Statute and to ensure the primacy of Australian jurisdiction to prosecute for international

Statute of the International Criminal Court and on the application of the Statute, No.1284/2000, 28 December 2000, Finland; Act on the Rome Statute of the International Criminal Court of 17 July 1998 (ICC Statute Act) entered into force 4 December 2000, Germany; International Crimes and International Criminal Court Act 2000, No.26/2000, assented 6 September 2000 and entered into force 1 October 2000, New Zealand; Federal Law on Cooperation with the International Criminal Court (CICCL) of 22 June 2001, Switzerland; International Criminal Court Act 2001 enacted 11 May 2001, United Kingdom.

¹⁶⁰ See for example International Criminal Court (Consequential Amendments) Act 2001, Act No.42, 2002, 27 June 2002, Australia (addresses complementarity issues); Law of the Republic of Azerbaijan on Legal Assistance in Criminal Matters, adopted June 2001; Mutual Legal Assistance in Criminal Matters Act, R.S 1985, c.30 (4th Supp.) 1998, c.37 amendments concerning the International Criminal Court entered into force 23 October 2000, Canada; International Legal Assistance in Criminal Matters Act, No.4/1994, 5 January 1994, Finland.

¹⁶¹ See Law of the Republic of Azerbaijan on Extradition of Criminal, adopted 15 May 2001, entered into force 19 June 2001; Extradition Act, S.C.1999, c. C-18, assented to 29 June 2000, entered into force 23 October 2000, Canada.

¹⁶² See Criminal Code of the Republic of Azerbaijan, adopted 30 December 1999, entered into force 19 June 2001; Act on the amendment of the Penal Code No.1285/2000, 28 December 2001, Finland; Act to introduce the Code of Crimes against International Criminal Law adopted 26 June 2002, Germany; The International Criminal Court Act 2001 (Elements of Crimes) Regulations 2001, N0.2505/2001, entered into force 1 September 2001, United Kingdom.

¹⁶³ See (n 159 above).

¹⁶⁴ Rosenberg (2002) 232.

crimes. The Australian Act¹⁶⁵ establishes procedures to enable compliance by Australia with requests for assistance from the ICC and for the enforcement of sentences. The Consequential Amendments Act¹⁶⁶ is the vehicle for creating offences that are the 'equivalent' of the crimes of genocide, crimes against humanity and war crimes set out in the Rome Statute.¹⁶⁷ The New Zealand ICC legislation specifically provides that genocide, war crimes and crimes against humanity are criminal offences under New Zealand law and define these acts by reference to the Rome Statute.¹⁶⁸

The need for a legislation to domesticate the Rome Statute cannot be overemphasized. It serves as an opportunity for states parties to address potential conflicts between the treaty and domestic law. It has also been used in others to incorporate ICC crimes in domestic law. Currently African countries such as DRC, Ghana, Nigeria and Senegal amongst others are involved in the domestic implementation of the Rome Statute.¹⁶⁹ The experience of other states will be helpful in this regard.

The next chapter will address the implications of Rome Statute on domestic constitutions in Africa and looks at ways of addressing the constitutional conflicts that might impede the domestic implementation of the treaty in Africa.

¹⁶⁵ See (n 159 above).

¹⁶⁶ See (n 160 above).

¹⁶⁷ G Triggs 'Implementation of the Rome Statute for the International Criminal Court: A quite revolution in Australian law' 29 April 2003 <<http://www.law.unimelb.edu.au/icil/topics/rome-statute2003.pdf>> [Accessed 18 August 2003]. See also Goh and Freeland (2002) 296.

¹⁶⁸ See Sec 9(2) of the New Zealand Act.

¹⁶⁹ CICC 'Country Information: Africa' <<http://www.iccnw.org/countryinfo/africa.html>> [Accessed 16 October 2003]

CHAPTER FOUR

4. IMPLICATIONS OF THE ROME STATUTE FOR DOMESTIC CONSTITUTIONS IN AFRICA

4.1 Immunity of heads of state or government

One of the constitutional problems raised by the ratification of the Rome Statute concerns immunity, which most African constitutions grant to heads of states and government officials.¹⁷⁰ Historically, heads of states were not subject to criminal responsibility for their actions, because of the merger of the sovereign and the sovereignty of the state.¹⁷¹

Contemporary international law no longer accepts that a state may treat its nationals as it pleases. Conventions and custom prescribe a wide range of human obligations with which states must comply. Moreover, some human rights norms enjoy such a high status that their violation, even by state officials, constitutes an international crime.¹⁷²

The Treaty of Versailles became a turning point as the immunity of the head of state was removed for 'a supreme offence against international morality and the sanctity of treaties.'¹⁷³ The lifting of immunity of heads of states has been replicated in most international instruments dealing with the prosecution of war crimes, genocide or crimes against humanity.¹⁷⁴

¹⁷⁰ See for example Art 65 of the Angola Constitution (1992); S. 57 of the Ghana Constitution (1992); Art 50 of the Lesotho Constitution (1993); Art 91 of the Malawi Constitution (1994); Sec 46 of the Tanzania Constitution (1977); Sec 308 of Nigeria Constitution (1999); S 98 of the Uganda Constitution (1995) and Art 132 of the Mozambique Constitution (1990).

¹⁷¹ Bassiouni (1999) 505.

¹⁷² Dugard (2000) 202.

¹⁷³ See Art 227 of the Treaty of Versailles of 1919.

¹⁷⁴ Art 6 of the Convention on the Prevention and Punishment of Genocide of 1948, Art 7 of the ICTY Statute of 1993 and Art 6 of the ICTR of 1994.

Under Article 27 of the Rome Statute,¹⁷⁵ a head of state or other official who commits a crime within the jurisdiction of the Court will lose his or her immunity and can be prosecuted by the ICC. The provisions of the Statute are applicable to everyone regardless of any distinction based on official recognition. In the light of its historical development, it becomes obvious that the main aim of a provision such as Article 27 is to clarify the scope of individual responsibility for crimes under international law.¹⁷⁶

As regards immunity for heads of states for crimes committed while in power, the United Kingdom's House of Lords ruled that Augusto Pinochet was not entitled to immunity in any form for the acts of torture committed under his orders when he was the Chilean head of state. The court held that while a head of state was entitled to absolute immunity by reason of his office (*ratione personae*), a former head of state was only entitled to immunity in respect of acts performed by him in the exercise of his functions as head of state (*ratione materiae*). Torture was not an act falling within the functions as head of state and was an international crime with the status of *jus cogens*. Consequently it held that Pinochet was not entitled to immunity.¹⁷⁷

Article 27 confirms that the rule that individuals cannot absolve themselves of criminal responsibility by alleging that an international crime was committed by a state or in the name of the state because in conferring this mandate upon themselves, they are exceeding the powers recognised by international law.¹⁷⁸ The provision has implications for domestic constitutions in Africa that grant immunity to heads of states. A number of solutions to this issue can be envisaged. Some states have introduced an amendment in

¹⁷⁵ Art 27 of the Statute provides:

'(1) this Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.'

