# Strengthening the Understanding of the Rome Statute of the International Criminal Court in Nigeria

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# FOREWORD

In Rome in 1998, participants debated the Rome Statute from very different perspectives. States and civil society, coming from countries with different legal traditions all shared the same sense that this conference was not just an exercise in putting ideas on paper. They knew that the new legal design would profoundly impact the way international relations are governed. Accountability and the rule of law would be the framework.

In Rome, the Nigerian Attorney General and Minister of Justice, H.E. Mr. Alhaji Abdullahi Ibrahim, stressed this new vision of a fundamental link between justice, accountability, and international peace: "We are convinced that the establishment of an effective international criminal system complementary to national criminal justice systems would contribute towards the maintenance of international peace and security."

In this sense, the ICC ("International Criminal Court") is part of a global movement. As UN Secretary-General Ban Ki-Moon stated in 2007: "The rule of law is a fundamental principle on which the United Nations was established. The United Nations goal continues to be a community of nations operating according to rules that promote human rights, human dignity and the settlement of international disputes through peaceful means. International criminal justice, a concept based on the premise that the achievement of justice provides a firmer foundation for lasting peace, has become a defining aspect of the work of the Organization".

For centuries, conflicts were resolved through negotiations without legal constraints. When the world was confronted with massive atrocities, there were essentially two options available: negotiate the impunity of the worst perpetrators or go to war. Idi Amin Dada and "Baby Doc" Duvalier were granted golden exiles, while the countries they ransacked remained engulfed in violence.

In Rome, States created a new and powerful tool to implement such a concept. They created a permanent International Criminal Court, with jurisdiction over genocide, crimes against humanity and war crimes. Substantive law has been codified, integrating the content of the Genocide Convention, the Geneva Conventions and the remarkable jurisprudence of the *ad hoc* tribunals.

# CRIMINAL RESPONSIBILITY IN THE ERA OF THE INTERNATIONAL CRIMINAL COURT: HISTORY, JURISDICTION, PROSPECTS AND CHALLENGES

*Oluyemi Bamgbose*

## Historical Antecedents of ICC

The history of International Criminal Court (ICC) is a complicated one. The idea of the prosecution of international crimes is an old one. Little incentive exists for a state to be interested in prosecuting its nationals for crimes perpetrated against the people of another state especially one with which it is at war. This is more so where the perpetrators are political leaders. No justice is also foreseen where a leader in an oppressive regime perpetrates heinous crimes against the humanity of the citizens as such leaders are usually in control of their nations' judicial systems.

The first true International Criminal Court dates back to 1474. At that period, Peter Von Hagenbach, a military officer, appointed by Duke of Burgundy was tried and condemned to death by twenty seven judges for atrocities against civilians committed by his troops. After World War I, the possibility of establishing an International Criminal Court was considered but was faced with great opposition. Some reasons for the initial proposal of an International Criminal Court were to ensure accountability for international crimes; deter the commission of international crimes; lessen the image of war crimes trials as victors' justice; find solutions to those atrocities committed against mankind; and maintain peace and world stability.

## Attempts to Establish an ICC

In 1942, the Allied Powers established the United Nations War Crimes Commission (UNWCC). It failed. Reasons for its failure included political consideration, insufficient/incomplete data, insufficient fund, inadequate staff, little support and lack of political influence because the commission was comprised almost entirely of representatives from exiled governments possessing only limited powers after World War II.

Following World War II, the experiences of the Nuremberg and Tokyo trials led United Nations (UN) members to revisit the issue of a permanent International Criminal Court. The establishment of the Nuremberg and Tokyo tribunals was as a result of the criticism of German deficiencies in prosecuting and punishing the war crimes committed between 1914 and 1918. In 1945, Allied Powers proceeded under the relevant Hague and earlier Geneva Convention with no explicit penal provisions. The Nuremberg and Tokyo Tribunals were set up in 1946. This only signalled to the world that the behaviour of the Nazis was unacceptable .The trial was open to criticism as a biased reflection of victor's justice. However the two courts were the starting point for the prosecution of various international crimes.

During and after these tribunals, the international community began to recognize that a permanent tribunal would be necessary to deal with such outrages should they occur in the future. With the establishment of the United Nations, the international community considered that the creation of the ICC was feasible. In fact the UN commissioned a study in 1948 to explore the possibility of establishing a permanent International Criminal Court. This was in form of the International Law Commission (ILC) which found, during one of its sessions between 1949 and 1950, that such a court was desirable and possible.

