

## **AN OVERVIEW OF THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: JURISDICTION AND COMPLEMENTARITY PRINCIPLE AND ISSUES IN DOMESTIC IMPLEMENTATION IN NIGERIA**

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### **ABSTRACT**

*This paper aims at providing, first, an overview of the Rome statute and the nature and functions of the International Criminal Court; second, an examination of general and specific issues in domestic implementation of the Rome Statute and finally to conclude with some viable options for Nigeria.*

### **1. INTRODUCTION: AN OVERVIEW OF THE ROME STATUTE ICC**

The twentieth Century witnessed some of the worst atrocities committed in the history of humanity, accounting for more than eighty six million civilian deaths in over 250 conflicts in the past fifty years alone. Since the Second World War with the Principles established by the Nuremberg and Tokyo Tribunals, the international community through the UN decided to take action to bring the perpetrators of the most heinous crimes against humanity to justice.

After some 50 years of prolonged discussion and debates the creation of a permanent international criminal court became a reality on July 17 of 1998 with the adoption of the Rome Statute.<sup>1</sup> It came into force on July 1, 2002, upon 60 ratifications. The Rome Statute was signed (on 1<sup>st</sup> June 2000) and ratified (on 27<sup>th</sup> September 2001) by Nigeria along with many other countries.<sup>2</sup>

The International Criminal Court (ICC) will fulfill two objectives:- (1) Safeguarding higher values such as the protection of human rights, an obligation that transcends State border; (2) and accountability for those responsible for the Commission of these crimes, so as to put an end to the impunity that is often associated with these violations.<sup>3</sup>

In terms of structure, the Rome Statute contains a preamble and 128 articles, grouped into 13 sections; it is a comprehensive text that establishes the ICC,

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<sup>1</sup> As of June 30<sup>th</sup> 2009, 108 countries have ratified or acceded to the ICC Statute. There are 40 other states which have signed but not ratified the treaty. Under customary international law a state that has signed but not ratified a treaty is obliged to refrain from acts which would defeat the object and purpose of the treaty. As of the above date, the USA and Israel have signed the Rome treaty. See [http://en.wikipedia.org/wiki/International\\_Criminal\\_Court](http://en.wikipedia.org/wiki/International_Criminal_Court). 30/06/2009 at p.1

<sup>2</sup> For positive commencement of the process of its domestication in view of Nigeria's long history of military dictatorship, unstable democracy, human rights abuses and impunity, see Federal Republic of Nigeria official Gazette for a bill titled:- "An Act to enable effect to be given in the Federal Republic of Nigeria to the Rome Statute of the International Criminal Court and for Purposes connected therewith", Federal Government Printers, Lagos, No. 46, Vol. 88, 12<sup>th</sup> June 2001, Pp. C. 689-767.

<sup>3</sup> See generally, Broom hall, B., "The International Criminal Court:- A Check list for National Implementation," in M. C. Bassouni (ed.) ICC Ratification and National implementing Legislation, France:- eres, 1999.

determines its composition and function; delineates its subject matter as well as its jurisdiction, both temporally and substantively; codifies the crimes as well as indicate the corresponding sentences and the procedural rules; and develops the procedural norms and the general principles of criminal law that will be reflected in the operation of the International Criminal Court.

The Court's headquarters is located in the Hague; it will not try states but rather individuals and will only prosecute those crimes considered gross violations, as indicated in the Statute. Furthermore, it does not try to substitute for states in the exercise of criminal jurisdiction but in complementary with national courts.

The Court may be activated by the Prosecutor, by a state Party or by the UN Security Council. Nevertheless, a State Party can request the removal of the Prosecutor or can contest the competence of the Court of the admissibility of the case, except in the situation that the case has been sent to the Court by the Security Council since it is understood to act on behalf of the international community. It is for this reason that the Security Council can ask for the suspension for up to twelve months of an investigation and Judgment initiated by the court.

In accordance with Part I of the Statute, the court is established with an international legal personality and will be located in the Hague, Netherlands. Part 2 specifies the Court will have Jurisdiction over the crimes of genocide, crimes against humanity and war crimes. One of the significant provisions of the Statute is the clear limitation of the Court's Jurisdiction to be complementary to national Jurisdictions, only proceeding with a case where a State is unwilling or unable to investigate and prosecute the case itself.

The ICC will fill a significant void in the international legal system. It will have Jurisdiction over individuals, unlike the international court of Justice which is concerned with issues of State Responsibility. Furthermore, unlike tribunals that have been established by the Security council on an ad hoc basis, such as the international Criminal Tribunals for the former Yugoslavia and for Rwanda (ICTY/R), the Jurisdiction of the ICC will not be restricted to dealing with crimes committed in one specific conflict or by one specific regime during one specific time period, and will be able to act more quickly after an atrocity has been committed. However, the ICC will only have Jurisdiction over crimes committed after it has come into existence (article 11).<sup>4</sup>

As a treaty-based institution, the ICC will have a unique relationship with the UN system. Unlike the ICTY/R, the ICC is not a creation of the Security Council, nor will it be managed by the UN General Assembly.<sup>5</sup>

However, it will receive some financial support from the UN, particularly when the Security Council refers matters to it for investigation (articles 3, 13 (b) and 115 (b)). The precise relationship between the ICC and the UN will be detailed in a special agreement that will be approved by the ICC Assembly of States parties (articles 2).<sup>6</sup>

## **2.1 Subject-matter Jurisdiction of the ICC**

Article 5 of the Statute lists the crimes that will be within the Jurisdiction of the Court: - genocide, crimes against humanity, war crimes, and the crime of aggression. Article 6 provides that the crime of genocide will be defined in the same way for the purposes of ICC prosecutions as it is currently under article 2 of the

<sup>4</sup> See Article 11 of the ICC Rome Statute of 17 July 1998.