¹⁷⁶ Triffterer (1999) 507.

¹⁷⁷ *R v Bow Street Metropolitan Stipendiary Magistrate: Ex parte Pinochet Ugarte* (No 3) [1999] 2 WLR 872; [1999] 2 All ER 97 (HL). See also Powel and Pillay (2001) 17 *South African Journal of Human Rights* 477 at 486.

¹⁷⁸ See Preamble to the Rome Statute, para. 8.

their general ICC implementing law that disallows any immunity as grounds for refusing to surrender someone to the ICC.¹⁷⁹

Other States Parties to the treaty however decided that they do not need to amend their constitutions, in order to provide for an exception to immunities under national law. They believe it is already implicit in their constitutions.¹⁸⁰ If the unlikely situation arises where the ICC requests the surrender of an official, such as their head of state, the relevant constitutional provisions could be interpreted to allow for the official to be surrendered. Since the purpose of the ICC is to combat impunity for ‘the most serious crimes of concern to the international community as a whole,’¹⁸¹ the argument follows that if a state official commits such a crime, this would probably violate the underlying principle of any constitution. Therefore, other states may be able to surrender state officials to the ICC, notwithstanding the protection that their constitutions may appear to offer to government official under normal circumstances.¹⁸²

African countries that are signatories to the Rome Statute with immunity clauses in their constitutions need to co-operate with the ICC by making a general amendment to their respective constitutions to allow for co-operation with the Court in all situations. The advantage of amending the constitution lies in the fact that it will undoubtedly eliminate all possibility of conflict with rules of domestic law and ensures that national courts comply with the obligation imposed by the Rome Statute. However, it should also be noted that the main problem associated with this procedure is that amending the constitution is a long and difficult process in several African countries.¹⁸³

Striking a balance in the domestic implementation of Article 27 will involve safeguarding the rights of the citizenry. The promotion and protection of human rights in Africa is an issue that demands the concerted effort of the executive, legislature and judiciary.

¹⁷⁹ See Sec. 6(1) of the Canadian Extradition Act of 1999, Sec 31 of the New Zealand Act of 2000, French Constitutional law of 8 August 2000 amending Art 118 of the Constitution A – No. 83, 25 August 2000.

¹⁸⁰ These include Australia, Canada, New Zealand, Norway, United Kingdom, Finland, Estonia and Netherlands amongst others.

¹⁸¹ See the Preamble to the Rome Statute, para 9.

¹⁸² COE (n 140 above).

¹⁸³ See for example Sec 9 of the Nigeria Constitution (1999); Sec 74 of the South African Constitution (1996); Art 139 of the Sudan Constitution (1998) and Art 259 of Uganda Constitution (1995).

Where the amendment of the constitution becomes inevitable, it is suggested that there should be the political will to effect the necessary changes that will grant greater protection for the vulnerable who are potential victims of human rights abuses in Africa.

4.2 Surrender of persons to the Court

Article 89 of the Rome Statute provides that, '[t]he Court may transmit a request for the arrest and surrender of a person [...] to any state on the territory of which that person may be found and shall request for the cooperation of that state in the arrest and surrender of such a person [...].'

This surrender procedure, which applies irrespective of nationality of the person concerned, may be at variance with the ban on extraditing or expelling nationals to be found in some constitutions in Africa.¹⁸⁴ The popular and perhaps most convincing way of approaching this provision consistent with the Statute involves an understanding of the qualitative different nature of 'surrender' and 'extradition' as provided by the Rome Statute.¹⁸⁵ It should also be noted that the two UN Tribunals follow the practice of 'surrender' instead of 'extradition'.¹⁸⁶

A State Party to the Rome Statute cannot invoke any grounds for refusal to surrender based on the nationality of the accused, or a constitutional provision that prohibits them from extraditing nationals. In conformity with Rome Statute and observing the principle of complementarity, if the ICC requests that a state surrenders one of its nationals, the State Party is obliged to comply with this request.¹⁸⁷

For many African states, the possibility of surrendering nationals to the ICC does not necessitate adoption of any particular legislative measure other than one that would provide for the surrender of any person to the ICC. Those with constitutions that expressly prohibit extradition of nationals can either amend the constitution like

¹⁸⁴ See for e.g., Art 25 of the Rwandan Constitution of 2003.

¹⁸⁵ Art 102 provides that '[f]or the purposes of this Statute:

(a)'surrender' means the delivering up of a person by a state to the Court, pursuant to this Statute.

(b)'extradition' means the delivering up of a person by one state to another as provided by Treaty, Convention or national legislation.'

¹⁸⁶ See Art 19(2) of the ICTY Statute of 1993 and Art 18(2) ICTR Statute of 1994.

¹⁸⁷ ICCLR (n 13 above) 51.

Germany¹⁸⁸ or give it an interpretative approach like Costa Rica where the Constitutional Court was of the opinion that the guarantee under its constitution that no Costa Rican may be compelled to abandon the national territory was not absolute.¹⁸⁹

It has been argued that the advantage of the interpretative approach with regards to surrender is that it avoids the need for constitutional reform and is in conformity with the Statute. It establishes simplified procedure with respect to the surrender of an accused person to the ICC. It also recognises the distinct nature of the Court's jurisdiction, which cannot be considered as a foreign jurisdiction and provides more efficient procedures for co-operation between the Court and States Parties to the treaty.¹⁹⁰

4.3 Sentencing

Under Article 77 of the Rome Statute, the penalties that may be imposed on the convicted person include imprisonment for a term of thirty years and life imprisonment where justified by the extreme gravity of the crime and the individual circumstances of the convicted person. During negotiations on the penalties for the ICC several countries expressed their desire to retain the option of the death penalty for particular heinous crimes while others opposed the introduction of the death penalty. The abolitionists eventually succeeded in excluding the death penalty from the range of punishments available to the ICC.¹⁹¹

The victory against death penalty however was not absolute as Article 80 of the Statute provides that '[n]othing in this part affects the application by states of the penalties

¹⁸⁸ Act to Amend the Basic Law (Article 16) entered into force 29 November 2000. The amendment provides '[a] regulation in derogation of this may be made by statute for extradition to a Member State of the European Union or to an international court provided there is observance of the principles of the rule of law.' See also COE, 'Progress Report by Germany and Appendices' <[http://www.legal.coe.int/criminal/icc/docs/Consult_ICC\(2001\)/ConsultICC\(2001\)14E.pdf](http://www.legal.coe.int/criminal/icc/docs/Consult_ICC(2001)/ConsultICC(2001)14E.pdf)> [Accessed 14 August 2003].

