

REGIONALISING ICC IMPLEMENTING
LEGISLATION: A WORKABLE SOLUTION FOR
THE ASIA-PACIFIC REGION?

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I INTRODUCTION

The International Criminal Court (ICC) is the most important institution created in the past decade in the area of international criminal law.¹ With the ICC now in operation, attention has shifted away from the delicate balances achieved at Rome² to the role which states ought to play in promoting international criminal justice. The enactment of national implementing legislation of a requisite standard constitutes an important step in this direction. Four years after coming into force, the Rome Statute of the ICC has 104 state parties (with Japan to become the 105th state party in 2007).³ About a third of these

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1 For an overview of the International Criminal Court (ICC), see William A Schabas *An Introduction to the International Criminal Court* (2 ed, Cambridge University Press, Cambridge, 2004).

2 Rome Statute of the International Criminal Court (Rome Statute) (17 July 1998) 2187 UNTS 3; 37 ILM 999.

3 As of 1 November 2006, there were 104 state parties. Information about state ratifications to the Rome Statute is available at <<http://www.iccnw.org/documents/RATIFICATIONSbyRegion.pdf>> (last accessed 15 November 2006).

states has passed ICC-related legislation.⁴ States have, therefore, been slow in enacting such legislation. In the Asia-Pacific region, very few states have ratified the Rome Statute when compared with the rest of the world and implementation rate in this region is very low.⁵

This paper focuses solely on implementation and does not examine the advantages of ratifying the Rome Statute. As a means of tackling the scarcity of implementing legislation available, the paper explores the merits of regionalism as an alternative to the "one state one Act" option which seems to be the norm to date. The adoption of legislation at a regional level presents certain distinct advantages which are examined alongside some potential disadvantages. In addition, three different regional approaches are presented in an effort to highlight how regional implementation might work in practice. The provision of regional training courses, the adoption of another state's legislation and assistance by a so-called "model" are explored as regional options available to state parties at the implementation stage. The implementation efforts of the independent state of Samoa are presented as a case study of the above options. The paper concludes that implementation at a regional level should be considered by states looking to implement the ICC Statute domestically.

II ICC IMPLEMENTATION: SOME GENERAL ISSUES

When discussing implementation, some fundamental questions as to why, when and how a state ought to engage in the process are important. Implementation enables the application of the Rome Statute by national legal orders. Without state assistance, the ICC cannot function, not only because it relies on states to arrest and

4 Information about states that have implemented the Rome Statute is available at <<http://www.nottingham.ac.uk/law/hrlc/international-criminal-justiceunit/implementation-database.php>> (last accessed 15 November 2006).

5 To date, there are only 11 state parties from the Asia-Pacific region. See <<http://www.iccnw.org/documents/RATIFICATIONSbyRegion.pdf>> (last accessed 15 November 2006). Of those states connected in some way with the Pacific Islands Forum, only Australia, Fiji, the Marshall Islands, Nauru, New Zealand, Samoa and Timor-Leste are parties.

surrender the accused before it,⁶ but also because its very jurisdiction is determined on the basis of state action or inaction.⁷ Having said that, it is important to emphasise that not all of the provisions of the Rome Statute need to be incorporated into domestic law. For state parties, the Statute contains an explicit obligation to provide for national procedures with regard to the cooperation regime.⁸ This obligation does not extend to the substantive criminal law provisions of the Statute, whose incorporation into national law remains at the discretion of the state concerned.⁹ Nevertheless, it would be advisable for a state to incorporate all the crimes set out in Article 5 of the Rome Statute (genocide, crimes against humanity and war crimes) into domestic law, as well as to review the defences and other general principles of international criminal law, to determine their compatibility with the ICC regime. The complementary nature of the ICC¹⁰ ensures that the ICC will only intervene if a state is "unwilling

6 As Antonio Cassese, the first President of the International Criminal Tribunal for the Former Yugoslavia (ICTY), observed, "[the] ICTY is very much like a giant without arms and legs – it needs artificial limbs to walk and work. And these artificial limbs are state authorities. If the cooperation of states is not forthcoming, they cannot fulfil their functions." Antonio Cassese "On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law" (1998) 9 EJIL 2, 8. This statement is even more relevant with regard to the ICC, which, except for referrals, cannot rely on the United Nations (UN) Security Council for the monitoring of cooperation.

7 See the reference to the ICC's complementary jurisdiction in Part V Assessment of Complementarity by the ICC: Mitigating Severance?

8 Rome Statute, above n 2, art 88: "[s]tates Parties shall ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under this Part [Part 9]."

9 Rome Statute, above n 2, fourth and sixth preambular paragraphs. Neither the preamble nor the reference therein are binding. Furthermore, the argument that the relevant preambular paragraphs codify existing customary law which obliges implementation is no more convincing. For this argument, see Jann K Kleffner "The Impact of Complementarity on National Implementation of Substantive International Criminal Law" (2003) 1 JICJ 86, 90-94.

10 See Rome Statute, above n 2, tenth preambular paragraph, arts 1 and 17. On complementarity, see generally John T Holmes "Complementarity: National Courts versus the ICC" in Antonio Cassese, Paolo Gaeta and John RDW Jones

or unable genuinely" to deal with a case.¹¹ Enabling national prosecution of the crimes contained in the Rome Statute constitutes the first step in evading the ICC's jurisdiction.¹²

The Rome Statute dictates the areas which require domestic legislation. However, it does not specify *when* implementation ought to take place. It seems that states are at liberty to decide the timing of implementation, which may take place before or after ratification. However, state parties should take account of the fact that, since the ICC became operational in July 2002,¹³ they may be required to cooperate with the ICC. State parties, therefore, need to be able to execute such a cooperation request if and when this arises. In practice, most states become parties to the ICC Statute first and implement its terms afterwards. States which have not yet joined the ICC regime are under no obligation to enact such legislation. They may wish, however, to consider enacting legislation prior to joining the ICC so as

(eds) *The Rome Statute of the International Criminal Court: A Commentary* (vol I, Oxford University Press, Oxford, 2002) 667-686; John T Holmes "Jurisdiction and Admissibility" in Roy S Lee (ed) *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers, Ardsley, New York, 2001) 321-348; Mireille Delmas-Marty "Interactions between National and International Criminal Law in the Preliminary Phase of Trial at the ICC" (2006) 4 JICJ 2.