<sup>5</sup> See Bassiouni, M.C., (ed.) *The Statute of the ICC:- Transactional Publishers, 1998.*

<sup>6</sup> See Roy S. L., (ed.), *The International Criminal Court:- Issues, negotiations, results, The Hague, Netherlands:- Kluwer Publishers, 1999.*

Genocide Convention 1948. Both crimes against humanity (article 7) and war crimes (article 8) have been carefully defined in the Statute to incorporate crimes from different treaty and customary sources, which 120 states at the Rome conference agreed were “the most serious crimes of concern to the international community as a whole” (article 5). The court will have jurisdiction over all the crimes except aggression once the Statute enters into force. Articles 5(2), 121 and 123 together provide that the court will have Jurisdiction over the crime of aggression when a suitable definition is accepted by a two thirds majority of all ICC states parties, at a Review conference to be held seven years after the entry into force of the statute. The provisions on the crime of aggression must also set out the conditions under which the court may exercise Jurisdiction over this crime which must be consistent with the UN Charter.

The procedural provisions of the Rome Statute have been drafted to create an optional balance between the following priorities: - (i) The need for an independent, apolitical, representative international court, which can function efficiently and effectively to bring to Justice those responsible for the most serious crimes of concern to the international community as a whole; (ii) the right of states to take primary responsibility for prosecuting such crimes if they are willing and able; (iii) the need to give victims of such crimes adequate redress and compensation; (iv) the need to protect the rights of accused persons; and (v) the role of the Security council in maintaining international peace and security, in accordance with its powers under chapter VII of the Charter of the UN. These considerations are all reflected in the functions and powers of the Court, and its relationship with other entities, as set out under the statute.<sup>7</sup>

### **Definitions of International Crimes: - A Comparative analysis**

The drafters of the Rome Statute believed that the definitions of crimes over which the ICC would exercise Jurisdiction would reflect existing international norms. For this reason, they looked to existing relevant treaties and customary international law when developing the definitions of crimes. The most relevant treaties were the Four Geneva Conventions of 1949 and their Additional Protocols of 1977, the Torture Convention, the Genocide Convention, the Statutes of the International Criminal Tribunals for the former Yugoslavia and Rwanda and other conventions dealing with specific crimes such as enslavement and apartheid. In some cases, the definitions of crimes adopted in the Rome Statute reflect a conservative interpretation of the law established by these conventions and forming part of customary international law. In other cases, they reflect a more expansive interpretation of international law in 1998 when the Rome Statute was negotiated. This part of the paper describes some of the more significant differences in definitions of international crimes.

#### **1. Crimes against humanity**

Unlike the Nuremberg Charter, no nexus to an armed conflict is required for crimes against humanity under the Rome Statute. This is an important and positive

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<sup>7</sup> See Claus Kress and Flavia, L., (eds.), *The Rome Statute and Domestic Legal Orders: - General aspects and Constitutional Issues*, Vol. 1, Baden-Ba-den:- Nomos, 2000.

development in international law and domestic crimes against humanity laws should not include such a nexus. The approach taken in the Rome Statute reflects the fact that crimes against humanity are often committed against civilians in the absence of hostilities and that the seriousness of the crime is not affected by whether it is committed in peace or war time.

In another positive development, the Rome Statute definition, unlike the definition in the Nuremberg Charter and the Statute of the International Criminal Tribunal for Rwanda (ICTR), does not require that the perpetrator have a discriminatory intent when committing a crime against humanity. This means that the attack against civilians that is the crime against humanity need not be committed against a particular group sharing certain characteristics such as nationality or religion.

## 2. **Torture**

Under the Torture Convention, the definition of “torture” requires that the act of torture be committed for a purpose, for example obtaining a confession or as a punishment. It also requires that the torture be committed “by or at the instigation of or with the consent or acquiescence of a public official or a person acting in an official capacity.” The Rome Statute definitions of torture, whether as a crime against humanity or a war crime, does not require either of these conditions to be met. The Rome Statute clearly includes torture when committed by persons with no connection to the state. Furthermore, there is no requirement that torture be committed for a purpose. For example, article 7(2)(e), defining torture as a crime against humanity, covers acts that are purposeless or merely sadistic.

The Rome Statute definitions of torture, better reflects the reality that torture is committed frequently by people who are not “officials” and who may have no purpose in torturing someone than to inflict severe pain and suffering. States parties implementing these crimes into their law should follow the Rome Statute definition.

## 3. **Enslavement**

The definition of enslavement in the Rome Statute builds on the 1926 Slavery Convention definition. However, article 7(2)(c) of the Rome Statute adds an element not present in the Slavery Convention definition. The Rome Statute defines enslavement as “the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children.” The explicit reference to trafficking in women and children reflects developments in international law since the Slavery Convention was adopted. In particular, it reflects the growing number of women and children who are trafficked and the international community’s attempts to stop this crime.

## 4. **Persecution**

Article 6(c) of the Nuremberg Charter included the crime of persecution, defining it by reference to certain grounds on which persons could be persecuted (i.e. political, racial or religious). Those grounds reflected the basis for persecution that occurred in the Second World War and which the Nuremberg trials were to address. The Rome Statute definition in article 7(1)(b) provides that persecution can be committed “against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds universally recognised as

impermissible under international law.” This expanded list of grounds for persecution better reflects the pattern that persecution has taken since the end of the Second World War. It is appropriate that States that incorporate this crime against humanity into their domestic law include a non-exhaustive list of grounds for which persons may be persecuted.