The ILC was mandated by the UN General Assembly to prepare a draft Statute for the ICC but this effort was abandoned due to opposition from powerful states on both sides of the Cold War. The event repeated itself between 1951 and 1953 when the draft schedules for the ICC were submitted. For instance, Russia (Old Soviet Union) and the United States of America felt that their sovereignty might be compromised by such a court. France was at that time the only permanent member of the UN Security Council that supported the formation of an ICC.[1]

After this period, little progress was made for many decades on the creation of an ICC and the Cold War was one major factor that hindered its progress, as the international community was so preoccupied with the war. During this period, serious violations of humanitarian laws continued but there was no international institution to punish offenders.[2] For example, neither the activities of Pol Pot's

[1]Basiouni MC. ,Crimes Against Humanity in International Law,Dordrecht ,Martins Nijhoff Publishers 1992, p.4

[2] McPherson BF., Building an International Criminal Court for the 21st Century; in Cornell International Law Journal 1998 ,p.11



regime in Cambodia nor Iraq's use of poison gas against Kurds was punished at that time. However the issue of Iraq is now before a Special Court.

After the Cold War and with the lessening of geopolitical tensions towards the end of the 1980s, the international community awoke to the need for the constitution of an ICC.[3] In 1989, the UN requested the ILC to consider the question of whether an ICC would be feasible or desirable. .In 1992 the report on this issue was examined and later that year a working group was established to look into the issue. It is worthy of note that the disintegration of the former Yugoslavia and the genocide in Rwanda in 1994 provided dramatic confirmation that an International Criminal Court was indeed still needed and urgently too. [4]

Between 1993 and 1994, the United Nations Security Council acting under Chapter VII of the Charter of the United Nations decided to deal with the gross violations of humanitarian law that occurred in former Yugoslavia and Rwanda. This was because there was no international framework in place to enforce international humanitarian law against the offenders and, as many international observers recognised, the nations involved could not be left to prosecute the offenders on their own. The effect of the step taken by the UN Security Council was the establishment of Ad hoc Tribunals to prosecute the perpetrators. This was noted to be a significant step in the prosecution of international crimes. As noted by Goldstones who was the original Chief Prosecutor for both International Tribunals, this was the first real international attempts to enforce international humanitarian law.[5]

Though the creation of the above Tribunals was laudable and their decisions important as precedents, it was still obvious that a permanent international court would be necessary to deal with such offences. The reasons were that establishing different tribunals for each incident would be expensive and time-consuming. Thus it was reasoned that this could be avoided and a permanent ICC would be able to deal with smaller scale incidents which by themselves would not warrant the setting up of a Tribunal. In addition, it was discovered that some problems that arose at

[3] Gilmore Williams,The Proposed ICC : Recent Developments . 5 Transnational Law and Contemporary Problems 1995, p.263-264

[4]Ferrance BB., An ICC: A Step Journey to World Peace. Volume 2. Keavia Publication 1950

[5] Akinseye George Y., The ICC:An Introduction to the Rome Statute.In Essays in Honour of Hon. Justice Eugene Ubaezonu JCA. Ibadan Fourth Dimension Publishers 2002, p.503

the Yugoslavia tribunal, such as obtaining custody of those indicted, would be avoided with the existence of a permanent ICC. The Yugoslavia and Rwanda Tribunals significantly affected the development of a Statute for a permanent ICC. Despite their shortcomings, it is clear that the Tribunals proved that the international prosecution of gross violations of international law is workable.[6] Therefore, in 1993, the UN General Assembly requested that as a matter of priority the International Law Commission (ILC) create a draft statute for a permanent ICC by July 1994.[7]

It is apt to state that between the request of the UN General Assembly in 1993 and the final adoption of the Rome Statute in 1998, several committees were set up and several sessions convened. At the Rome conference, there were some disagreements with some provisions relating to jurisdiction and prosecutorial power.[8] The United States of America was in the forefront of such disagreements.

**Birth of the International Criminal Court**

At the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome Conference) held in Rome between June 15 and July 17 1998, the International Criminal Court (hereinafter referred to as ICC) came into existence pursuant to Article 1 of the Rome Statute of the International Criminal Court (hereinafter referred to as Rome Statute.) The Rome Statute was adopted on July 17, 1998. In attendance at the conference were 160 States out of which 47 were from Africa. At the conference, the Secretary General of the United Nations, Kofi Annan, made the following remarkable statement:

> There can be no global justice unless the worst of crimes – crimes against humanity – are subject to the law. In this age more than ever, we recognize that the crime of genocide against one people truly is an assault on us all – a crime against humanity. The establishment of an International Criminal Court will ensure that humanity's response will be swift and will be just.