¹⁸⁹ ICCLR (n 13 above) 51.

¹⁹⁰ Rinoldi and Parisi (1999) 347.

¹⁹¹ Schabas (1998) 281.

prescribed by their national law, nor the law of the states which do not provide for penalties prescribed in this part.¹⁹²

One effect of Article 80 is that, despite the exclusion of the death penalty from the Rome Statute, national courts can still continue imposing this penalty on persons convicted of crimes within the jurisdiction of the ICC.¹⁹³ Such inconsistency in sentencing may be a particular problem for the ICC because its role in the international penal system will be complementary to that of national courts.¹⁹⁴ The principle of complementarity under the Rome Statute as already discussed envisages a situation where national courts have primary responsibility for prosecuting and punishing individuals falling under the subject-matter jurisdiction of the Court.¹⁹⁵

The ICC could therefore face a situation similar to the one in Rwanda, where the ICTR has imposed life sentences on the architects of the genocide while Rwandan courts have given lesser participants the death penalty.¹⁹⁶ It seems however that the international community will have to live with this potential disparity in sentencing till states that support the death penalty move towards its abolition as provided under international law.¹⁹⁷

For many African states, the imposition of a life sentence by the ICC will not necessitate the adoption of any particular legislative measure. However states with provisions that explicitly prohibit the extradition of a person to a state where this sentence constitutes cruel punishment may either amend the constitution or use the interpretative approach. A number of opinions of constitutional courts in various states including Spain, Costa

¹⁹² In Africa, Angola, Cape Verde, Cote d'Ivoire, Djibouti, Guinea-Bissau, Mauritius, Mozambique, Namibia, Seychelles and South Africa have abolished the death penalty by law while Burkina Faso, Central African Republic, Congo Brazzaville, Gambia, Madagascar, Mali, Niger, Senegal and Togo have abolished it in practice <<http://web.amnesty.org/pages/deathpenalty-countries-eng>> [Accessed 14 August 2003].

¹⁹³ King and Rosa (1999) 320.

¹⁹⁴ As above. See also Art's 1, 17 and 18 of the Rome Statute.

¹⁹⁵ See (Chapter 2 above). See also Wedgwood (2000) 404.

¹⁹⁶ UN Integrated Regional Information Networks, 'Court sentences 11 to death for Genocide' August 4 2003 <<http://allafrica.com/stories/200308040161.html>> [Accessed 14 August 2003].

¹⁹⁷ See Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty adopted in New York, 15 December 1989.

Rica, Ecuador, and Ukraine have interpreted the provision which prohibits life sentences or state that the main objective of penal system are education and training to be consistent with the Rome Statute.¹⁹⁸

From the foregoing, it is evident that several implications exist with regards to the domestic implementation of the Rome Statute. It has also been shown that several states have used different methods to achieve the desired results of effective co-operation with the Court. It will therefore be crucial for African governments to study the Rome Statute and consider its constitutionality with domestic laws in order to make use of the opportunity for effective legislative engagement in protecting human rights in the continent.

The next Chapter will be a comparative analysis of strategies adopted by South Africa, Nigeria and DRC in the domestic implementation of the Rome Statute. The legal systems of the three countries will be discussed with regards to constitutional provisions on the implementation of international treaties and how it has impacted on the ratification and implementation process.

¹⁹⁸ ICCLR (n 13 above) 54.

CHAPTER FIVE

5. INCORPORATING THE ROME STATUTE IN NATIONAL JURISDICTIONS IN AFRICA

5.1 The Rome Statute and South African Development Community

The Southern African Development Community (SADC) played an important role in the establishment of the Court. Delegations from Lesotho, Malawi, Swaziland, Tanzania, and South Africa had participated in the effort to establish the ICC from as early as 1993, when the ILC presented a draft statute to the General Assembly Sixth Committee for consideration.¹⁹⁹

A number of SADC consultative meetings were held between 1995 and 1997 to consider the possible implications and benefits arising from the establishment of the ICC. On 14 September 1997, legal experts from SADC States adopted the 'Principles of Consensus' in Pretoria and transmitted them to the Ministers of Justice and Attorneys–Generals for review. The SADC Ministers of Justice and Attorneys–Generals latter issued a 'Common Statement' which became the instruction manual for SADC's negotiations during the Rome conference.²⁰⁰

There was a follow up meeting in July 1999, following the adoption of the Rome Statute in 1998. Delegates representing 12 member states of the SADC participated in the SADC conference on the Rome Statute of the ICC in Pretoria, South Africa. The objectives of the conference includes:

- (1) familiarising government officials with the provisions of the Statute and to discuss the implementations for legislation;
- (2) identifying areas on the Statute, which would require domestic legislation for implementation including offences within the Court's jurisdiction; enforcement and international cooperation;
- (3) coordinating as far as possible the process of ratification in the region;
- (4) agreeing to the extent possible on harmonizing of domestic legislation in order to

¹⁹⁹ Maqungo (n 31above).