Article 7 (1)(h) also provides that, for the purposes of the ICC, persecution must occur in connection with an act referred to in article 7(1) or any crime within the Jurisdiction of the ICC. Importantly, this language differs from the Nuremberg and Tokyo Charters. Those Charters required that persecution be committed in connection with another crime within their respective Tribunal’s Jurisdiction. The Rome statute provides an alternative. Persecution must occur either in connection with another crime within the Jurisdiction of the ICC or in connection with any act referred to in article 7(1). This article sets out all the acts that could amount to a crime against humanity for the purposes of the ICC. This means that persecution in connection with a single act of, say, torture may fall within the Rome Statute definition even if the single act of torture would not itself amount to a crime against humanity.

#### 5. **Enforced disappearance**

There are two major differences between the definition of enforced disappearance in article 7(2) (i) of the Rome Statute and those found in other international instruments. The first is that the Rome Statute definition provides that, in addition to states, political organisations should be held responsible for the crime of enforced disappearance. Until the adoption of the Rome Statute, enforced disappearances could only be committed by states or with their approval or acquiescence. Secondly, the Rome Statute definition adds the concept of detention for a “prolonged” period of time to distinguish enforced disappearance from other unlawful deprivations of liberty.

Article 7(2) (i) defines the crimes against humanity of enforced disappearance as:

...the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of , a State or a political organisation, followed by a refusal to acknowledge the deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

#### 6. **War Crimes**

Article 8 of the Rome Statute gives the ICC Jurisdiction over war crimes when committed during international conflicts (articles 8(2)(a) and (b) and when committed during non-international armed conflicts (articles 8(2)(c) through (f).

Article 8(2)(a) of the Rome Statute, defines war crimes as grave breaches of the Geneva Conventions of 12 August 1949, namely any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention.” Eight acts are listed. These largely follow the provisions in the Geneva Conventions.

Article 8(2)(b) defines war crimes as “other serious violations of the laws and customs applicable in international armed conflict, within the established framework

of international law, namely, any of the following acts.” Twenty six acts are enumerated.

In most respects, the definitions of war crimes committed in international armed conflict in the Rome Statute are consistent with existing international law, in particular with the definitions in the four 1949 Geneva conventions, and the Hague Regulations.

War crimes committed in non-international armed conflicts are addressed in international law. Subparagraph 8(2)(c) follows common article 3 of the four Geneva Conventions. Subparagraph 8(2)(e) draws on The Hague Regulations, the Geneva conventions, and Additional Protocol II. Subparagraphs 8(2)(d) and (f) limit the scope of the ICC’s Jurisdiction over acts committed in non-international conflicts. They exclude internal disturbances and tensions, riots, isolated and sporadic acts of violence and other acts of a similar nature.

The following explains some of the more important differences in the war crimes definitions.

1. **A showing of serious injury to body or health**

Three of the crimes listed in article 8(2)(b) of the Rome Statute are found in article 85 (3) of Protocol I: Intentionally directing attacks against civilian objects (b) (ii); intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or wide spread and severe damage to the natural environment (b) (iv); and attacking or bombarding, by whatever means, town, villages etc (b) (v).

Article 85(3) of protocol I to the Geneva Conventions States that “the following acts shall be regarded as grave breaches of this Protocol, when committed wilfully, in violation of the relevant provisions of this Protocol, and causing death or serious injury to body or health.” By contrast, the Rome Statute does not explicitly require “death, serious injury to body or health” in connection with these three crimes. States are urged to adopt the Rome Statute definition.

ii. **Widespread and severe damage to the natural environment.**

Article 8(2)(b)(iv) of the Rome Statute includes “widespread, long-term and severe damage to the natural environment” in the list of acts defining the war crime of internationally launching an attack in the knowledge that such attack will cause incidental loss. This violation is not found in the Geneva Conventions or the Additional Protocols. Note however the article 8(2)(b) threshold that such damage must be “clearly excessive” in relation to the overall military advantage anticipated.

iii. **Indirect transfer of civilian population**

Article 8(2)(b) (viii) defines the war crime of transferring civilian populations by an occupying power. The Rome Statute definition of this crime refers both to the direct and indirect transfer of civilian population and includes the transfer of its own civilian population into territory it occupies as well as the deportation or transfer of all parts of the civilian population of the occupied territory.

This crime is based on article 49 of the Fourth Geneva Convention, which is now recognized as a grave breach in article 85 (4)(a) of Additional Protocol I. However, the Rome Statute expands this prohibition to cover transfers of the occupying power’s own civilian population into the territory it occupies. The additional prohibition against “indirect” transfers in article 8(2)(b) (viii) is intended to

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make explicit that this crime includes the situation of an occupying power failing to take measures to prevent its civilian population from transferring itself into the territory it occupies.

iv) **Attacks against UN peacekeepers**

Article 8(2)(b)(iii) of the Rome Statute prohibits intentionally directing attacks against UN personnel involved in humanitarian or peacekeeping missions as long as they are entitled to protection given to civilians under international law of armed conflict. The Rome Statute is the first international treaty to include in a war crimes definition, explicit reference to international attacks against this particular group of people and their installations and property.

v. **Crimes of Sexual Violence.**

Under article 8(2)(b)(xxii) of the Rome Statute, “committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions’ is a war crime when committed in international armed conflict.