11 Rome Statute, above n 2, art 17.

12 As the ICC's Prosecutor said, upon taking up his position in June 2003: "the absence of trials before ... [the ICC], as a consequence of the regular functioning of national institutions, would be a major success." Luis Moreno-Ocampo, Chief Prosecutor of the International Criminal Court "Statement made at the ceremony for the solemn undertaking of the Chief Prosecutor of the ICC" (Ceremony for the solemn undertaking of the Chief Prosecutor of the International Criminal Court, The Hague, 16 June 2003) 2, available at <http://www.icc-cpi.int/library/organs/otp/030616_moreno_ocampo_english_final.pdf> (last accessed 15 November 2006).

13 The Rome Statute came into force on 1 July 2002, 60 days after the 60th ratification, which took place on 11 April 2002. See Rome Statute, above n 2, art 126.

to ensure that there will be no possibility of their being found non-compliant with the Rome Statute once they become parties to it.¹⁴

Despite the unquestionable merits of enacting national legislation, states have generally not taken up the implementation challenge. Undoubtedly, implementation takes time. Even when the political will is present, the drafting of legislation and its subsequent approval by the relevant body, usually the national Parliament, take a substantial amount of time. Moreover, implementation requires expert knowledge and adequate resources to do it properly. Although international criminal law implementation should not be unknown to states following the creation of the International Criminal Tribunals for the former Yugoslavia and Rwanda in 1993 and 1994 respectively,¹⁵ little or no legislation has actually been enacted for the purposes of cooperation with those Tribunals.¹⁶ Finally, the Rome Statute is a

14 The United Kingdom is a good example of a state which implemented first and ratified later. The International Criminal Court Act 2001 (UK) was passed on 24 September 2001 and entered into force on 17 December 2001. The United Kingdom's instrument of ratification was deposited on 4 October 2001, once the Act had been passed.

15 UNSC "Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 2001" (25 May 1993) S/RES/827/1993 [ICTY Statute]; UNSC "Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994" (8 November 1994) S/RES/955/1994 [ICTR Statute].

16 See Amnesty International "International Criminal Tribunals: Handbook for Government Cooperation" (1 August 1996) IOR 40/07/96, 41, available at <<http://web.amnesty.org/library/index/engior400071996>> (last accessed 15 November 2006). A limited number of states has enacted legislation regarding the ICTY Statute: list available at <<http://www.un.org/icty/legaldoc/e/basic/cooperation/legisindex.htm>> (last accessed 15 November 2006). Some of these states also implemented the ICTR Statute at the same time. See <<http://www.icrc.org/ihl-nat.nsf/WebLAW2?OpenView&Start=1&Count=150&Expand=15#15>> (last accessed 15 November 2006). In Africa, Uganda, Benin, Burkina Faso, Cameroon, Côte d'Ivoire, Kenya, Mali, Namibia and Tanzania

highly complex legal instrument which requires good understanding of international criminal law by national drafters.

A state's ability to implement may be affected by certain provisions found in its constitution and in its legal system. Provisions in the Rome Statute may conflict with various constitutional guarantees.¹⁷ A constitutional provision typically has an elevated status within the legal system of a state, which makes it difficult to amend. Any conflict between the Rome Statute and national constitutional provisions may lead to delays in implementation. The European Commission for Democracy (Venice Commission) of the Council of Europe has identified the following areas as potentially conflicting with the ICC regime:¹⁸

[The] immunity of persons having an official capacity; the obligation for states to surrender their own nationals to the court at its request; the possibility for the court to impose a term of life imprisonment; exercise of the prerogative of pardon; execution of requests made by the court's Prosecutor, amnesties decreed under national law or the existence of a national statute of limitation; and the fact that persons

arrested and transferred suspects to the International Criminal Tribunal for Rwanda without having legislation in that respect. It could be argued that such legislation was unnecessary due to the fact that the ad hoc Tribunal was created by the UN Security Council using Chapter VII powers and a Security Council resolution. However, in most legal systems, the authority to execute a request for arrest and surrender, for example, would have to be grounded in domestic legislation giving effect to the international provision.

17 See, for example, Helen Duffy "National Constitutional Compatibility and the International Criminal Court" (2001) 11 *Duke J Comp & Intl L* 5; Darryl Robinson "The Rome Statute and its Impact on National Law" in Antonio Cassese, Paolo Gaeta and John RWD Jones (eds) *The Rome Statute of the International Criminal Court: A Commentary* (vol II, Oxford University Press, Oxford, 2002) 1849-1869; Venice Commission of the 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 (Venice, 15-16 December 2000)" (15 January 2001) CCDL-INF (2001) 1.

18 See Venice Commission, above n 17, 1 (footnotes omitted).

brought before the court will be tried by a panel of three judges rather than a jury.

Such constitutional issues may prove problematic, particularly when executing an ICC cooperation request. In case of a constitutional incompatibility with the Rome Statute, a state essentially has two options. It may either amend the conflicting constitutional provisions or interpret them in such a way so as to allow for the application of the ICC regime.¹⁹ Amending the constitution or interpreting it in line with the Rome Statute is important, but it is also time-consuming.

The model a state follows regarding the incorporation of international law within its domestic legal system may also pose difficulties regarding the implementation of the Rome Statute.²⁰ States that follow the dualist tradition require incorporating legislation to give effect to an international treaty at the domestic level. States following the monist legal tradition may – mistakenly perhaps – assume that there is no need to provide for implementing legislation. In a state that follows the pure monist tradition, implementing legislation would be altogether unnecessary, since the Rome Statute

19 For example, in France, the Head of State cannot be prosecuted before the national courts. Therefore, an amendment was made to Article 53-2 of the French Constitution of 1958 to recognise the jurisdiction of the ICC over the Head of State. See Antoine Buchet "L'intégration en France de la Convention portant statut de la Cour pénale internationale: histoire brève et inachevée d'une mutation attendue" in Claus Kieß and Flavia Lattanzi (eds) *The Rome Statute and Domestic Legal Orders; General Aspects and Constitutional Issues* (vol 1, Nomos Verlagsgesellschaft, Baden-Baden, 2000) 65.