²⁰⁰ Nsereko (2000) 169.

facilitate cooperation with the Court.²⁰¹

At the end of the conference, participants adopted a Model-Enabling Act – Ratification Kit for the ICC and ‘Common Understanding’ setting out general principles, which would guide the SADC approach to ratification and subsequent Preparatory Commission meetings.²⁰² The Model Act is divided into five parts and deals with issues such as interpretation, definition of crimes, immunities and privileges of Court officials, cooperation with the Court, arrest and surrender of persons to the Court, enforcement of sentences and miscellaneous provisions.²⁰³ Follow up meetings were also held in several SADC states on the ratification and implementation of the Rome Statute.²⁰⁴

5.1.1 International treaties under South African legal system

Before 1994, the relationship between international law and domestic law was left to the courts to decide.²⁰⁵ South Africa followed the dualist approach to the incorporation of international instruments as treaties were negotiated, signed, ratified and acceded to by the executive. Only those treaties incorporated by Act of Parliament became part of the South African law thus treaty-making fell exclusively within the competence of the executive.²⁰⁶ The Interim Constitution of 1993 introduced a major change in the approach of South African law to international treaties. Ironically, it is with respect to treaties that the final Constitution presents the most significant change from the Interim constitutional position in so far as public international law is concerned.²⁰⁷

²⁰¹ R Dicker ‘South African Governments Adopts Common Approach to ICC

Ratification’ The SADC States that participated in the meeting include Angola, Botswana, Lesotho, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe. See CICC Monitor Issue 12 1999 <www.iccnw.org/html/monitor12b.html> [Accessed 18 July 2003].

²⁰² As above.

²⁰³ S Maqungo ‘The establishment of the International Criminal Court: SADC’s participation in the negotiations’ (2000) 9 *African Security Review* <www.iss.co.za/Pubs/ASR/9No1/InCriminalCourt.html> [Accessed 3 August 2003].

²⁰⁴ CICC ‘ICC Update’ <<http://www.iccnw.org/publications/update/iccupdate17.pdf>> [Accessed 18 July 2003].

²⁰⁵ Dugard (1995) 11 *South African Journal on Human Rights* 241 at 241.

²⁰⁶ Dugard (n 172 above) 54.

²⁰⁷ Keightley (1996) 12 *South African Journal of Human Rights* 405 at 409.

Under the Interim Constitution of 1993, the executive retained the power to negotiate and sign treaties while the National Assembly and Senate were required to agree to the ratification of and accession to treaties.²⁰⁸ The Constitution also provided that treaties ratified by resolutions of the two houses of parliament became part of municipal law, provided Parliament expressly provides for it.²⁰⁹ According to Dugard:

[t]he clear purpose of the Interim Constitution was to facilitate the incorporation of the treaties into municipal law. The drafters of the Interim Constitution however failed to take account of the bureaucratic mind. Government departments required to scrutinize treaties before they were submitted to Parliament refused to present treaties to parliament for ratification until they were completely satisfied that there would be no conflict between provisions of the treaty and domestic law. The result was that few treaties were presented to Parliament expeditiously. The Parliamentary procedure for dealing with treaties further delayed ratification. Consequently, few of treaties ratified by Parliament were incorporated into municipal law.²¹⁰

Because of the problems encountered in the Interim Constitution, the drafters of the 1996 Constitution elected to return to the pre-1993 position relating to incorporation of treaties, without abandoning the need for parliamentary ratification of treaties.²¹¹ Three principal methods are employed by the legislature to transform treaties into municipal law under the 1996 Constitution. In the first instance, the provisions of a treaty may be embodied in the text of an Act of Parliament. Secondly, the treaty may be included as a scheduled to a Statute; thirdly an enabling Act of Parliament may give the executive power to bring the treaty into effect in municipal law by means of proclamation or notice in the Government gazette.²¹²

²⁰⁸ See S. 231 (2) of the Interim Constitution, Act 200 of 1993.

²⁰⁹ See S.231 (3) of the Interim Constitution Act 200 of 1993.

²¹⁰ Dugard (n 172 above) 55.

²¹¹ See S. 231 of the South African Constitution, Act 108 of 1996

²¹² Dugard (n 172 above) 57.

5.1.2 An overview of the Act

The Rome Statute was signed and ratified by the Republic of South Africa on 17 July 1998 and 27 September 2000 respectively. An inter-departmental committee was established to study the Rome Statute. It was found that the Rome Statute is constitutional and no amendments were required. Ratification only required that an explanatory memorandum attaching the Rome Statute be submitted to Cabinet and then to Parliament.²¹³ The draft bill was subsequently passed in July 2002 and signed into law in August 2002 by the President.

The South African ICC Act²¹⁴ provides for interpretations and definitions consistent with the South African Constitution²¹⁵ and the Rome Statute.²¹⁶ The objects of the Act reiterates the principle of complementarity and the need to cooperate with the Court in the investigation and prosecution of persons accused of committing crimes or offences referred to in the Statute.²¹⁷ Chapter 2 of the Act excludes immunity from prosecution conferred by constitutions to heads of state or government and officials.²¹⁸

It also grants limited universal jurisdiction to South African courts with regards to crimes provided under the Rome Statute on the basis of the active and passive personality principle based on the nationality of the offender or the victim.²¹⁹ The approach adopted in the Act by giving South African courts extended jurisdiction to deal with crimes, which are committed outside the territory of the Republic, is similar to the Canadian legislation, among others, dealing with the prosecution of crimes under the ICC.²²⁰

²¹³ The South African Minister for Justice and Constitutional Development introduced the International Criminal Court Bill [B42B – 2001] in the Parliament as a Section 75 Bill. Section 75 of the 1996 Constitution refers to the procedure in passing Bills that do not amend the Constitution (S. 74) and do not affect the Provinces (S. 76). See Jesserger and Powel (2001) 14 *South African Journal of Criminal Justice* 344 – 362.

²¹⁴ See Sec. 2 of the South African ICC Act.

²¹⁵ See S.39 of the South African Constitution of 1996.

²¹⁶ See Art 21 of the Rome Statute.

²¹⁷ See S. 3 of the Act. Immunity clauses are not in the South African 1996 Constitution.

²¹⁸ S.4 (2) of the Act. See also See Art 1 (3) of the Azerbaijan Extradition of Criminals Act 2001, S. 6 of the Canadian Extradition Act of 1999 and S. 23 of the United Kingdom's International Criminal Court Act 2001. See also Duffy (2001) 11 *Duke Journal of Comparative and International Law* 5 at 29.

²¹⁹ See Sec 4 (3) of the South African ICC Act.

²²⁰ See S.8 of the Canadian Crimes Against Humanity and War Crimes Act, 2000.

The Portfolio Committee on Justice and Constitutional Development in its report to the Parliament expressed the view that the possibility of giving the South African courts universal jurisdiction to deal with the prosecutions under discussion should be explored. The Committee consequently requested the Department of Justice and Constitutional Development to look into the possibility of such a law taking into consideration difficulties, which may arise as a result of competing interests from different countries. However the option was not explored further probably because of the politically sensitive issues involved.²²¹

The Act also provides for the immunity and functioning of the Courts' personnel.²²² The purpose of the privileges and immunities of the officials of the Court, its personnel and officials and those participating in proceedings of the Court is to safeguard the integrity and autonomy of the Court.²²³ As a treaty-based international organisation, the Court and its officials will need to have sufficient diplomatic status to carry out their responsibilities.