On that day, the Statute was opened for signature by all states in Rome at the headquarters of the Food and Agriculture Organisation of the United Nations. Ten Countries signed on the first day, out of which seven were from Africa. Thereafter, pursuant to Article 125 of the Rome Statute, the Statute was opened for signature for all State Parties at the Ministry of Foreign Affairs in Italy until 17 October 1998 and thereafter opened for signature in New York, at United Nations Headquarters until December 31, 2000.[9]

Article 126 provides that the Statute will enter into force only after the deposit of 60 instruments of ratification with the Secretary General of the United Nations. By December 31, 2000, the last day on which the Rome Statute was opened for signature,[10] 139 Countries[11] had signed. Nigeria[12] signed the Rome Statute on June 1, 2000 and delivered her instrument of ratification on September 27, 2001. On April 11, 2002, ten governments ratified the Rome Statute, bringing the total number of ratifications to 66, well above the 60 needed to launch the Court.

With this milestone and pursuant to Article 126(2) which states as follows:

> "for each State ratifying, accepting, approving or acceding to this Statute after the deposit of the 60th instrument of ratification, acceptance, approval or occasion, the Statute shall enter into force on the first day of the month after 60th day following the deposit by such State of its instrument of ratification, acceptance, approval or accession," the Rome Statute entered into force on July 1, 2002, having crossed the threshold requirement of 60 ratifications.[13]

Thus, the International Criminal Court is the first treaty-based independent and permanent court.[14]

The establishment procedure for the ICC differed from the ICTY and the ICTR which were creations of United Nations Security Council resolutions[15] and the Special Courts which were creations of negotiations between the Secretary General and the Government of nations[16] affected by crimes of international concern.

## The Jurisdiction of the ICC

As a general rule, international agreements bind only the parties to them.[17] Therefore, by virtue of Article 12 of the Rome Statute, a State which becomes a party accepts the jurisdiction of the Court. There is, however, controversy as to whether the jurisdiction of the ICC should extend to nationals of States who are not parties to the Rome Statute.[18] This controversy seems resolved by Article 12(3) of the Rome Statute which allows the ICC to exercise jurisdiction if a State which is not a party to the Statute accepts the jurisdiction of the Court as required by the Statute.

The ICC may exercise its jurisdiction with respect to a crime referred to in Article 5 of the Statute where such a crime is referred to the Prosecutor by a State party or where such a crime is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations or the Prosecutor initiates an investigation in respect of such a crime.[19]

[14] Rome Statute, Preamble

[15] The ICTY being the first to be created after the second world war was established by UN Security Council Resolution 827 of May 1993 adopted unanimously by the Security Council at its 3217 meeting .See Res.827, UNSCOR, 48th Year, 1993 SC Res.&Dec.At 29, UN Doc.S/INF/49(1993).This was followed by ICTR, set up by the Security Council Resolution 955 adopted by a vote 13-1-1 by the Security Council at its 3453rd meeting, on 8 November 1994.SC.Res.955,UNSCOR,49th Year, 3453 meeting at 1, UN Doc.S/Res/955(1994)

[16] For instance, the Sierra Court for Sierra Leone was established on 16 January 2002, after a successful negotiation between the Secretary General and the Government of Sierra Leone. See the Decision of 13 March 2004 by the Appeals Chamber on the establishment and jurisdiction of the Special Court of Sierra Leone in the two cases of *Prosecutor v. Morris Kallon*, Case No.SCSL-2004-15-AR72(E); *Prosecutor v.Brimma Bazzy Kamara*-SCSL-2004-16-AR72(E)

[17] Article 34 of the 1969 Vienna Convention

[18] Madeline Morris " *The United States and the ICC: High Crimes and Misconception*" 2001 64 law &Contemporary Problem 13. p.3

[19] Rome Statute, Article 13





The Rome Statue vests in the ICC jurisdiction over "most serious crimes of concern to the international community as a whole" namely genocide, crimes against humanity, war crimes and the crime of aggression. The Rome Statute provides definitions of genocide, crimes against humanity and war crimes. A brief discussion of these crimes is necessary to aid clearer understanding of the principles of criminal responsibilities.

## Genocide

The crime of genocide was first defined in the Convention on the Prevention and Punishment of the Crime of Genocide of 1948.[20]

The Convention is the basis for the definition of the crime of genocide as contained in the Rome Statute of the ICC:

> " 'Genocide' means any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> a. Killing members of the group;
> b. Causing serious bodily or mental harm to members of the group;
> c. Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> d. Imposing measures intended to prevent births within the group;
> e. Forcibly transferring children of the group to another group."[21]

An essential element of the crime of genocide is the intent to destroy, in whole or in part, a national, ethnical, racial or religious group. This is what distinguishes genocide from other crimes and not the magnitude of the killing or other acts. Accordingly, while the killing or other acts committed with the intent to destroy a religious group may amount to genocide, whether or not it cut across several ethnic groups, it is doubtful, whether having regard to the provisions of Rome Statute, if the killing or other acts committed with the intent to destroy a professional