Although none of these acts are “new” crimes, the Rome Statute is the first treaty to contain such an extensive list of crimes of sexual violence. For example, article 4(e) of the Statute of the ICTR prohibits “rape, enforced prostitution, and any form of indecent assault.” Rape, forced prostitution, and indecent assault are prohibited under the Fourth Geneva Convention article 27, and Protocol I, article 76 (1), but are not expressly listed as grave breaches. Article 32 of the Geneva Convention prohibits any “measure of brutality whether applied by civilian or military agents.” Protocol II, article 4(2)(e), prohibits “outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution, and any form of indecent assault”. Article 4(2)(f) prohibits “slavery and the slave trade in all their forms.” Rape was prosecuted as a war crime by the International Military Tribunal for the Far East in the Tokyo trials.

The definition of war crimes of sexual violence committed in armed conflict not of an international nature is set out in article 8(2)(e)(vi). This provision contains the same list of acts as article 8(2)(b)(xxii), namely rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence.

This definition compares favourably with those found in other international conventions covering crimes of sexual violence committed in internal conflicts. For example, article 4(2)(e) of Additional Protocol II prohibits rape, enforced prostitution, and any form of indecent assault. Article 4(2)(f) prohibits “slavery and the slave trade in all their forms.” Article 4(e) of the statute of the ICTR prohibits “rape, enforced prostitution, and any form of indecent assault. The list of acts is the same as in article 8(2)(b)(xxii) covering.” States parties are urged to ensure that their national laws criminalize every act listed in articles 8(2)(b)(xxii) and 8(2)(e)(vi) both as war crimes and as national crimes.

vi. **Child Soldiers**

Under articles 8(2)(b) (xxvi) and 8(2)(e)(vii), it is a crime to conscript or enlist children under the age of 15 years into the national armed forces or to use them to participate actively in hostilities. This is consistent with Protocols I and II additional

to the Geneva Conventions and the UN Convention on the Rights of the Child, which set 15 as the minimum age for military recruitment and participation.

However, a stronger standard is established in the Optional Protocol to the convention on the Right of the Child on the involvement of children in armed conflict, which establishes 18 as the minimum age for participation in armed conflict, for compulsory recruitment or conscription and raises the minimum age for voluntary recruitment by governments from the current age of 15 years. The Protocol also prohibits any form of recruitment of children under the age of 18 by armed groups. States should adopt the standard in the optional protocol, not the Rome statute, and prohibit any recruitment of those less than 18 years, whether forced or voluntary.

### **2.3 Other important features of the Court.**

The Statute embodies a traditional concept of Justice that provides for the prosecution and punishment of the guilty and obliges the court to establish principles relating to reparation to, or in respect of, victims, including restitution, compensation and rehabilitation (article 75). Furthermore, article 79 provides that a Trust Fund will be established by decision of the Assembly of States Parties. The Fund will be managed according to criteria to be determined by the Assembly (article 79 (3)). The court can decide whether to compensate victims through this fund and it may order that money or other property collected through fines and forfeiture be transferred to the fund (articles 75 (2) and 79 (2)).

The Statute goes beyond this and gives victims a voice – to testify, to participate at all stages of the court proceedings and to protect their safety, interests, identity and privacy. Such inclusive participation reflects the principles of the 1985 UN Declaration of Basic principles of Justice for Victims of Crime and Abuse of Power, to be implemented by national judicial systems. The provisions of the statute require the Court to provide these protections and rights in its proceedings (e.g. article 68). The inclusion of these provisions in the Statute demonstrates the importance of victims in the whole process and it is hoped that the court will provide an effective forum for addressing grave injustices to victims the world over.<sup>8</sup>

The participants to the Rome Conference were particularly sensitive to the need to address gender issues in all aspects of the court's functions.<sup>9</sup> The statute includes important provisions with respect to the prosecution of crimes of sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence are defined as crimes against humanity and war crimes. The Court will be staffed with people knowledgeable in issues relating to violence against women, and there will be a fair representation of both female and male Judges on the Court.

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<sup>8</sup> See Ladan, M.T., *The Nigerian Human Rights violations Investigation Commission within an international context*, submitted to the Justice Oputa Panel, Abuja, 3<sup>rd</sup> January 2001, as Volume two of its final report to the President of Nigeria.

<sup>9</sup> See Phillippe K., and John t. H., "The Rome Conference on an international Criminal Court:- The Negotiating Process", (1999) 93 A.J.I.L.2.

### **3.0 OBLIGATIONS OF STATE PARTIES TO IMPLEMENT THE PROVISIONS OF THE STATUTE<sup>10</sup>**

Actually, implementing an international treaty means putting the treaty into effect. It goes a bit further than mere observance of the law. It implies that its general aim, the result that was desired by those who adopted the treaty, is achieved or will be achieved, so that the treaty-rules can be said to have been given full effect.

Usually, the obligation to perform a treaty is intrinsic to its accession by the state and therefore is not expressly stipulated. The Vienna convention on the law of treaties simply states that a treaty must be performed in good faith by the states which are parties to it. Indeed, a state in good faith does want that the treaty to which it has become a party, is given full effect.

Hence implementation covers all those measures, which must be taken to ensure that the rules of international criminal law are fully respected.

All states have a clear obligation to adopt and apply measures of implementing international criminal law. One or more government ministries, the legislature, the courts, the armed forces, or other state organs may take these measures. However, it is states which continue to have the primary responsibility to ensure the effective implementation of international criminal law, and which must first and foremost adopt measures at the national level. The means of implementation that have a preventive character are, essentially those whereby states have the duty to take measures pertaining to the domestic legal order. These measures are called “national measures of implementation”.

Hence, this part of the paper is divided into general and specific issues of implementation.

#### **3.1 GENERAL ISSUES OF IMPLEMENTATION<sup>11</sup>**

As with any international treaty, States need to consider whether becoming a Party to the Rome Statute will require changes to be made to their national laws or administrative procedures, to enable them to meet all of their obligations under the treaty. For example, some legislative measures may need to be taken to ensure effective cooperation between states parties and the court during its investigations. If States already have national legislation pertaining to international legal assistance and extradition, there will be little difficulty to introduce these measures.