However unlike the ICTY/R the Court is not a creation of the Security Council. The Court and its officials do not totally fall under the 1946 Convention on the Privileges and Immunities of the United Nations.²²⁴ Article 48 of the Rome Statute attempts to address this situation in part by providing the privileges and immunities to the Court and its officials that are necessary for the effective functioning of the Court.²²⁵

²²¹ The Committee had considered the option of the universal jurisdiction exercised by the courts in Belgium. See The Portfolio Committee on Justice and Constitutional Development Report on International Criminal Court Bill [B 42 - 2001], 7 June 2002

<<http://www.pmg.org.za/docs/2002/comreports/020607pcjusticereport.htm>> [Accessed 29 July 2003]. However the Belgium Universal Jurisdiction Law of 1993 was repealed on 1 August 2003. See HRW 'Belgium: Universal Jurisdiction Law Repealed' <<http://www.hrw.org/press/2003/08/belgium080103.htm>> [Accessed 29 August 2003].

²²² See Sec 7 of the South Africa ICC Act.

²²³ ICCLR 'Agreement on the Privileges and Immunities of the International Criminal Court: Important consideration for Implementation'

<http://www.icclr.law.ubc.ca/Publications/Reports/ICC%20Reports/APIC_Guide_Eng.Pdf> [Accessed 2 August 2003].

²²⁴ Convention on the Privileges and Immunities of the United Nations, 1 U.N.T.S. 15, 13 February 1946.

²²⁵ Tolbert (1999) 667.

The South African ICC Act also provides for the amendment of domestic laws²²⁶ to bring them in conformity with definition of crimes under the Rome Statute and deals with several other co-operation issues such as arrest and surrender of persons²²⁷ and prosecution of offences against the administration of justice in terms of the Rome Statute.²²⁸

The adoption of an implementing legislation for the Rome Statute by South Africa is a clear commitment to human rights and democracy in Africa. The domestication process by South Africa is aimed at strengthening the ability of South African courts to indict those who commit genocide, war crimes and crimes against humanity. The South African law incorporating the provisions of the Rome Statute made significant use of the Model-enabling Act. It is hoped that other SADC member states that are States Parties to the treaty will emulate the South African procedure.

5.2 The Nigeria draft legislation

5.2.1 Domestic implementation of treaties in Nigeria

The implementation of international treaties in Nigeria is governed by the constitution. The Nigerian Constitution of 1999 provides that '[n]o treaty between the Federation and any other country will have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly'.²²⁹ On the authority of the *African Re-insurance Corporation Case*²³⁰ it would appear that a person may not be able to invoke the jurisdiction of a municipal court to directly enforce the provisions of an

²²⁶ See S. 39 of the South African ICC Act which amends the Criminal Procedure Act No 51 of 1977 and Military Discipline Supplementary Measures Act No. 16 of 1999.

²²⁷ See generally Chapter 4 of the South African ICC Act, which deals with cooperation with and assistance to Court in or outside South Africa.

²²⁸ See S. 37 of the South African ICC Act, 2002. See also S. 16 of the Canadian Crimes Against Humanity and War Crimes Act, 2000.

²²⁹ See Sec 12 of the Nigerian Constitution of 1999.

²³⁰ *African Reinsurance Corporation Case* [1986] 3 NWLR 811 at 834.

international instrument without its incorporation into national law.²³¹ The African Charter on Human and Peoples' Rights was incorporated into Nigerian law through this process.²³²

Nigeria ratified the Rome Statute on the 27 of September 2001. Subsequently, the Federal government through the Ministry of Justice presented an Executive Bill²³³ to the National Assembly²³⁴ as required by section 12 the Constitution.

5.2.2 An overview of the Nigeria draft Bill

The draft Bill is a replica of the Rome Statute as the entire treaty is annexed to the preamble of the draft Bill. The process raises several questions as to the compatibility of the Rome Statute with Nigerian domestic laws and how the country will meet up with its obligations under the Rome Statute if the Bill is passed in its present status by the Nigerian Parliament. Some of the important issues are discussed below.

Firstly, The Nigerian Constitution provides that 'no civil or criminal proceedings shall be instituted or continued against a person to whom this section applies during his period of office [...]. This section applies to a person holding the office of President or Vice-

²³¹ M Ladan 'Issues in domestic implementation of the Rome Statute of the International Criminal Court in Nigeria' Paper presented at a Round -Table session with Parliamentarians on the Implementation of the Rome Statute in Nigeria organised by the Nigerian Coalition on the International Criminal Court (NCICC), 12 November 2002, National Assembly Complex, Abuja, Nigeria [on file with author].

²³² See African Charter on Human and Peoples Rights (Ratification and Enforcement) Act, Cap 10 Laws of the Federation 1990 which domesticates the African Charter. See also *Abacha V. Fawehinmi* [2000] 6 NWLR 228 where the Nigerian Supreme Court stated that '[c]ap 10 [African Charter] is a statute with international flavour [...] if there is a conflict between it and another statute, its provisions will prevail over those of that other statute for the reason that it is presumed that the legislature does not intend to breach an international obligation.' See also *Ogugu v State* (1994) 9 NWLR (Pt.366).

²³³ The Rome Statute of the International Criminal Court (Ratification and Jurisdiction) Bill 2001.

²³⁴ The National Assembly consists of two Chambers, the House of Representatives (Lower House) and the Senate (Upper House). The first reading of the Bill took place at the Lower House on 27 September 2001 while the Debate on the General Principles of the Bill was on 9 October 2001. The Bill was subsequently referred to a Committee of the Whole House on the same date and the report of the House was not released till the dissolution of the House in 2003.

President, Governor or Deputy Governor [...].²³⁵ The provision is incompatible with the provision of article 27 of the Rome Statute.²³⁶ This leaves Nigeria with two options: amending the constitution to bring it in conformity with the Rome Statute or give the provision a purposive interpretation. According to Ladan:

Article 27 of the [Rome] Statute therefore necessitates a constitutional amendment to section 308 of the 1999 Constitution by providing an exception to this absolute immunity. This amendment could be minor, and may simply consist of the addition of a provision making an exception to the principle of immunity for the Head of State or other officials, should they commit one of the crimes listed under the Statute.²³⁷

It is argued that the amendment option will better serve the citizenry in view of experiences on human rights abuses perpetrated by past Nigerian leaders. It will also send a strong signal to politicians and human rights abusers and invariably serve as a deterrent to potential dictators in the country.