[20] Convention on the Prevention and Punishment of the Crime of Genocide, Article 2

[21] Rome Statute , Article 6

group on political ground will constitute genocide for which an individual, say a superior commander, could be criminally responsible. For instance, the Darfur crisis in Sudan, when it comes to be determined at the ICC may well pose a challenge to the statutory definition of Genocide under the Rome Statute.[22]

## Crimes against humanity

The term "crimes against humanity" originated in the preamble to The Hague Convention IV of 1907 respecting the Laws and Customs of War on Land, which codified the customary law of armed conflict. The crimes were first defined in the Nuremberg Charter.[23] For an act to constitute a crime against humanity, the act must be committed as part of a widespread or systematic attack directed against any civilian population with the knowledge of the attack[24] The Rome Statute identifies a number of acts that can constitute crimes against humanity such as murder, extermination, enslavement, torture, persecution, deportation or forcible transfer of a population, enforced disappearance of persons and apartheid. In addition to these acts, the Statute explicitly identifies rape, sexual slavery, enforced prostitution, forced pregnancy, forced sterilization and other forms of sexual violence as crimes against humanity.[25]

[22] United Nations Security Council Resolution 1593 referred the situation in Darfur to the Prosecutor of ICC. The Darfur crisis which started in 2003 in western Sudan involved two rebel groups- the SLM/A and the JEM representing the agrarian farmers who are non Arabized black African Muslims. In seeking to defeat the rebel movements, the Government of Sudan armed and supported local tribal and other militias known as the "Janjaweed" composed of black African Muslims who herded cattle, camels and other live stocks. Attacks by the Janjaweed on civilian populations in the area have led to the death of tens and thousands of persons in Darfur, a situation which was described on the September 9 2004 by the US Secretary of State in the following word "genocide has been committed in Darfur and the Government of Sudan and the Janjaweed bear responsibility". President Bush echoed the same in July 2005, when he stated that the situation in Darfur was "clearly genocide". See http://www.state.gov/r/pa/ei/bgn/5424.htm

[23] Nuremberg Charter, Article 6(c)

[24] Rome Statute, Preamble to Article 7

[25] Rome Statute, Article 7





## War crimes

For the purpose of the Rome Statute, "war crimes" mean grave breaches of the Geneva Conventions of 12 August 1949[26]; other serious violations of the laws and customs applicable in international armed conflict within the established framework of international law;[27] in case of an armed conflict not of an international character serious violations of Article 3 common to the four Geneva Conventions of 12 August 1949 which include certain acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause[28]; and other serious violations of the laws and customs applicable in armed conflicts not of an international character within the established framework of international law.[29] An interesting feature of this category of crime is that it has relevant sections on international and non-international conflicts.

## Aggression

The exercise of jurisdiction by the Court over the crime of aggression is however conditional on the adoption of a provision in accordance with Articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction. It is conjectured that the inclusion of the crime of aggression in the Statute of the ICC may well be a reason for the lack of will on the part of the United States to ratify the Statute in view of its activities in international politics[30] which she fears may expose her citizens to indictments at the ICC.

## Criminal responsibility

The Rome Statute of the ICC addresses criminal responsibility for the unlawful conduct of an accused and is applicable to all the categories of crimes, viz., genocide, crimes against humanity, war crimes and the crime of aggression. In order to vest in the ICC the jurisdiction over any of the crimes under its Statute, the prosecution

[26] Rome Statute, Article 8(2)(a)

[27] Rome Statute, Article 8(2)(b)

[28] Rome Statute, Article 8 (2)(c)

[29] Rome Statute, Article 8 (2)(e)

[30] For instance recent attack against Iraq.

team has a duty to demonstrate that the accused person is either individually responsible[31] for the crime or he is responsible as a commander or a superior[32] otherwise known as command responsibility.

**Individual criminal responsibility**

To demonstrate the individual criminal culpability of an accused, it has to be proven that the accused

:

(a) Commits such a crime, whether as an individual jointly with another or through another person, regardless of whether that other person is criminally responsible;

(b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;

(c) For the purpose of facilitating the commission of such a crime, aids, abets, or otherwise assists in its commission, including providing the means for its commission;

(d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
   (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
   (ii) Be made in the knowledge of the intention of the group to commit the crime;

(e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;

[31] Rome Statute, Article 25(2)
[32] Rome Statute, Article 28



(f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the crime purpose.[33]

The foregoing provisions have benefited from the experience of the International Criminal Tribunal for the former Republic of Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) and are clear improvements on their respective provisions on individual criminal responsibility. For instance, Article 7(1) of the ICTY, also mirrored by Article 6(1) of the ICTR, merely provides that "a person, who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime... shall be individually responsible for the crime." Hence by logical inference, the provisions of Article 25(3) (d)[34], Article 25(3) (e), and Article 25(3) (f) of the Rome Statute are new statutory additions to the principle of individual criminal responsibility as understood in international criminal justice before the coming into effect of the Rome Statutes of the ICC.