20 For a more detailed and sophisticated analysis, see Ian Brownlie *Principles of Public International Law* (6 ed, Oxford University Press, Oxford, 2003) 31-33; L Ferrari-Bravo "International and Municipal Law: The Complementarity of Legal Systems" in R StJ MacDonald and D M Johnston (eds) *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory* (Martinus Nijhoff, Dordrecht, 1983) 715; Joseph G Starke "Monism and Dualism in the Theory of International Law" (1936) 17 BYIL 66; Felice Morgenstern "Judicial Practice and the Supremacy of International Law" (1950) 27 BYIL 42.

would be directly applicable in the domestic legal order and would prevail over any conflicting piece of legislation.²¹

However appealing this argument may sound, it overlooks how monism works in practice as well as the subtleties of the Rome Statute's provisions. First, not many states follow the "pure" form of monism. Rather, monism and dualism present two extremes and most states find themselves operating somewhere in between.²² Secondly, even if a state does follow a "pure" monist tradition, it is not easily discernible how the Rome Statute could be applied in the domestic sphere without specific legislative authority. Although the crime provisions within the Statute could be directly relied upon in the domestic legal order, the cooperation regime would need further implementation. A state needs to specify in its legislation which is the competent authority, among others, to receive the cooperation request or to arrest the suspect and transfer the latter to the ICC.²³ The authority to execute a cooperation request should be explicitly provided for nationally.²⁴ Hence, the existence of legislation in place is necessary; and this is independent of the legal system followed and common to both monist and dualist traditions.

21 The monist tradition dictates that when a state ratifies an international agreement, the self-executing provisions of that treaty apply directly in domestic law and prevail over conflicting domestic provisions. See Eileen Denza "The Relationship between International Law and National Law" in Malcolm D Evans (ed) *International Law* (Oxford University Press, Oxford, 2003) 415, 421.

22 See Denza, above n 21, 422-428, who examines the approach taken by six different countries. See also Francis G Jacobs and Shelley Roberts (eds) *The Effect of Treaties in Domestic Law* (Sweet and Maxwell, London, 1987); Ignaz Seidl-Hohenveldern "Transformation or Adoption of International Law into Municipal Law" (1963) 12 ICLQ 88.

23 Rome Statute, above n 2, arts 86, 87(1), 89.

24 This is also evidenced by the Rome Statute, above n 2, art 88, which specifically requires the availability of domestic procedures: "[s]tates Parties shall ensure that there are procedures available under their national law for all of the forms of cooperation."

III REGIONAL ICC IMPLEMENTATION: SOME PRELIMINARY OBSERVATIONS

The Rome Statute does not prescribe a set implementation model. Certainly, the problems discussed above have restricted the number of states that have enacted legislation implementing the Statute. Such problems are not limited to a certain geographical region and cut across different legal systems. The Asia-Pacific region is no different in that respect. Although thus far each state has chosen to enact legislation individually, the possibility of a regional approach to implementation should not be disregarded.

From the perspective of the availability of legislation, an examination of the existing legislation reveals that the majority of states that have implemented the Rome Statute nationally are on the European continent. Legislation has also been passed in some states which are "sympathetic" to international criminal justice, such as Canada,²⁵ Australia,²⁶ New Zealand²⁷ and South Africa.²⁸

For our present purposes, it is worth examining whether European integration has played some role in this development. The fact that most states which have passed legislation are member states of the European Union (EU) reveals a possible connection between the higher implementation rate and membership of the EU. ICC-related matters fall within the second pillar of the EU and the EU Council has adopted a common position promoting the ICC and its operation.²⁹

25 Crimes Against Humanity and War Crimes Act SC 2002 c 24.

26 International Criminal Court Act 2002 (Cth). See Gideon Boas "An Overview of Implementation by Australia of the Statute of the International Criminal Court" (2004) 2 JICJ 179.

27 International Crimes and International Criminal Court Act 2000 (NZ).

28 Implementation of the Rome Statute of the International Criminal Court Act 2002 (South Africa).

29 See Council Common Position (EU) 2003/444/CFSP of 16 June 2003 on the International Criminal Court [2003] OJ L 150/67 [Council Common Position], which states in its eighth recital: "[t]he implementation of the Rome Statute requires practical measures that the European Union and its Member States

Peer pressure among states may have also contributed to the enactment of implementing legislation. It is not unknown for the EU to have encouraged promotion of international criminal justice within its ranks and among countries wishing to accede to the EU.³⁰ The active involvement of many of the European states in the drafting of the Rome Statute may have also contributed to the enhanced interest in the ICC's function. EU member states, encouraged by the regional organisation in which they participate, strive to strengthen the ICC's objectives.³¹

This is not to say that implementation in Europe is consistent. No harmonisation obligation is attached to ICC matters within the EU. States, therefore, are at liberty to choose to implement at their own pace. Nor does it mean that the legislation across Europe takes a similar form. States have opted for varying solutions.³² Although EU integration has assisted in the promotion of the ICC cause, the EU has

should fully support." However, the above obligation is not replicated in the main body of the Council Common Position. In a way, implementation on behalf of the European Union member states is taken for granted and the emphasis is on providing assistance to third states. See Council Common Position, art 2(3): "[t]he Member States shall share with all interested States their own experiences on the issues related to the implementation of the Statute and, when appropriate, provide other forms of support to that objective. They shall contribute, when requested, with technical and, where appropriate, financial assistance to the legislative work needed for the participation in and implementation of the Statute by third countries. States considering to become party to the Statute or to cooperate with the Court shall be encouraged to inform the Union of difficulties encountered on that path."

30 See Council Common Position, above n 29, art 9(2). By virtue of this provision, the Common Position applies to Romania, Bulgaria and Turkey. See also the pressure put on Serbia with regard to its international criminal law obligations and the impact non-compliance with these might have on its future accession prospects. See European Commission "EU-Serbia relations" (2006), available at <http://ec.europa.eu/enlargement/serbia/eu_serbia_and_montenegro_relations_en.htm> (last accessed 15 November 2006).