Secondly, the principle of complementarity and co-operation with the Court is not addressed by the Bill. There is no provision for co-operation with the Court and how the principle of complementarity will be implemented between the Court and the Nigerian legal system. Thirdly, there is no provision for the privileges and immunities of the ICC personnel as provided under article 48 of the Rome Statute. This, it is argued, will require the amendment of the Nigerian Diplomatic Immunities and Privileges Act²³⁸ to provide for the privileges and immunity of the ICC personnel.²³⁹

Fourthly, there is need to domesticate the crimes under the Rome Statute. There is currently no law in Nigeria that recognizes genocide as a crime. Nigeria has not ratified the Genocide Convention of 1948 and will therefore rely on the customary rule of international law to punish the offence of genocide. However the ratification and domestication of the Rome Statute serves as a good opportunity for Nigeria to amend

²³⁵ See Sec 308 of the Nigerian Constitution of 1999.

²³⁶ See (n 175 above).

²³⁷ Ladan (n 231 above) 14.

²³⁸ See the Diplomatic Immunities and Privileges Act, Cap 99 Laws of the Federation of Nigeria 1990.

²³⁹ See e.g., Sec 54 of the Canadian Crimes Against Humanity Act 2000, Sec 6 of the South Africa ICC Act, Sch. 1 of the UK's International Criminal Court Act 2001.

the Criminal Code to enable Nigerian courts to be able to prosecute crimes under the Rome Statute.

With regards to the War Crimes, Nigeria ratified the Genocide Conventions and the Additional Protocols I and II in 1961 and 1988 respectively. However, the Protocols have not been domesticated like the Geneva Conventions²⁴⁰. The incorporation of the Rome Statute therefore offers Nigeria an opportunity to address the issues of incorporating the Protocols into domestic law and also updating the definition of War Crimes to reflect the provisions of the Rome Statute.

The need to incorporate international instruments into national law cannot be overemphasized. It enables the citizens to go to court and insist on their rights. It also serves as a launching pad for public interest litigations. For example, based on the Geneva Convention Act which confers universal jurisdiction to Nigerian Courts for War Crimes, several human rights activists and non-governmental organisations have called on the Nigerian Attorney-General and Minister of Justice to surrender former President of Liberia Charles Taylor to the Special Court in Sierra Leone or commence legal actions against him under the Geneva Conventions Act for crimes committed in Liberia.²⁴¹

It is argued that the draft Bill before the Nigerian National Assembly needs modification to incorporate the issues raised above as the Bill in its present form is incapable of meeting Nigeria's obligations under the Rome Statute. One of the reasons adduced for the limitations of the draft Bill is the lack of consultation with stakeholders and civil society organisations before the Ministry of Justice submitted the Bill to the Parliament. This is in contradistinction with the process that led to the adoption of the Rome Statute in 1998 in which civil societies and non-governmental organisations played significant roles in the process leading to the adoption of the treaty. It is therefore argued that the National Assembly should organise public hearings on the draft Bill to enable interested

²⁴⁰ See Geneva Conventions Act. Cap 162 Laws of the Federation of Nigeria 1990.

²⁴¹ See Art 3 of the Geneva Conventions Act. See C Obiagwu 'Why Taylor's stay is illegal' Vanguard Newspapers Friday, 5 September 2003 <<http://www.vanguardngr.com/articles/2002/features/fe405092003.html>> [Accessed 16 October 2003]. See also Nigerian Coalition on the International Criminal Court 'Try or Extradite Taylor Now!' ThisDay Newspapers Tuesday 26 August 2003. <<http://www.thisdayonline.com/law/20030826law03.html>> [Accessed 16 October 2003].

parties to voice their concerns as regards to the implementation of the Rome Statute in Nigeria.

5.3 The DRC draft legislation

5.3.1 Domestic implementation of treaties in DRC

The legal system of DRC has been described as monist in nature. According to the government of DRC:

[t]he Constitution recognizes the superiority of international law over domestic legal order. International treaties and conventions ratified or approved by the State become the law of the land after their publication in national Gazette and no specific legislation is required to give effect to the treaty at national level [...]. The Government is in charge of negotiating international treaties and conventions under the authority of the President of the Republic who ratifies them. When a provision of an international treaty or convention is contrary to domestic legislation, ratification or approval requires amendment of the domestic law.²⁴²

The constitutions of some Francophone African countries similar to that of DRC provide that international treaties apply directly like domestic law²⁴³. The provision as bolstered the argument that there is no obligation to domesticate international instruments since treaties generally do not require any special requirement for implementation. However, the case of Hissene Habre²⁴⁴ brought to the fore the need to implement human instruments locally.

In February 2000, a Senegalese court indicted Chad's exiled former dictator on torture charges and placed him under house arrest. It was the first time that an African former head of state had been charged with atrocities against his people by the court of another

²⁴² ICRC 'Report of the ICRC-UNESCO Regional Seminar for SADC States and Madagascar on the Implementation of International Humanitarian Law and Cultural Heritage Law' 19-21 June 2001, Pretoria South Africa at 67. See also art 199 and 200 of the DRC draft Constitution of 1998.

²⁴³ See for example Art 190 of the Rwandan Constitution of 4 June 2003.

²⁴⁴ The former President of Chad charged in Senegal with torture during his rule in the 80's. See P Kambale 'The Development of the Habre Case in Senegal' <<http://www.ips-dc.org/projects/legalscholars/kambale.PDF>> [Accessed 29 August 2003].