By virtue of the principle of mutual judicial guidance, the ICC will benefit from the interpretation offered by the jurisprudence of the ICTY and the ICTR on the principle of individual criminal responsibility. The available jurisprudence discussed below has held that participation of the accused need not cover cumulatively all the forms or stages of the crime but any one or more of them will suffice for the establishment of culpability.[35]

[33] Rome Statute, Article 25(3)
[34] *Ibid*. This provision essentially relates to the doctrine of Joint Criminal Enterprise (JCE), and it is not expressly indicated by the Statutes of the ICTY and ICTR. It is however noteworthy that the jurisprudence of the ICTR and ICTY which by way of mutual judicial guidance will apply to the ICC recognizes that participation under Article 7(1) of the ICTY and Article 6(1) of the ICTR, depending on circumstances, may amount to Joint Criminal Enterprise. See note in 39
[35] *The Prosecutor v.Jean Paul Akayesu*, Case No.ICTR-96-4-T, Trial Chamber Judgment (hereinafter referred to as *Akayesu* Trial Chambers Judgment), dated 2 September 1998, para.473;*The Prosecutor v.Ruzindana and Kayishema*, Case No.ICTR-95-1-T, Trial Chambers Judgment, dated 21 May 1999, paras.194-197

"Commits"[36]

The word "commits" is not limited to the Accused person's physical and direct participation in any or all the crimes charged.[37] "Commits" covers not only situations where the Accused either alone or jointly with others physically performs all the requisite elements of the *actus reus* of the crime, but where the Accused engenders a culpable omission in violation of criminal law.[38]

The Accused must have possessed the *mens rea* of the relevant crime, or he or she must have been aware of the substantial likelihood that a crime would occur as a consequence of his/her act or omission.[39]

"Orders"[40]

A person may also incur individual criminal responsibility by ordering the commission of one of the crimes referred to in the Rome Statute. The word "orders" has been interpreted in the jurisprudence of the ICTY and ICTR as suggestive of a superior-subordinate relationship between the person giving the order and the one executing it.[41] Essentially, the *actus reus* of "orders" is that a person in a position of authority uses it to convince another to commit an offence.[42] This authority may be established via particular facts.[43] It is sufficient for these facts to indicate the implied existence of a superior-subordinate relationship.[44]

[36] Rome Statute, Article 25(3)(a)
[37] *ibid*
[38] *The Prosecutor v. Alesksovski*, Case. No.IT-95-14/I, Appeal Chambers Judgment (hereinafter referred to as *Aleskovski* Appeal Chambers Judgment), dated 24 March 2000, paras.162-164; *The Prosecutor v.Bagilishema*, Case No.ICTR-95-IA-T, Trial Chamber Judgment, dated 7 June 2001, para.243;*The Prosecutor v.Kvocka et al.*, Case No.IT-98-30/I, Trial Chamber Judgment (hereinafter referred to as *Kvocka* Trial Chambers Judgment), dated 2 November 2001, para.243
[39] *Tadic* Appeals Chamber Judgment, para.229
[40] Rome Statute, Article 25(3)(b)
[41] *The Prosecutor v. Semanza*, Case No.ICTR-97-20-A, Appeals Chamber Judgment ( hereinafter reffered to as *Semanza* Appeals Chamber Judgment), dated 20 May 2005, para.360 (*citing* Semanza Trial Chamber Judgment, para.382)
[42] *Semanza* Appeals Chamber Judgment, para. 361 (*citing The Prosecutor v.Kordic and Cerkez*, Case No. IT-95-14/2, Appeals Chamber Judgment, dated 17 December 2004 ( hereinafter referred to as *Kordic* Appeals Chamber Judgment), para.28
[43] *Akayesu* Trial Chambers Judgment, para.483
[44] *Semanza* Appeals Chamber Judgment, para.361





No formal relationship between the accused and the perpetrator is required.[45] The authority creating the kind of superior-subordinate relationship may also be of a purely temporary nature.[46] Under some circumstances, the existence of sufficient authority may be established by proving that the Accused is related to those in power.[47]

Ordering requires proof that one or more persons other than the Accused must have performed the *actus reus* of the relevant crime as a perpetrator, with or without the participation of the Accused. The perpetrator must have acted in execution of or otherwise in furtherance of an express or implied order given by the Accused to the perpetrator as a subordinate or other person over whom the Accused possessed *de jure* or *de facto* authority to order.[48] More over, the Accused must have been aware of the substantial likelihood that the crime committed would be a consequence of the implementation of the order.[49]

"Aids and abets"[50]

In the jurisprudence of the ICTY, the *Kvocka Trial Judgment* held that an aider and abettor to specific intent crime only needs to have knowledge of the perpetrator's full intent but need not share the intent.