31 See generally Nicolaos Strapatsas "The European Union and its Contribution to the Development of the International Criminal Court" (2003) 33 RDUS 399.

32 See below note 65.

not acted as an effective catalyst for implementation. Another point that needs to be emphasised is that a high degree of integration is not essential for regionalism to work. Plenty of European states, particularly from the so-called "New Europe", have not yet enacted legislation, thus following the global trend.

Regionalism may be defined widely or narrowly.³³ For the purposes of ICC implementation, what constitutes a region is not determinative. What matters is the adoption of implementing legislation, regardless of the basis on which a region is defined. The Asia-Pacific is a good example to show that multiple conceptions of what is a region could work equally well. The Asia-Pacific may be viewed as one region, but it may also be divided into smaller sub-regions: for instance, Southeast Asia could be one group; the Pacific islands could be another. Regionalisation may include states which follow a similar legal tradition or indeed belong to the same regional organisation. Either of them would be valid. Any of the above and other combinations of states may engage in ICC implementation.

There are certain distinct advantages in dealing with issues of implementing legislation regionally. The first relates to the legal systems involved. States in the same region are likely to face similar challenges when tackling common problems. Moreover, there is a higher possibility that their legal systems might be similar.³⁴ Even if the legal systems do not present any similarities, states within a region would be familiar with the legal systems of neighbouring states and may be able to extract useful information or practices to be applied nationally.

The second consideration relates to the nature of international criminal law. Given that the ICC operates in post-conflict situations or

33 Please note that the terms "regionalism" and "regionalisation" in this piece are not terms of art and are used interchangeably.

34 This does not mean identical. Even within the predominately "civil law" Europe, no two countries have exactly the same systems. Moreover, the United Kingdom follows the "common law" approach.

in cases where serious disturbances have taken place, states in the region are likely to have been affected more. The possibility of a conflict or instability spreading to nearby states should not be underestimated. This needs to be qualified, however, as not every conflict will necessarily cross a state's borders.³⁵ Yet, in many instances, the impact of conflicts is not limited to a specific country, but is felt well beyond the theatre of conflict.³⁶ In addition, alleged perpetrators are more likely to flee to a nearby country than to a different region altogether, and there is ample scope for cooperation at a regional level in that respect too.³⁷

Besides the above factual situation, use may be made of existing regional ties in order to foster coordination on ICC matters. States may already cooperate at a regional level within the context of the same regional inter-governmental organisation.³⁸ Irrespective of the degree of integration or scope of the institution, states are also accustomed to cooperating on various matters which require the drafting of legislation. Mechanisms to facilitate this may already be in place. Arguably, the jurisdiction of such an organisation on human rights issues might facilitate ICC implementation, but even ad hoc initiatives within the auspices of an existing institution should not be excluded.³⁹

35 The situation in the former Yugoslavia, for instance, despite its intensity, did not spread to the rest of the Balkans.

36 In Africa, for example, crimes committed in the context of the Rwandan genocide spread to some neighbouring states, particularly in the refugee camps where a number of victims had found refuge. This is why the ICTR Statute has limited extraterritorial jurisdiction over crimes committed by Rwandan citizens in the territory of neighbouring states (ICTR Statute, above n 15, art 7).

37 See the example of Charles Taylor, who fled to Nigeria.

38 For instance, the Council of Europe, the Association of Southeast Asian Nations (ASEAN), the Organization of American States and the African Union.

39 See Li-ann Thio "Implementing Human Rights in ASEAN Countries: Promises to Keep and Miles to Go Before I Sleep" (1999) 2 Yale HR Dev LJ 1.

The main advantage that regionalisation offers is economic. Sharing a pool of experts able to draft ICC-implementing legislation enhances the capacity of a state to draft such legislation. It also assists in improving the quality of this legislation, as more ICC experts are likely to be found at a regional rather than at a national level. Spreading the cost of implementation across states in the same region makes the adoption of legislation easier and more efficient, particularly for small or medium-sized countries.

***IV THE ADVERSE EFFECTS OF REGIONALISATION:
FRAGMENTATION AND VARIATION OF ICC
IMPLEMENTATION***

The Rome Statute does not provide for uniform implementation or set the standards that states ought to follow when incorporating the ICC regime into domestic law. The adequacy of a state's legislation is judged by the successful execution of a cooperation request or the conduct of national investigations and prosecutions for crimes falling under the ICC's jurisdiction. This should be taken into account when examining the adverse effects of regionalisation. The absence of guidance by the ICC as to how to implement the Rome Statute does not displace the underlying conviction that some uniformity will ultimately ensue, simply by effectively incorporating the Statute nationally.

Although implementation at a regional level poses certain risks to the unity of international criminal law, a certain variation in implementation is tolerated, as evidenced by the absence of strict criteria on implementation that need to be fulfilled, and even encouraged, in order to accommodate the states' different requirements under national law.⁴⁰ These risks may not be as severe as those that would be encountered with regional international criminal

⁴⁰ The Rome Statute itself recognises that national law procedures have a role to play in the cooperation with the ICC and respect for national requirements is accommodated in a number of provisions. Reference to national law is made in Rome Statute, above n 2, arts 89(1), 93(1)(l) and 99(1).

law enforcement,⁴¹ but they are nevertheless worth exploring. When looking at regional approaches to ICC-implementing legislation, the main adverse effects would be potential fragmentation of international criminal law and departure from the Rome Statute provisions.

Fragmentation would occur if a region adopted legislation which contravened the Rome Statute, and which would be subsequently used to execute a cooperation request or to prosecute ICC crimes nationally. If this were replicated across a number of regions, fragmentation could ensue as different standards would be applied depending on the locality of the forum. This fragmentation would not only affect the relationship of states belonging to the same region with the ICC, but would have an impact on intra-regional interaction with regard to international criminal law matters.