The aim of this part of the paper is to highlight the general issues in domestic implementation of the Rome Statute in Nigeria; and the compatibility of the Statute’s general principles of criminal law with our national constitution, penal legislations and other international conventions to which Nigeria is a signatory.

#### **3.1 DOMESTICATION PROCESS OF THE ROME STATUTE IN NIGERIA<sup>12</sup>**

<sup>10</sup> For detail analysis See Ladan, M.T., “*An Overview of the Rome Statute of the International Criminal Court: Obligations of State Parties and Issues in Domestic Implementation in Nigeria*”, A Paper Presented at Judicial Colloquium on the Rome Statute of the International Criminal Court, Organized by the Civil Resource Development and Documentation Centre (CIRDDOC) Enugu, Nigeria, Venue: Beyelsa State House Conference Room, Abuja, date: 23<sup>rd</sup> – 25<sup>th</sup> July, 2008

<sup>11</sup> Human Rights Watch, New York:- Making the ICC Work, A Handbook for implementing the Rome Statute, Vol. 13, No. 4(G), September 2001, Pp. 1-22.

<sup>12</sup> Supra note 2 for Official Gazette on Ratification and Jurisdiction Bill.

Having ratified the Rome Statute of the International Criminal Court on 27<sup>th</sup> September 2001, Nigeria is automatically obliged to the Court, and the Statute operates in the future and does not apply retroactively.

In the case of Nigeria under the 1999 National Constitution, a treaty is not Justiciable in our domestic courts unless it has been domesticated or incorporated into Nigerian Law or enacted into law by an Act of the National Assembly. On the authority of the African Reinsurance Corporation case (1986) 3NWLR pt. 31, p. 811. At 834 supported by a long line of English cases of the common law tradition, it would appear that a person may not be able to invoke the jurisdiction of a municipal court to directly enforce the provisions of the Rome Statute in Nigeria.

Thus section 12 of the Nigerian Constitution<sup>13</sup> provides as follows:-

(1) “No treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly.”

(2) “The National Assembly may make laws for the Federation or any part thereof with respect to matters not included in the Exclusive Legislative list for the purpose of implementing a treaty.”

(3) “A bill for an Act of the National Assembly passed pursuant to the provisions of subsection (2) of this section shall not be presented to the president for assent, and shall not be enacted unless it is ratified by a majority of all the Houses of Assembly in the Federation.

The domestication process in Nigeria therefore, requires the provisions of the Rome Statute of the ICC to be enacted into law by the instrumentality of the Rome Statute of the International Criminal court (Ratification and Enforcement) Act, of a particular No., and of a given year.<sup>14</sup> This is subject to the requirements of subsections (2) and (3) of section 12 of the constitution. This was the method adopted in enacting into law by the National Assembly in 1983 of the African Charter on Human and Peoples’ Rights as Cap. A.9 Laws of the Federation of Nigeria 2004.

Consistent with the subject matter of jurisdiction of the Rome Statute of the ICC, Nigeria has equally ratified and domesticated the relevant provisions of the Geneva Convention of 1949 as part of Nigerian Law: - Cap. G.3, Vol.7 Laws of the Federation 2004.

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<sup>13</sup> The National Constitution of Nigeria came into force on May 29, 1999.

<sup>14</sup> See supra note 2 already gazetted by the by the Federal Government of Nigeria.

**Table 1: - List of Domesticated IHL/IHRL Treaties/National Implementing Legislations/Draft Domestication Bills in Nigeria: - 1960 – 2011**

<b>S/NO</b>	<b>TITLE OF INSTRUMENT</b>	<b>STATUS</b>
1.	Geneva Conventions Act Cap. G.3 Vol. 7. LFN 2004	Domesticated Treaty: - Commencement date: 30/9/60
2.	Armed Forced Act Cap. A. 20 Vol.1 LFN 2004	Implementing legislation relating to universal jurisdiction and state duty to punish for IHL violations. Commencement date 6 <sup>th</sup> July 1994 (Initially Armed Forces Decree 105 of 1993 as amended in 1994)
3.	Nigerian Red Cross Society Act Cap. N.130 Vol. 12 LFN 2004	Implementing legislation: - Commencement date 1/1/1961
4.	Geneva Conventions and Additional Protocol Bill. December 2007	Draft Bill before the National Assembly: - For the Repeal of Cap. G.3 LFN 2004 and for the domestic implementation of both the conventions and the Additional Protocols.
5.	Chemical Weapons Convention (Prohibition) Bill, 2006	Implementing legislation: - Officially gazette 12 <sup>th</sup> April, 2006, Vol.3, No. 8 NASS Journal, Abuja. Yet to be passed into law by the NASS.
6.	Convention Against Torture and Other Cruel, Inhuman Punishment (Ratification and Enforcement) Bill 2004	Implementing legislation passed by both chambers of NASS – 25 May, 2005.
7.	Rome Statute of the ICC (Ratification and Jurisdiction) Bill 2005	Implementing legislation: - Officially gazetted 12 <sup>th</sup> July, 2001, Vol. 88 No. 46. Passed by the Senate: 19 <sup>th</sup> May 2005.
8.	Diplomatic Immunities and Privileges Act Cap. D9 Vol. 5 LFN 2004	Domesticated the Vienna Convention on Diplomatic Relations etc, Commencement date of the Act: 27 Dec. 1962
9.	The African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act Cap. A.9 LFN 2004	Domesticated ACHPR Treaty
10.	The Child Rights Act, 2003	Special Implementing legislation of the UN CRC and the AUCRWC. Commencement date: - 31 <sup>st</sup> July 2003.
11.	National Commission for Refugees etc Act (of 29-12-89) Cap. N.21 LFN 2004	Domesticated in Nigeria 1951 UN Convention and its 1967 Protocol on Refugees as well as the 1969 OAU (AU) Refugees Convention.