African country. On July 4, 2000 the Court of Appeals of Dakar dismissed the charges against Habre, ruling that Senegal had not enacted any legislation to implement the CAT and therefore had no jurisdiction to pursue the charges because the crimes were not committed in Senegal.²⁴⁵

The Supreme Court (Cour de Cassation) confirmed the decision on March 2001 re-emphasising the special character of the criminal law and the need for implementing legislation, confirming the decision that the CAT was not self-executing.²⁴⁶ The Habre decision and recommendations of civil society organisations and legal scholars have resulted in the domestic implementation of international treaties in some African Francophone countries. Senegal for example has produced a draft law which aims at fulfilling the obligation of Senegal under the Rome Statute with regards to cooperation with the Court and incorporation of ICC crimes into domestic law.²⁴⁷

5.3.2 An overview of the DRC draft Bill

The DRC ratified the Rome Statute on 11 April 2002. The DRC draft implementation of the Statute of the International Criminal Court Bill (DRC draft Bill) 2002 was drafted by the government after consultation with several stakeholders including the judiciary, civil society, legal scholars and human rights activists. The DRC draft Bill was also presented and defended before the Law Reform Commission, Judiciary Section of the Supreme Court, the Presidency and various ministries in October 2002.²⁴⁸

The preamble of the DRC draft Bill states that 'the objective of the [...] legislation is to ensure the proper implementation of the norms of the Statute of Rome within Congolese applicable law and above all, to ensure good administration of justice in accordance with

²⁴⁵See HRW 'International Justice: World Report 2001' <<http://www.hrw.org/wr2k1/special/icc.html>> [Accessed 11 August 2003].

²⁴⁶ As above.

²⁴⁷ G Laroque 'A region of progress and promise in implementing legislation' *CICC Monitor*, 23 February 2003 <<http://www.iccnw.org/publications/monitor/23/Monitor23.200302English.pdf>> [Accessed 11 August 2003].

²⁴⁸ CICC 'Country Reports: Democratic Republic of Congo' <<http://www.iccnw.org/countryinfo/africa/congodemrep.html>> [Accessed 16 October 2003].

the spirit and contents of the Statute.²⁴⁹ The DRC draft Bill is made up of five sections and 68 articles. The DRC draft Bill provides that the purpose of the legislation is:

- to integrate the norms of the Statute of the International Criminal Court within criminal legislation [...];
- to adapt the rules of organisation and judiciary competence, of criminal procedure as well as the code of military justice;
- to organise judicial cooperation with the International Criminal Court.²⁵⁰

The DRC draft Bill applies to all Congolese citizens irrespective of any official capacity. The draft legislation provides that ‘immunities or rules of special procedures associated with persons of official capacity [...] do not prevent the judge from exercising his/her competence with regards to the person in question’²⁵¹ This is in furtherance of the provision of article 27 of the Rome Statute which has been discussed above.

The DRC draft Bill grants universal jurisdiction to Congolese courts in terms of crimes provided under the Rome Statute by stating that ‘infractions under the present law are punishable even when committed outside of the country or even when they present no ties to Congolese territory.’²⁵² The legislation also defines crimes of genocide,²⁵³ crimes against humanity²⁵⁴ and war crimes²⁵⁵ with reference to the definitions under the Rome Statute. With regards to the cooperation with the Court, the DRC draft Bill provides for the establishment of the Office of the Prosecutor that will be charged with cooperation with the Court.²⁵⁶

However in terms of cooperation with the Court the DRC draft Bill is silent with regards to the privileges and immunities of the personnel of the ICC in the discharge of their duties as provided under article 48 of the Rome Statute.²⁵⁷ The draft Bill did not create any

²⁴⁹ See Preamble to the DRC draft Bill 2002 para. 26.

²⁵⁰ See Art 1 of the DRC draft Bill.

²⁵¹ See Art 9 of the DRC draft Bill.

²⁵² See Art 18 of the DRC draft Bill.

²⁵³ See Art 19 of the DRC draft Bill.

²⁵⁴ See Art's 20 - 23 of the DRC draft Bill.

²⁵⁵ See Art's 24 - 39 of the DRC draft Bill.

²⁵⁶ See the Preamble para. 19 and Art 44 of the DRC draft Bill.

²⁵⁷ See (n 218 above).

offence with regards to the administration of justice of the ICC under article 70 of the Rome Statute.²⁵⁸ It is hoped that the above issues raised will be dealt with before the National Parliament adopts the Bill as law.

DRC presents a challenge to the ICC. Recently the ICC Prosecutor stated that the Court is closely monitoring developments in DRC as several petitions have been submitted before the Court with regards to the atrocities and human rights abuses committed since the entry of the force of the treaty.²⁵⁹ It is hoped that with the effort of the international community and the ICC, those found to be involved in the human rights abuses currently raging in the DRC will be tried either in Congolese courts or before the ICC.

The discussions above illustrate the need for effective implementation of the Rome Statute. While acknowledging the strengths and weakness of the implementation strategies discussed above, it is of utmost importance to appreciate the need for the involvement of several stakeholders in the process of implementation of the Rome treaty in Africa.

5.4 The Rome Statute and human rights in Africa

5.4.1 Jurisdiction over non-parties in Africa

Treaties are only binding on States Parties that have obligation under it.²⁶⁰ However, there are circumstances under which the Rome Statute will have jurisdiction over acts committed in states that are not parties to the Rome Statute. This is where a non-State Party accepts the jurisdiction of the Court for specified crimes by making a declaration

²⁵⁸ See Sec's 16 -26 of the Canadian Crimes Against Humanity Act of 2000, Sec's 14 - 23 of the New Zealand's International Crimes and International Criminal Court Act 2000, Sec 12 of the Norway's Act No 65 of 15 June 2001 relating to the implementation of the Statute of the International Criminal Court of 17 July 1998 (Rome Statute) in Norwegian Law and Sec 36 of the of the South African ICC Act, 2002.

²⁵⁹ International Criminal Court 'The Prosecutor on the co-operation with Congo and other States regarding the situation in Ituri, DRC' The Hague, 26 September 2003 <<http://www.icc-cpi.int/php/news/persbericht>> [Accessed 23 October 2003].

²⁶⁰ See Art 34 of the Vienna Convention on the Law of Treaties, adopted 23 May 1969 and entered into force 27 January 1980 UN Treaty Series, vol. 1155, p.331.

under the Rome Statute.²⁶¹ It is therefore possible for the Court to exercise jurisdiction over African States that are not States Parties to the treaty as long as they are willing to accept the jurisdiction of the Court for specified crimes.²⁶²

The ICC can also have jurisdiction over a non-State Party where the Security Council has determined pursuant to Chapter VII of the UN Charter that there is a threat to the peace, breach of peace or an act of aggression.²⁶³ Subject to the potential use of the veto power in the Security Council, the ICC will initiate proceedings irrespective of the fact that the state involved is not a State Party and has not accepted the jurisdiction of the Court.²⁶⁴

5.4.2 Relationship with African human rights system

The ratification and implementation of the Rome Statute in Africa will go a long way in promoting and protecting human rights in the continent. However several African states that signed the Rome Statute are yet to take steps to ratify or incorporate the treaty into national law.²⁶⁵ According to Odinkalu:

African States generally have a poor record of compliance with obligations under international human rights treaties. The reasons for this poor record are, on closer examination, much more complicated than a straightforward absence of will on their part to take these norms seriously, although this is clearly a factor. It is conceivable that far from being involved in deliberately subverting the relevant instruments, many of the states genuinely lack the skills, personnel and resources required to comply with the complex web of obligations and norms undertaken by them through these treaties.²⁶⁶

It is argued that the lack of expertise and political may hamper the incorporation of the Rome Statute in most jurisdictions in Africa. Most African governments are also

²⁶¹ See Art 12 (3) of the Rome Statute.