Fragmentation is more likely to occur with regard to the substantive criminal law part of the Rome Statute, as a request for cooperation may only be treated in terms of whether or not it has been effectively executed.⁴² When prosecuting the core crimes nationally, differing approaches may result in convictions or acquittals which would be inconsistent with the Statute regime. This may be due to the fact that national legislation does not fully incorporate the definitions of the crimes found in the Rome Statute, because it takes into account defences that do not exist at the international level or because it does not follow certain procedures enshrined in the Statute. This is exacerbated by the fact that the ICC may only deal with a handful of cases arising out of each situation it examines.⁴³ The vast majority of cases will be heard before national courts. Moreover, should a number of states from the same region strictly adhere to the same regional

41 William W Burke-White "Regionalization of International Criminal Law Enforcement: A Preliminary Exploration" (2003) 38 *Tex Intl LJ* 729, 755-759.

42 Failure to cooperate with the ICC is dealt with in Rome Statute, above n 2, art 87(7).

43 ICC Office of the Prosecutor "Paper on Some Policy Issues before the Office of the Prosecutor" (Office of the Prosecutor, September 2003), available at <http://www.icc-cpi.int/otp/otp_policy.html> (last accessed 15 November 2006).

regime, rather than the Rome Statute, this would also result in variation of international criminal law. A regional regime may differ significantly from other implementation efforts undertaken in other regions, thus leading to different approaches.

Although the above dangers exist, there is no empirical evidence to suggest that this would be a common problem so as to advocate against a regional approach to implementing legislation. For this to occur, it would take a number of years and differing regional implementation approaches which are strictly adhered to by all states in the region. Even if this is the case, the ICC's complementary jurisdiction would assist in limiting the fragmentation and variation described above.

***V ASSESSMENT OF COMPLEMENTARITY BY THE ICC:
MITIGATING SEVERANCE?***

One of the most important concepts in the Rome Statute is the principle of complementarity which regulates the relationship between the ICC and domestic legal orders.⁴⁴ National courts co-exist with the ICC and enjoy a conditional primacy in dealing with a situation. The ICC can only be seized of jurisdiction if the former are proven to be genuinely unwilling or unable to investigate or prosecute.⁴⁵ The main provision on complementarity is Article 17 of the Rome Statute, which covers issues of admissibility. Article 17 is a highly complicated provision with many of its elements remaining far from clear, which prompted Shabtai Rosenne to advocate for an advisory opinion from the International Court of Justice for clarification.⁴⁶

Consistent with the principle of complementarity,⁴⁷ the ICC will look into national implementing legislation when it examines whether

44 See Rome Statute, above n 2, tenth preambular paragraph, arts 1 and 17.

45 Rome Statute, above n 2, art 17.

46 Shabtai Rosenne "The Jurisdiction of the International Criminal Court" (1999) 2 Yrbk Intl Hum L 119, 130.

47 See the references provided in note 10, above.

a case is being or has been adequately dealt with by a state. If such legislation exists, then the state's compliance with the Rome Statute and its application by the national courts becomes relevant in the assessment of whether a state is both willing and able genuinely to investigate or prosecute. In the case in which national legislation is deemed to fall short of the requisite standard, it is foreseeable that the case in question would meet the criteria for trial at the international level. The above determination is left to the ICC. The standards as well as the methods that the ICC would employ to measure the adequacy of implementing legislation are not clear, since the Rome Statute does not provide any guidance in that respect.

When examining legislation, the ICC may take a number of approaches. It could assess each piece against the Rome Statute. The complexity of the Statute may render its incorporation very difficult for states with scarce resources.⁴⁸ The question, therefore, arises whether a state's ability to implement should be taken into consideration when assessing the quality of implementing legislation. In such a case, the ICC legislation should be examined in relation to other pieces of legislation adopted by the same jurisdiction. Yet another approach would involve comparing the ICC implementing legislation of one state with that of others in order to determine whether the legislation meets the requisite standards for a decision on complementarity. An inter-state comparison would help create a level playing field in implementation.

It could be that the implementation process may well result in some coordination. If states adopt similar approaches, through regionalism for instance, this may not be precluded. However, coordination is not stated in the Rome Statute and it is not an immediate aim of the ICC. Of more interest is the case where a state has very limited resources at its disposal and cannot reach adequate standards in its legislation. In the case of a state or a region that has

⁴⁸ For a general discussion on the limited legal resources available in Pacific island states, see in this book A H Angelo "Legal Capacity in Pacific Island Countries" chapter 4.

undertaken a *bona fide* implementation, which is, however, not of the requisite quality, the ICC would potentially have jurisdiction. The issue of limited resources and its impact on the quality of implementing legislation at an early stage after ratification should perhaps be explored. And this is an argument that might be put forward by the affected states. However appealing, the ICC should not too easily succumb to a "two-speed", region-specific or culturally differentiated implementation. First, the criminal nature of the ICC means that maintaining high standards is important. Secondly, creating double standards will not help the ICC's primary mission, which is combating impunity worldwide.

Advocating differing standards will not be unique to the ICC. It seems, however, that international practice militates against such a proposition. In *Kalashnikov v Russia*,⁴⁹ the European Court of Human Rights dismissed Russia's claim that the conditions complained of "did not differ from, or at least were no worse than those of most detainees in Russia"⁵⁰ and found a violation of the European Convention on Human Rights,⁵¹ upholding the internationally recognised standards on detention conditions.⁵² Moreover, the Eritrea Ethiopia Claims Commission dismissed the contention that camp guards and staff lived in the same conditions as the prisoners of war⁵³ and defended the

49 *Kalashnikov v Russia* [2002] ECHR 596 (Third Section, ECHR).

50 *Kalashnikov v Russia*, above n 49, para 93.

51 Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950) 213 UNTS 223, art 3.

52 *Kalashnikov v Russia*, above n 49, para 103.

53 *Prisoners of War, Eritrea's Claim 17 (Eritrea v Federal Democratic Republic of Ethiopia)* (Partial Award) (1 July 2003) Eritrea Ethiopia Claims Commission, para 24, available at <<http://www.pca-cpa.org/ENGLISH/RPC/EECC/ER17.pdf>> (last accessed 15 November 2006).

provisions in the Third Geneva Convention.⁵⁴ Maintaining the treaty's high standards ensures uniformity.⁵⁵

It is not clear whether the ICC would be prepared to follow any of the above approaches. Most of them, however, would have to be dismissed. The ICC is bound by the Rome Statute which created it. It acts as the guardian of the Statute and, consequently, will also be guided by the latter for its jurisdiction and operation. Compliance of implementing legislation with the Rome Statute is, therefore, essential. Certainly, the ICC does not have the capacity to review each piece of implementing legislation in order to establish how it measures against the Statute or the rest of legislation available. As no harmonisation obligation exists in the Rome Statute, the ICC is not compelled to proceed in this direction. It is expected, however, that the ICC will be routinely checking the adequacy of implementing legislation when it makes a finding on complementarity and, depending on the extent of any possible non-compliance, this may or may not have an impact on the ICC's decision as to whether the case will stay with national courts or will be taken over by the ICC.