[45] *Semanza* Appeals Chamber Judgment, para. 361( citing *Kordic* Appeals Chamber Judgment, para.28)
[46] *Semanza* Appeals Chamber Judgment, para. 363
[47] *The Prosecutor v.Alfred Musema*, Case No.ICTR-96-13-T,Trial Chamber Judgment, dated 27 January 2000, para.142 ( citing *The Government Commissioner of the General Tribunal of the Military Government of the French Zone of Occupation in Germany v.Herman Roechling and others*, LAW REPORTS, VOL.XIV, Appendix B,paras.1092 and 1106 (finding civilian industrial leaders guilty of failing to take action against abuses committed by members of the Gestapo, even though the Accused only had *de facto* power in that he had no official authority to issue orders to Gestapo personnel))
[48] *The Prosecutor v.Kordic and Cerkez*, Case No. IT-95-14/2, Trial Chamber Judgment (hereinafter referred to as *Kordic* Trial Chambers Judgment), para.388
[49] Rome Statute, Article 25(3) (b). *The Prosecutor v. Blaskic* , Case No.IT-95-14, Trial Chamber Judgment ( hereinafter referred *Blaskic* Trial Chamber Judgment) to as , paras.278, 282; *Kordic* Trial Chamber Judgment,paras.385,388
[50] Rome Statute, Article 25(3)(c)

Aiding and abetting requires that the Accused, by his or her conduct, must have directly made a significant or substantial contribution to the commission of the *actus reus* of the relevant crime performed by another person.[51] The Accused must have known that his or her conduct would substantially contribute to the commission of the *actus reus* of a crime being perpetrated by another person, or have been aware of the substantial likelihood that this would be a consequence of his or her conduct.[52]

The Accused must be aware of the essential elements of the crime being committed,[53] including the perpetrator's *mens rea* and take the conscious decision to act in the knowledge that he thereby supports the commission of the crime.[54]

**"Acting within a common purpose"[55]**

The jurisprudence of the ICTR and the ICTY recognizes that participation under Article 6(1) and 7(1) respectively includes modes of participating in commission of crimes where a plurality of persons having a common criminal purpose embarks on criminal activity that is then carried out either jointly or by some members of this plurality of persons.[56]

[51] *Tadic* Appeals Chamber Judgment, para.229; *Blaskic* Trial Chamber Judgment, paras.283-284; *Kordic* Trial Chamber Judgment,para.399

[52] *Blaskic* Trial Chamber Judgment, paras.286

[53] *Aleskovski* Appeal Chambers Judgment,paras.163-164; *Kordic* Trial Chamber Judgment,para.400

[54] *The Prosecutor v. Kunarac et al.*, Case No.IT-96-23/1, Trial Chambers Judgment, dated 22 February 2001, para.392

[55] Rome Statute, Article 25(3)(d)

[56] . See *The Prosecutor v.Ntakirutimana*, Case Nos. ICTR-96-10-A and ICTR-96-17-A, Appeals Chamber Judgment (hereinafter referred to as *Ntakirutimana* Appeal Chambers Judgment) dated 13 December 2004, para.468; *The Prosecutor v. Rwamakuba*, Case No.ICTR-98-44-AR72.4, Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide, dated 22 October 2004, para.31. See also the ICTY case of *The Prosecutor v. Dusko Tadic*, Case No.IT-94-1-A, Appeal Chambers Judgment (hereinafter referred to as *Tadic* Appeal Chambers Judgment) dated 15 July, 1999, paras.191-192, where the Appeals Chamber explained the rationale for its finding that participation in Article 7(1) of the Statute of the ICTY encompasses participation in a joint criminal enterprise as follows: "...{This} is not only dictated by the object and purpose of the Statute, but is also warranted by the very nature of many international crimes which are committed most commonly in war times situations. Most times, these crimes do not result from the criminal propensity of single individuals but constitute manifestations of collective criminality..."