As with any treaty, States may create a single piece of legislation that covers every aspect of implementation,<sup>15</sup> or amend all relevant pieces of their existing legislation separately, in order to comply with the statute<sup>16</sup>. However, there are some special considerations worth taking into account when approaching the implementation of the Rome Statute.

States Parties will have a special relationship with the ICC, particularly in terms of providing judicial assistance. As such there are some particular features of the ICC that may not lend them to being incorporated as amendments to existing arrangements for state-to-state cooperation. For example, there will be no grounds for refusal when a state is asked to surrender a person to the ICC (article 89). This is clearly different from the usual extradition arrangements between States. Therefore, States may wish to draft new ICC-specific “surrender” legislation, instead of trying to adopt existing laws on extradition.

### **3.2 Compatibility of Rome Statute’s General Principles of Criminal Law with our National Constitution, Penal Laws, etc.**

<sup>15</sup> Ibid, at Pp. 15-16

<sup>16</sup> See Human rights Watch, New York:- Comparative Tables on how various countries are implementing the Rome Statute, Draft No. 2, November 10, 2002, tables 1-3.

In keeping with the principle of legality (*nullum crimen sine lege* and *nulla poena sine lege*), meaning no one is to be held criminally responsible under the Statute for acts which did not constitute crimes under it at the time they were committed. The court is required to construe strictly the definitions of crimes and not to extend them by analogy, with any ambiguities interpreted in favour of the person investigated, prosecuted or convicted (Article 22). In this way, the Statute ensures that the interpretive discretion of the judges is kept within the confines of the statute, that is, within the limits set by the states that negotiated it. Also, a person convicted by the court can be punished only in accordance with its terms (Article 23).

Provisions relating to this requirement of Criminal Justice in Nigeria can be found in Section 11 of the Criminal code Act Cap. C.38 Vol.4 Laws of the Federation of Nigeria 2004 which states that:-

..No person can be punished for doing or omitting to do an act unless the act or omission constituted an offence under the law in force when it occurred.

Section 36 (8) of the 1999 Constitution speaks in the same vein when it states that:- “No persons shall be held guilty of a criminal offence on account of any act or omission that did not, at the time it took place constitute such an offence, and no account of any act or omission that did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for any criminal offence heavier than the penalty in force at the time the offence was committed. This is also the language of section 36 (12) of the 1999 Constitution which states that:- no one shall be convicted of a criminal offence unless that offence is defined and the penalty therefore is prescribed in a written law; and in this subsection a written law refers to an Act of the National Assembly or a Law of a State, any subsidiary legislation or instrument under the provisions of law. The decision in the case *Aoko v. Fagbemi* (1961) 1 ALL NLR 400 was quashed for making an offence an act of adultery which was not an offence at the place of its commission.

The Rome Statute does not apply to conduct prior to its entry into force. In the event of a change in the law before entering of final Judgement in a case, the law more favourable to the person investigated, prosecuted or convicted will be applied (Article 23).

The crimes within the Jurisdiction of the ICC are not to be subject to any statute of limitations (Article 29). In agreeing to this provision, the Diplomatic conference reaffirmed the example of the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity. This international treaty had been ratified by Nigeria and hence binding legally on her.

Next is the principle of *‘ne bis in idem’* meaning: - “No person may be tried for the crimes for which he has already been convicted or acquitted by either the ICC or by any other tribunal (Article 20 of the Statute). However, under Article 20 (3) of the Rome Statute there is an exception to this principle by stating that the ICC may prosecute someone who has already been prosecuted by another tribunal when the previous proceeding:- (a) was for the purpose of shielding the person concerned from criminal responsibility for crimes within the Jurisdiction of the court; or (b) otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in circumstances, were inconsistent with an intent to bring the person concerned to Justice.”

Therefore, by interpreting the norm of Article 20(3), comparing it to (1) and (2) of the same Article, one arrives at the conclusion that the general principle of the ICC is to respect previous judgements in the sense that if a suspect has already been tried under proceedings that safeguard due process, the person shall not be submitted to a second trial. A second trial will take place only under the extraordinary circumstances described above. These cases of fraudulent proceedings only arise under authoritarian rule to shield members of the regime from punishment. Hence section 36 (9) of the 1999 Nigerian Constitution provides that:- “No person who shows that he has been tried by any court of competent Jurisdiction or tribunal for a criminal offence and either convicted or acquitted shall again be tried for that offence or for a criminal offence having the same ingredients as that offence save upon the order or a superior court,” thereby implementing the legal principle of *ne bis in idem*.

Furthermore, the statute sets out in Part 3, Articles 22 to 33, the most important general principles of criminal law, and reflects contributions from a wide range of countries as well as the highest international standards. Principles and standards related to investigation and prosecution are contained in other parts of the Statute.

The court will be able to impose criminal responsibility on natural persons who have committed crimes within the Jurisdiction of the court (Article 25). The material elements of the crime must be committed with intent and knowledge, as defined in the statute (Article 30). This requirement of mental elements is consistent with the provisions of sections 8 and 9 and 22 of the Nigerian Criminal Code.