So long as the same standards are employed by both the ICC and the states concerned (either individually or as part of a regional implementation process), regardless of whether they are rich or poor, or whether they have adequate or inadequate legislation, it is practically irrelevant where the person will be tried. The aim is to ensure that culprits do not go unpunished.⁵⁶ Convergence between the

54 *Prisoners of War, Eritrea's Claim 17 (Eritrea v Federal Democratic Republic of Ethiopia)*, above n 53, para 101. See Convention (III) relative to the Treatment of Prisoners of War (12 August 1949) 75 UNTS 135, arts 13, 21-29, according to which detention of prisoners of war (POWs) must not seriously endanger the health of those POWs.

55 Evidence of concessions regarding standards may be found in the European Committee for the Prevention of Torture's general comments. See Alex Birtles "The European Committee for the Prevention of Torture and the Electronic Recording of Police Interviews with Suspects" (2001) 1 HR L Rev 69, 82.

56 For an interesting exposé of the importance of combating impunity, no matter whether international criminals are brought to justice before international

ICC's standards and those of the national courts is inevitable if complementarity is applied properly. If a state does not meet the requisite standards of investigation or prosecution, the ICC should step in to deal with the case. From the point of view of the ICC, it does not matter where the person is tried, so long as that person gets a fair trial for the crimes set out in the Rome Statute⁵⁷ and an appropriate punishment is imposed if the person is found guilty. For the person concerned, there might be an issue of preference, but legally, all that matters is that the most serious of crimes are dealt with properly, either at the national or at the international level. For the state, though, it might be an issue of pride, if it is deemed not to be willing or able to deal with a case, particularly where the state genuinely endeavours to apply the Rome Statute, but is let down by the lack of actual implementation. In such cases, the ICC ought to uphold its own standards and assert jurisdiction on the basis of complementarity. Not only will this guarantee uniform application of the law, but it will also provide the impetus for greater compliance with the Statute. For regionalism, it means that legislation produced regionally would have to be examined against the ICC's standards and ultimately any discrepancies in terms of sub-standard or significantly varying legislation will have to be resolved as part of the process.

Setting the ICC's standards is crucial. It is very difficult at this early stage to speculate on the standards the ICC will employ in informing its decision on complementarity based on implementing legislation. It would take a few cases to appreciate the ICC's response in practice and to have a clear picture of the direction it is likely to take. It is important to note that, in any case, the ICC should have as its guide two fundamental principles: first, that the implementing legislation should assist its operation; and, secondly, that the human rights of the accused are respected throughout the process of

tribunals or domestic courts, see William Schabas "Regions and International Criminal Law" (Regionalising International Criminal Law Conference, University of Canterbury School of Law, 19 August 2006).

⁵⁷ Rome Statute, above n 2, art 5.

cooperation. This can also be achieved if national legislation is adopted at a regional level.

VI REGIONALISING ICC IMPLEMENTATION: THREE PRACTICAL APPROACHES

Having examined the advantages as well as the potential disadvantages implementation at the regional level offers and how the latter may be tackled through the ICC's complementary jurisdiction, the following three approaches for regional implementation may be proposed. The first involves regional training with the view of increasing capacity locally, which will enable the adoption of implementing legislation at a later stage. The second consists of using legislation adopted by another state within the same region by a state wishing to implement. The third approach deals with the possibility of using a "model" piece of legislation.

A Regional Training

Technical legal training to promote a high level of expertise may be one way of guaranteeing the drafting of suitable implementing legislation. Delegates of states within the same region, who share similar perspectives and face potentially similar problems, may convene to discuss ICC implementation. Although this regional capacity-building would be beneficial to the region as a whole, given that the skills to be gained may be used more widely, this is a medium to long-term solution. It does not guarantee that states will in fact draft implementing legislation as a result of this process. If the aim is to produce an Act within a short period of time, the two approaches that follow would be more appropriate.

B Use of Another State's ICC Legislation

Use may be made of ICC legislation adopted by other states in the region. For instance, in the Asia-Pacific region, the legislation adopted by Australia or New Zealand may constitute a good starting point for

other states wishing to enact legislation.⁵⁸ Such states may opt for the adoption of another state's enacted legislation in the exact form or subject to amendment. The merits of this approach lie in the fact that such legislation would have been in force for a few years already and would probably have been the subject of analysis aiming to highlight the relevant achievements and shortcomings.⁵⁹

It is not impossible that certain similarities may exist among pieces of legislation from the same region. From a regional perspective, this may be explained by the proximity of legal systems within a specific region and the need for similar approaches. States would, therefore, be at liberty to "copy" other implementation pieces. As a state's legislation is available in the public domain, other states wishing to implement may make an informed decision as to which provisions best suit their needs and to what extent such legislation is suitable per se or requires some adaptation to the local circumstances. When this is done regionally, harmonisation across the region may ensue as a result of this process.

58 But see later in this book Treasa Dunworth "The International Crimes and International Criminal Court Act 2000 (NZ): A Model for the Region?" chapter 7 regarding the (un)suitability of New Zealand's legislation as a model for the South Pacific region.