There are three basic requirements of this form of participation that must be proven. First it must be proven that two or more individuals were, in one way or the other, involved together in the commission of a crime. These persons need not be organized in military, political or administrative structures.[57]

Second, it must be proven that there existed a common design or plan constituting or including the commission of a crime. The plan, design or purpose need not have been previously arranged or formulated. The common plan or purpose may materialize extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put in effect a joint enterprise.[58]

Finally it must be proven that the Accused participated in the common design or plan and was thereby linked and related to the commission of the crimes. The Accused's participation need not involve the physical perpetration of the crime, as such, but may take the form of assistance in or contribution to, the execution of the common plan or purpose.[59]

The *mens rea* differs according to the category of joint criminal enterprise involved. The first category includes those cases where all perpetrators, acting pursuant to a common plan, possess the same criminal intention, for instance, the formulation of a plan to kill; although their methods of participation may differ. Under this category, it has to be proven that the Accused intended to commit a crime, this intent being shared by all other individuals involved in the crime being perpetrated.[60] In cases where the participants did not carry out, or cannot be proven to have physically carried out the *actus reus* of the common plan (e.g. the killing) individual criminal responsibility could be imputed if (a) the Accused voluntarily participated in one aspect of the common design (e.g., by inflicting a non-fatal violence upon the victim, or by providing material assistance to or facilitating the activities of his co-

[57] *Ntakirutimana* Appeal Chambers Judgment, para.466; *Tadic* Appeal Chambers Judgment,para.227(i)

[58] *Ntakirutimana* Appeal Chambers Judgment, para.466; *Tadic* Appeal Chambers Judgment,para.227(ii)

[59] *Ntakirutimana* Appeal Chambers Judgment, para.466; *Tadic* Appeal Chambers Judgment,para.227(iii)

[60] *Ntakirutimana* Appeal Chambers Judgment, para.467; *Tadic* Appeal Chambers Judgment,para.228

perpetrators; and (b) the accused, even if not personally carrying out the killing, nevertheless intended the result.[61]

The second category, essentially a variant of the first, involves the accused participating in a concerted plan or system, such as a system of ill-treatment or repression. The Appeals Chamber has described this category as embracing the so-called "concentration camp" cases.[62] Invoking the decisions of the World War II military courts, the Appeals Chamber has held that the notion of common criminal purpose was applied to instances where the offences charged were alleged to have been committed by members of military and administrative units, such as those running concentration camps, i.e. by groups of persons acting pursuant to a concerted plan.[63] The requisite *mens rea* for this form of joint criminal responsibility comprises (a) knowledge or awareness of the system, and (b) the intent to further the common concerted design of ill treatment.[64]

The third category of cases involves a common design to pursue one course of conduct where one of the perpetrators committed an act which, while outside the common design was nevertheless a natural and foreseeable consequence of the effecting of the common purpose.[65] Criminal responsibility "may be imputed to all participants within a common criminal enterprise where the risk of death occurring was both a predictable consequence of the execution of the criminal design and the accused was either reckless or indifferent to that risk".[66] To establish criminal responsibility under this category, it needs to be proved that (a) it was foreseeable that such a crime might be perpetrated by one or other members of the group and (b) the accused willingly took the risk.[67]

[61] *Tadic* Appeal Chambers Judgment,para.196
[62] *Tadic* Appeal Chambers Judgment,para.202
[63] *ibid*
[64] *Ntakirutimana* Appeal Chambers Judgment, para.467; *Tadic* Appeal Chambers Judgment,para.203
[65] *Ntakirutimana* Appeal Chambers Judgment, para.467; *Tadic* Appeal Chambers Judgment,para.204
[66] *Tadic* Appeal Chambers Judgment,para.204
[67] *Ntakirutimana* Appeal Chambers Judgment, para.467( citing *Tadic* Appeal Chambers Judgment,paras. 202, 220 and 228





## Responsibility of Commanders and Other Superiors (Command Responsibility)

Aside from individual criminal responsibility, Article 28 of the Rome Statute fixes other grounds of criminal responsibility for commanders and other superiors. It provides as follows:

(a) "A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

(i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

(ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

(b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control as a result of his or her failure to exercise control properly over such subordinates, where:

(i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;

(ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and

(iii) The superior failed to make all necessary and reasonable measures within his or her power to prevent or repress their commission or

> to submit the matter to the competent authorities for investigation and prosecution."[68]

The jurisprudence of the ICTR and the ICTY has recognized that a civilian or a military superior, with or without official status, may be held criminally responsible for offences committed by subordinates who are under his or her effective control.[69] The chain of command between a superior and subordinate may be either direct or indirect.[70] In the light of judicial guidance from the jurisprudence of the ICTR and the ICTY, the following three concurrent conditions must be satisfied before a superior may be held criminally responsible for the acts of his or her subordinates:

(i) There existed a superior-subordinate relationship between the person against whom the charge is directed and the perpetrators of the offence;

(ii) The superior knew or had reason to know that the criminal act was about to be or had been committed;

(iii) The superior failed to exercise effective control to prevent the criminal act or to punish the perpetrators thereof.[71]