²⁶² Ngonji (n 34 above) 33.

²⁶³ See Art 12 (2) of the Rome Statute.

²⁶⁴ Williams (1999) 350.

²⁶⁵ There are currently 22 African countries that have ratified the Rome Statute and another 22 that only signed the treaty <<http://www.iccnw.org/countryinfo/worldsignsandratifications.html>> [Accessed 27 October 2003].

²⁶⁶ Odinkalu (2003) 47 *Journal of African Law* 1 at 24.

concerned with the implications of the implementing the Rome Statute. Currently the campaign by the US to cut down aid to several African countries that are States Parties to the Rome Statute has put some governments in a dilemma whether to support the Court at the risk of losing financial aid from the US. It is hoped that African governments will further the interest of human rights in Africa by co-operating with the Court as required by the Rome Statute.

The African Charter on Human and Peoples' Rights (African Charter)²⁶⁷ and the Protocol to the African Charter on the establishment of an African Court²⁶⁸ are the main instruments for promoting and protecting human rights in Africa. However non-governmental and individual complaints before the African Court are subject to declarations made by States Parties to the Protocol²⁶⁹ while there is no such restriction under the African Charter. It is argued that this may limit the effectiveness of the African Court.

The point of departure between the African human rights system and the ICC is that while the former is concerned with state responsibility, ICC aimed at individual responsibility and also provides an opportunity for states to deal with cases of human rights violations under domestic law.

The African Commission on Human and Peoples Rights (the Commission) in the interpretation of the Charter could draw inspiration from the Court and therefore enhance the jurisprudence of the Commission.²⁷⁰ The same is also applicable to the African Court. It is argued that Article 7²⁷¹ of the Protocol to the Charter could be interpreted to include crimes under the Rome Statute. It is argued that the African human rights system will be further be developed through the establishment of the ICC and in the process strengthen the African human rights system.

²⁶⁷ African Charter on Human and Peoples' Rights, adopted 27 June 1981, OAU Doc. CABLEG/67/3.Rev.5, entered into force on 21 October 1986.

²⁶⁸ Protocol to the African Charter on the Establishment of the African Court on Human and Peoples' Rights, adopted 9 June 1998 O.A.U Doc CM/2051(LXVII) (not yet in force).

²⁶⁹ Art 5 (3) and 34 (6) of the Protocol to the Africa Charter.

²⁷⁰ Art 60 of the African Charter.

²⁷¹ Art 7 of Protocol provides that '[t]he Court shall apply the provision of the Charter and any other relevant human rights instruments ratified by the States concerned.'

CHAPTER SIX

6. CONCLUSIONS AND RECOMMENDATIONS

From the foregoing it can be stated that the adoption of the Rome Statute is a positive development in the quest to promote and protect human rights throughout the globe. It has also been argued that African States Parties to the Rome Statute need to adopt implementing laws to fulfill their obligations under the treaty. This is because the principle of complementarity gives national courts the opportunity to punish crimes committed within their jurisdiction. It is only when such States are unable or unwilling to act that the ICC will assume jurisdiction.²⁷²

The ICC promises to be a deterrent to potential human rights abusers in the continent. With the experience of the ICTY/R, it is now possible to indict leaders and prosecute them for human rights abuses. Though the Court cannot prosecute crimes committed before its inception, it is hoped that its presence will be able to deter those who are responsible for human rights abuses in several African countries.

The incorporation of the Rome Statute into national law will serve as an opportunity for States Parties to amend and update laws to make them compatible with the provisions of the treaty. The experience of other countries it is argued will assist in addressing the constitutional implications posed by the Rome Statute on domestic constitutions in Africa. It is further argued that the interest of human rights in Africa will be best served if the provisions relating to immunity are amended.

The process of ratification and implementation of the Rome Statute by South Africa is one that should be emulated by other African countries in the bid to bring to justice those who commit crimes provided under the Rome Statute. This will involve the active participation of all stakeholders in the process. There is also need for the Parliamentarians to organize public hearings to enable civil society organizations and interested groups to make inputs during the domestic implementation of the treaty.

²⁷² Ellis (n 4 above) 215 at 421.

The ICC has not been given the necessary publicity it deserves in the continent. Several African countries that are States Parties to the treaty have not done much to bring to the attention of its citizens the potentials of the Court. The effective functioning of the Court will depend on the cooperation and assistance of States Parties. Publicizing the ICC will go a long way to reassure the populace about the potentials of the Court in bringing to justice those who commit human rights abuses.

There is need to carry along the civil society and non-governmental organizations in the domestic implementation of the Rome Statute in Africa. The adoption and entry into force of the Rome Statute was as a result of strong partnership and collaboration between States Parties and civil society organizations at the international level. The replication of such a relationship at the national level will definitely yield positive results.

While it is unrealistic to argue that the domestic implementation of the Rome Statute will be the panacea to human rights abuses in the continent, the effective usage of regional and international instruments in the promotion and protection of human rights in Africa cannot be overestimated. Several African countries lack effective judicial protections. At times, the judiciary is under the whims and caprices of the executive and there is no free and fair trial. Recourse to regional and international mechanisms could be seen as a last resort.

The Court can also assist the African Commission and the African Court in the development of the jurisprudence of the African human rights system. It is therefore argued that the Rome Statute will be able to assist several African countries to develop strong domestic mechanisms for human rights protections. With this, the Rome Statute would have achieved one of its objectives of putting an end to impunity for perpetrators of genocide, crimes against humanity and war crimes thus contributing to the prevention of such crimes²⁷³ and improving human rights protection mechanisms in Africa.

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²⁷³ See the Preamble to the Rome Statute para. 5.

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