59 A number of academic books and articles with comments on ICC legislation have been produced in recent years. See, for example, Matthias Neuner (ed) *National Legislation Incorporating International Crimes: Approaches of Civil and Common Law Countries* (Berliner Wissenschafts-Verlag, Berlin, 2003); Claus Kreß and Flavia Lattanzi, above n 19; Antonio Cassese and Mireille Delmas-Marty (eds) *Juridictions Nationales et Crimes Internationaux* (PUF, Paris, 2002); Valerie Oosterveld, Mike Perry and John McManus "The Cooperation of States with the International Criminal Court" (2002) 25 *Fordham Intl LJ* 767; Boas, above n 26; Jan MacLean "Gesetzentwurf über die Zusammenarbeit mit dem Internationalen Strafgerichtshof" (2002) 6 *ZRP* 260; Jörg Meißner "Die Zusammenarbeit Deutschlands mit dem Internationalen Strafgerichtshof. Anmerkungen zum Regierungsentwurf eines IstGH-Gesetzes" (2002) 15 *HuV-I* 35; Robert Cryer "Implementation of the International Criminal Court Statute in England and Wales" (2002) 51 *ICLQ* 73; Max Du Plessis "Bringing the International Criminal Court Home: The Implementation of the Rome Statute of the International Criminal Court Act 2002" (2003) 16 *SAJCL* 1.

C Adoption of a "Model"

A third approach would be for a state to consider one of the "models" that have been put forward either by groups of states or by other organisations. For instance, in 1999, the Southern African Development Community (SADC) adopted a non-binding Model Enabling Act on Ratification of the Rome Statute of the International Criminal Court.⁶⁰ Moreover, in 2004, the Commonwealth Secretariat issued a Model Law to Implement the Rome Statute of the International Criminal Court (Commonwealth Model Act).⁶¹ Furthermore, in 2005, the Arab League adopted the Arab League Model Law Project on Crimes under the Jurisdiction of the ICC.⁶²

The SADC and the Arab models constitute purely regional efforts. Regional models may appeal to states that do not have the capacity to enact legislation using individual resources. The SADC model is quite comprehensive and aims to cover most aspects of the Rome Statute that need to be incorporated into domestic law. The Arab model, however, focuses exclusively on the crimes under the ICC's jurisdiction and does not cover the ICC cooperation regime. Both the above models constitute valuable efforts as they are drafted at regional level, close to the states where they will be implemented. However, they have not been particularly influential in their respective regions. No evidence exists that any state has adopted them. This may be due to the lack of cohesion among the SADC countries or, as concerns Arab countries, the relatively recent adoption of the Arab model. This

60 See Daniel D Ntanda Nsereko "Implementing the Rome Statute within the Southern African Region (SADC)" in Claus Kreß and Flavia Lattanzi (eds), above n 19, 169.

61 Commonwealth Secretariat "Model Law to Implement the Rome Statute of the International Criminal Court" (Commonwealth Secretariat, 31 August 2006) [Commonwealth Model Act], available at <<http://www.iccnw.org/?mod=romeimplementation>> (last accessed 15 November 2006).

62 Arab League Justice Ministers Council "Arab League Model Law Project on Crimes under the Jurisdiction of the ICC" (Arab League, 29 November 2005), available at <<http://www.iccnw.org/?mod=romeimplementation>> (last accessed 15 November 2006).

does not mean that this type of regionalisation does not work. It may be that the impact of the above models to date has been rather limited. The potential, however, which these models have for raising awareness and encouraging discussion on ICC implementation, and also in providing a good basis for a state to draft its own legislation upon, should not be underestimated.

A more comprehensive approach can be found in the model produced by the Commonwealth Secretariat. The Commonwealth Model Act is testament to another form of regionalism: that of common law as opposed to civil law.⁶³ Aimed at common law countries, the Commonwealth Model Act provides a blueprint for an Act covering every aspect of the Rome Statute that needs to be implemented; it covers both the substantive law and cooperation regimes, as well as offences against the administration of justice and provisions relating to the enforcement of sentences. It provides various alternative options that could be adopted by a state.⁶⁴ Compared to the SADC and Arab models, the Commonwealth Model Act is considerably more comprehensive (58 pages in length). Given that it is potentially relevant to a larger number of states, this model is not tailored to the needs of a specific region. Being both specific and at the same time advisory in nature, this model may prove to be a helpful tool for states. In sum, models are particularly useful when states cannot commit the resources necessary to enact their own autonomous pieces of legislation. As certain parts of the Rome Statute must be implemented nationally, the model approach constitutes a sound solution for a state to comply with its obligations.

What all of the above approaches have in common is that states benefit greatly from the experience gained by other states which have already undergone the implementation process. This is true both at a

63 Although aimed at common law countries, that is not to say that civil law countries could not benefit from the Commonwealth Model Act.

64 See, for example, proposed options for the definitions of the crimes: Commonwealth Model Act, above n 61, 4-7.

regional level and more globally. It is immensely instructive to examine how other states have dealt with similar issues. The areas arising from the Rome Statute that need to be implemented are common to all states. As the Statute does not prescribe a certain procedural regime to be applied, however, states may choose different forms of implementation and the adoption of different procedures nationally.⁶⁵ This is where the limitations of the adoption of another state's legislation or of the use of a model lie. Each particular legal system is bound to have some unique features or at least certain

65 Some states have opted for one or more stand-alone Acts (for example, Switzerland, Australia and New Zealand). Germany comes directly to mind as an example of the latter, as it has adopted a complete "international criminal code" dealing with the substantive part of the Rome Statute and a separate cooperation law to implement the cooperation regime. However, neither of the two instruments is incorporated within existing legislation. Rather, they mirror the existence of a domestic criminal code and of a code of criminal procedure. This approach is definitely thorough, in the best of the codification traditions, and allows for a complete analysis of the possible issues that may arise when dealing with international criminal law before domestic courts. Some other states have opted for amendment of only those provisions affected by the ratification of the Rome Statute. France, for instance, incorporated the cooperation provisions into its criminal procedure code. This approach has the distinct advantage that the applicable provisions can be found in a single document, allowing for better access and understanding of the procedures and their interaction with the rest of criminal law and criminal procedure law. This approach is particularly appealing to civil law countries, where codes are the cornerstone of the system. Another approach is the combination of the two approaches described above. Namely, there is a free-standing Act and the provisions in other pieces of legislation that are affected are amended accordingly (Canada, United Kingdom). States that have incorporated the ICC crimes into domestic law have largely followed two approaches. They have either adopted them as they are found in the Rome Statute, or have departed from the wording of the Statute and have opted for a wider or narrower approach. Canada is a good example of a wider approach. It allows for prosecution before Canadian courts of crimes under customary law. Given that not all the crimes in the Rome Statute constitute codification of customary law, Canada's approach is wider than the scope of the Statute in that respect. Moreover, Germany adopts a holistic approach, which, through the enactment of the *Völkerstrafgesetzbuch*, encapsulates an exercise in restructuring domestic prosecution of crimes falling under ICC jurisdiction, much broader than the incorporation envisaged by the Rome Statute. Other states, however, chose to reproduce in their domestic laws definitions of crimes as they were found in the Rome Statute (for example, the United Kingdom).

elements that differentiate it from the legal systems of other states.⁶⁶ A "one fits all" approach, therefore, cannot work. Some adaptation of an existing piece of legislation or model is likely to be necessary to more accurately reflect the situation on the ground.