## **DEFENCES TO CRIMINAL LIABILITY**

The Statute provides defences, or grounds for excluding criminal responsibility, which will have a considerable impact on the scope of criminal responsibility under the statute. As such, they will be important to states wishing to provide in their implementing legislation for the possibility of conducting proceedings at the national level. The defences, as stated in Articles 31 and 32 are:- insanity, intoxication, self-defence, duress, mistake of fact or mistake of law. The Nigerian Criminal Code provides for all these defences under sections 24 to 29 of the Criminal Code, thereby implementing the grounds for excluding criminal responsibility.

However, under Article 33 of the Statute, a person is not relieved of criminal responsibility by the fact that the crime was committed under order of a Government or of a superior, whether military or civilian, unless the person was under a legal obligation to obey the order, did not know the order was unlawful, and the order was not manifestly unlawful. Any order to commit genocide or crimes against humanity is deemed to be manifestly unlawful. This is consistent with the provisions of sections 56 and 57 of the Nigerian Armed Forces Act Cap. A.20 Vol. 1, LFN 2004,<sup>17</sup> where disobedience to lawful superior orders is punishable.

So a soldier in Nigeria is under a duty to disobey unlawful or illegal superior orders otherwise he will be answerable for any crime or offence committed thereby. This was the decision of the court in the leading, Nigerian case of *The State V. Pius Nwaoga and another* (quoted in, Achike, O., *Military law and military rule in Nigeria* (1978) Fourth Dimension Publishers, Enugu, Pp. 52-55.

<sup>17</sup> Formally Decree No. 105 of 1993 as amended in 1994

#### **4. SPECIFIC ISSUES OF IMPLEMENTATION**

This section of the paper is intended to highlight the various forms of state cooperation that are detailed in the statute, and to suggest ways that Nigeria can ensure its ability to provide such assistance, as required. Each of the various types of cooperation outlined here may require a different approach to implementation, depending on the particular state's criminal procedures and existing mechanisms for international judicial assistance.

##### **4.1 PRIVILEGES AND IMMUNITIES OF ICC PERSONNEL.**

Under Article 48 of the statute States should recognise the privileges and immunities of the Judges, prosecutors, deputy prosecutors and Registrar in their implementing legislation as are accorded to heads of diplomatic missions and will, after the expiry of their terms of office, continue to be accorded immunity from legal process of every kind in respect of words spoken or written and acts performed by them in their official capacity. This will help to prevent any politically motivated allegations against such personnel or any reprisals after they retire from the court. This is very similar to article 105 of the UN Charter regarding Judges of the International Court of Justice.

Accordingly, an amendment to Part II, Sections 14 to 16 of the *Diplomatic Immunities and Privileges Act* Cap. D.9 Vol.5 Laws of the Federation of Nigeria 2004 (on ICJ), is recommended to accommodate the Judges and other ICC Personnel consistent with Article 48 of the Statute.

##### **4.2 POSSIBLE CONSTITUTIONAL ISSUES RELATING TO SURRENDER AND ABSENCE OF IMMUNITY FOR HEADS OF STATE.**

Articles 59 and 89 of the Rome Statute could involve constitutional questions for Nigeria when the state is obligated to surrender its national, irrespective of his rank or status in the society at the ICC's request. This is because under section 308(1) and (3) of the Nigerian Constitution, 1999, the President or Vice-President, Governor or Deputy-Governor of a State shall not be arrested or imprisoned, and no process of any court requiring or compelling the appearance of such persons shall be applied for or issued.

Further, the absence of immunity for Heads for State or government or any other Government official while performing his official functions during his period in office conflicts with section 308 of the constitution,. Under Section 308 (1) (a), no civil or criminal proceedings shall be instituted or continued against any of the persons mentioned above during his period of office. Under article 27 of the statute, a Head of State or other officials of Government who commits a crime within the Jurisdiction of the ICC 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 capacity.

The idea of an absence of immunity for Heads of State accused of international crimes is not new. The existence of this rule was recognised following the First World War in the Treaty of Versailles, after the Second World War in the Charter of the Nuremberg Tribunal, in the Genocide Convention, by the International Law Commission, and in the Statutes of ICTY/R.

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 a State, because in conferring this mandate upon themselves, they are exceeding the powers recognised by international law. With respect to

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immunity for former Heads of State for crimes committed while they were in power, the United Kingdom's House of Lords ruled that Senator Augusto Pinochet was not entitled to immunity in any form for the acts of torture committed under his orders when he was Chile's Head of State. The House of Lords indicated that because the alleged acts of torture could not be considered as constituting part of the functions of a Head of State, these acts were not protected by any immunity.<sup>18</sup>

Article 27 of the 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.

However, several European States have 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.<sup>19</sup> If the unlikely situation arises where the ICC requests the surrender of an official, such as their head of State, a purposive interpretation of the relevant constitutional provisions would allow for that official to be surrendered, given that the purpose of the ICC is to combat impunity for "the most serious crimes of concern to the international community as a whole." 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 the official under normal circumstances.<sup>20</sup>

A State party could also make provisions to ensure that its own courts can prosecute the Head of State or any State official for the commission of crimes within the Jurisdiction of the ICC. The advantage of this approach is that, as a result of the principle of complementarity running through the statute, the state would likely exercise jurisdiction in this matter. Another advantage is that it may be easier for states to prosecute their leaders themselves. Whatever solution is adopted, immunity should no longer be absolute and should not prevent the ICC from prosecuting the perpetrators of the international crimes listed under the statute.<sup>21</sup>

Under Article 29 of the Statute, perpetrators of crimes covered by the statute can still be prosecuted and punished by the ICC regardless of the number of years that have elapsed between the crime's commission and the indictment. States must therefore ensure that persons may be surrendered to the ICC, even when statutory limitations would normally apply under national legislation to the crime for which they are being charged.