VII REGIONALISM IN PRACTICE: CASE STUDY OF SAMOA

The Pacific island state of Samoa covers an area of 2860km² and has a population of slightly less than 180,000 people.⁶⁷ Samoa took active part in the negotiations prior to, and following, the adoption of the Rome Statute and ratified it on 16 September 2002. For Samoa, commitment to the ICC was paramount, not least since it had a judge on the ICC for the first few years of its operation.⁶⁸ Despite the strong political will as regards the ICC, it took a long time to pass implementing legislation.

In Samoa, the office responsible for all legislation drafting is the Office of the Attorney-General. With approximately 15 people in total working for the Attorney-General's Office, it is immediately evident that the drafting capacity of this small state is rather limited.

Samoa benefited from training in respect of the ICC and in relation to the challenges of implementation.⁶⁹ In that regional training course, the Samoan delegate was able to share her experiences and express

66 See, for example, the French Loi no 2002-268 du 26 février 2002 relative à la coopération avec la Cour pénale internationale, art 1, available at <<http://www.iccnw.org/documents/FrenchImplementingLeg.pdf>> (last accessed 15 November 2006), inserting in the *Code de procédure pénale* new provisions stating that surrender to the ICC may only be ordered if the Instruction Chamber is satisfied that there is no obvious mistake (arts 627-8 and 627-13). What constitutes an "erreur évidente" is not entirely clear from the legislation.

67 For general information on Samoa's political, legal and economic system, see <http://www.govt.ws/gi_listing.cfm> (last accessed 15 November 2006).

68 Judge Neroni Tuiloma Slade (2003-2006), who was not, however, re-elected in the recent round of election of ICC judges.

69 A representative of the Attorney-General's Office attended the 3rd ICC Training Course for the Asia Pacific Region, organised by the Human Rights Law Centre, University of Nottingham, in Kuala Lumpur (Malaysia) in September 2005.

her concerns amongst colleagues from the entire Asia-Pacific region and to engage in discussions as how to best incorporate the ICC regime into domestic law. Subsequently, in early 2006, a first draft was produced based exclusively on the Commonwealth Model Act.⁷⁰ The author was privileged to have travelled to Samoa for the purpose of assisting in the drafting of Samoa's ICC legislation in January 2006.⁷¹ After a close examination of the Samoan Constitution,⁷² the Crimes Ordinance Act⁷³ and the mutual legal assistance legislation,⁷⁴ it was decided that certain amendments to the Commonwealth Model Act were necessary and the final text of the Bill was produced.⁷⁵

Samoa's legislation is very detailed and suitable to a common law country where generally every particular aspect of the procedure has to be specifically provided for in the relevant Act. The Attorney-General's Office in Samoa had looked at various other pieces of legislation before deciding that the Commonwealth Model Act best reflected what Samoa was trying to achieve in international criminal justice. The legislation, therefore, draws substantially upon the Commonwealth Model Act, but it is fine-tuned to fit with the rest of the Samoan legislation.⁷⁶ This is not the place to provide a more

70 See Commonwealth Model Act, above n 61.

71 This was possible through the bilateral assistance programme of the Human Rights Law Centre of the University of Nottingham and with the generous financial contribution of the Canadian government.

72 Constitution of the Independent State of Western Samoa 1960, available at <http://www.paclii.org/ws/legis/consol_act/cotisows1960535/> (last accessed 15 November 2006).

73 Crimes Ordinance Act 1961 (Samoa), available at <http://www.paclii.org/ws/legis/consol_act/co1961135/> (last accessed 15 November 2006).

74 A new piece of legislation was due to be adopted in early January 2007: The Mutual Assistance in Criminal Matters Act 2007 (Samoa).

75 International Criminal Court Bill 2006 (on file with the author), which would later be adopted as International Criminal Court Act 2007 (Samoa).

76 See for example the provisions of the International Criminal Court Bill 2006, Part II, which differ from the Commonwealth Model Act in terms of the sentences envisaged for genocide, crimes against humanity and war crimes.

detailed analysis of the implementing legislation, but Samoa's example is one which merits greater attention in the context of regionalisation of ICC implementation as the final outcome draws upon the three approaches outlined above. Samoa is, therefore, a good case study in order to see how regionalisation can work in practice.

VIII CONCLUSION

If the aim when adopting ICC legislation is to have a good piece of implementing legislation which fully meets a state's obligations under the Rome Statute and also enables it to effectively investigate and prosecute crimes falling under the ICC's jurisdiction, then alternatives to the "one state one Act" model should be sought. This would guarantee that more states enact legislation which would have been unable otherwise to do so. If regionalisation of ICC-implementing legislation is capable of encouraging states to adopt legislation nationally, then due attention should be paid to its merits and states ought to consider this as an option. The economic argument attached to regionalism is an important incentive to do so. However, an uncritical adherence to a particular country's legislation or to a particular model might outweigh the benefits a regional approach has to offer. As no state is absolutely identical to another, some fine-tuning of regional efforts to meet a state's needs may be necessary. However, the light monitoring, which is likely to be the result of consistency in the standards applied by the ICC when deciding on the principle of complementarity, is a powerful tool in favour of regionalisation in ICC implementation. Such mitigation of fragmentation and variation renders implementation efforts at a regional level a valuable option which should be given some thought by states looking to incorporate the ICC regime into national law.