Nigeria may wish to follow the example of France, by making a general amendment to the constitution that allow the country to cooperate with the ICC in all situations. The French Government decided to adopt the following constitutional provisions, which addressed all three areas of conflict:- "the Republic may recognise the Jurisdiction of the International Criminal Court as provided by the treaty signed on 18 July 1998" (article 53-2, constitutional Law No. 99-568). The advantage of this type of constitutional reform is that it implicitly amended the constitutional

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<sup>18</sup> See for an extensive analysis of Pinochet's case, Ladan M. T., "Pinochet:- A Land mark case in international law", in:- UDUS Law Journal, Usmanu Dan Fodio University, Sokoto, Nigeria, 2000, Vol. 1, No. 2, Pp. 149-158.

<sup>19</sup> *Supra* note 19, tables 1-3.

<sup>20</sup> *Ibid*, tables 1-2

<sup>21</sup> Ladan, M.T., "Introduction to International Human rights and Humanitarian Laws", 2001, ABU. Press, Zaria, Nigeria, Chapters 7 and 8.

provisions in question, without opening an extensive public debate on the merits of the provisions themselves.

### 4.3 SUBJECT-MATTER JURISDICTION

The jurisdiction of the ICC is limited, as set forth in Article 5 of the statute, “to the most serious crimes of concern to the international community as a whole.” These crimes are:- the crime of genocide, crimes against humanity, crimes of war and the crime of aggression. The crime of aggression will fall under the jurisdiction of the court once it is defined and this will be done in conformity with the requirements of the charter of the UN.

Regarding genocide, it should be remembered that the UN Convention for the Prevention and Punishment of Genocide was approved in 1948 and not yet ratified by Nigeria. The Rome Statute has included the majority of the acts that constitute genocide as defined by the Convention.

With respect to crimes against humanity in the Rome Statute, may appear exactly as they do in international instruments, as for example, the crimes of slavery, torture, forced disappearance, apartheid, rape, forced prostitution and other grave sexual abuses. Nigeria has also ratified the majority of these international instruments that condemn and sanction these crimes.

The War Crimes in the statute were taken from the four Geneva Conventions of 1949, which make illegal certain acts committed in times of internal or international armed conflict. The Geneva conventions and the Additional Protocols I and II of 1977 were also ratified by Nigeria in 1961 and in 1988 respectively. While the Geneva Conventions have already been domesticated as Cap. G.3 Vol. 7 Laws of the federation of Nigeria 2004, the Protocols are yet to be domesticated.

Accordingly, it is proposed here that in order to implement the Protocols as well, Nigeria needs to amend Cap. G.3 Vol. 7, by means of Geneva Conventions (Amendment) Act.<sup>22</sup> This proposal<sup>23</sup> is consistent with the Australian Geneva Conventions Act, 1957 (as amended in 1991).

In sum, the majority of these grave breaches that constitute violations of human rights are already recognized in the Nigerian legal order, whether in the Constitutional, the Penal Legislations or in international conventions ratified by Nigeria.<sup>24</sup>

### 4.4 UNIVERSAL JURISDICTION AND DUTY TO PUNISH INDIVIDUALS

*The Geneva Conventions Act* covers persons of all nationalities, regardless of the place where the offence is committed.<sup>25</sup> Indeed the Act states that any person may be proceeded against, tried and sentenced in Nigeria for an offence committed outside the country, as if the crime had been committed in Nigeria. The Act goes further to state categorically that for all purposes incidental to or consequential on the trial or

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<sup>22</sup> See the Federal Executive approved Proposed Bill: - For the Repeal of the Geneva Conventions Act, Cap. G.3 LFN 2004 and for the Enactment of Geneva Conventions and Additional Protocols Act 2007.

<sup>23</sup> Proposal made by this writer since November 2002 in a Paper titled: - Issues in Domestic Implementation of the Rome Statute of the National criminal Court, published in the Journal of Public Law, Rivers State University, Portharcourt, Rivers State, Nigeria, Vol. 1 2003 at pp.112-128.

<sup>24</sup> See Uchehgbu, Okere and Ladan, M. T., Report on Nigerian National Practice Study on Customary Rules of International Humanitarian Law, September 1997, submitted to the ICRC, Lagos/Geneva.

<sup>25</sup> Cap. G.3 Vol. 7, Laws of the Federation 2004

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punishment, the offence shall be deemed to have been committed in Nigeria (Sections 3-4 of the Act).

Nigeria as one of the High Contracting Parties to the Geneva Conventions has a right to punish individuals violating international humanitarian law on the basis of universal jurisdiction. Thus in addition to sections 3-4 and first schedule to the Geneva conventions Act, section 130 (2) of the Armed Forces Act Cap. A.20 LFN 2004 has conferred universal jurisdiction over war criminals to General Courts Martial. In Conclusion therefore, the opinio Juris of Nigeria is supportive of the right to punish individuals violating international humanitarian law and by extension the Rome Statute on the basis of Universal Jurisdiction.

## **5. CONCLUSION**

The Rome Statute of the ICC has the potential to mark a significant turning point in the way the international community views peace, transition and the enforcement of international law. The Jurisprudence of the ICC – and of national courts that investigate and prosecute crimes within the Jurisdiction of the court, or that cooperation with it, will quickly bring international criminal law to a level of development commensurate with its importance. On a practical level, the court will fill many of the gaps that characterise the current system of national enforcement, and will encourage advancements in national law and practice even outside the scope of the statute as such.

From a practical point of view, whether Nigeria introduces the ICC – Specific legislation, amend existing pieces of legislation separately, or use a hybrid approach, the changes to the legal order of the state will need to be disseminated widely once they come into force. This will ensure that all relevant personnel are aware of the changes that the new legislation or amendments may introduce into the law in their particular area of work.