The test for assessing a superior-subordinate relationship is the existence of a *dejure* or *de facto* hierarchical chain of authority, where the accused exercised effective control over his or her subordinates as of the time of the commission of the offence. The recognized relationship is not restricted to military hierarchy, but

[68] Rome Statute, Article 28(a) and (b)

[69] *The Prosecutor v.Semanza Laurent*, Case No.ICTR-97-20-T, Trial Chambers Judgment (hereinafter referred to as *Semanza* Trial Chamber Judgment), dated 15 May, 2003, para.400; *The Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-T, Trial Chambers Judgment, dated 21 May 1999, para.294; *The Prosecutor v. Alfred Musema*, Case No. ICTR-96-13-A, Trial Chambers Judgment, dated 27 January 2000, para.148; *The Prosecutor v. Zejnil Delalic et al.*, (*Celebici* case), Case No.IT-96-21-T,Trial Chamber Judgment, dated 16 November 1998, para192-196

[70] *Semanza* Trial Chamber Judgment, para.400

[71] *Celebici* Appeals Chamber Judgment, paras.189-198,225-226,238-239,256 and 263; *Blaskic* Trial Chambers Judgment, para.294; *Aleksovski* Trial Chambers Judgment, para.69;*Kordic* Trial Chamber Judgment,para.401; *Kayishema and Ruzindana* Trial Chamber Judgment, paras217-231; *Semanza* Trial Chamber Judgment,para.400; *Niyitegeka* Trial Chamber Judgment, para.477.





may apply to civilian authorities as well.[72] By effective control is meant that the superior, whether a military commander or a civilian leader, must have possessed the material ability, either *de jure* or *de facto*, to prevent or punish offences committed by subordinates. The test to assess a superior-subordinate relationship, in the words of the Appeal Chambers in *Bagilishema* is as follows:

> as long as a superior has effective control over subordinates, to the extent that he can prevent them from committing crimes or punish them after they committed the crimes, he would be held responsible for the commission of the crimes if he failed to exercise the such ability of control.[73]

In accordance with current jurisprudence, a superior will be found to possess, or will be imputed with the requisite *mens rea* sufficient to incur criminal liability, where, the court is satisfied that (1) the superior had actual knowledge, established through direct or circumstantial evidence, that his or her subordinates were committing or either about to commit, or had committed an offence or (2) information was available to the superior which would have put him or her on notice of offences committed by subordinates.[74]

Where it is demonstrated that an individual is a superior with the requisite knowledge, then he or she will incur criminal responsibility only for failure to take "necessary and reasonable measures" to prevent or punish crimes committed by subordinates .Such measures have been described as those within the "material possibility" of the superior, even should the superior lack the "formal legal competence" to take such measures.[75]

In addition, the fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or a superior, whether

[72] *Celebici* Appeals Chamber Judgment,paras.192-193 and 197-198

[73] *The Prosecutor v Bagilishema*, Case No. ICTR-95-1A-T,Trial Chamber Judgment (hereinafter referred to as *Bagilishema* Trial Chamber Judgment), dated 7 June 2001, para.61

[74] *Semanza* Trial Chamber Judgment,para.405; *Bagilishema* Trial Chamber Judgment,para.28; *Kayishema and Ruzindana* Trial Chamber Judgment, para.228; *Celebici* Appeals Chamber Judgment, para.239

[75] *Semanza* Trial Chamber Judgment, para.406; *Kayishema and Ruzindana* Trial Chamber Judgment, para. 302.

military or civilian shall not relieve such person of criminal responsibility unless (a) the person was under a legal obligation to obey orders of the Government or the superior in question; (b) the person did not know that the order was unlawful; and (c) the order was not manifestly unlawful.[76] Article 33(2) provides that the orders to commit genocide or crimes against humanity are manifestly unlawful.

## Defences Available for the Accused at the ICC

The defences available for the Accused at the ICC include insanity, intoxication, self-defence and duress.[77] A mistake of fact or law may also exclude criminal responsibility if it negates the mental element required by the crime.[78] By virtue of the provision under Article 33(1), it appears that a person obeying superior order may be exempted from criminal responsibility provided that (a) the person was under a legal obligation to obey orders of the Government or the superior in question; (b) the person did not know that the order was unlawful; and (c) the order was not manifestly unlawful. Such orders must, however, not be any of the orders to commit genocide or crimes against humanity which the Statute regards as manifestly unlawful.

## Language of the Court

The official languages of the Court shall be Arabic, Chinese, English, French, Russian and Spanish while only English and French shall be the working languages. At the request of any party to a proceeding or a State allowed to intervene in a proceeding, the Court may authorize a language other than English or French to be used by such a party or State.[79]

## Penalties and Sanctions

Subject to the power of review,[80] the ICC may impose penalties on a person convicted of a crime. Such penalties may be any of the following: imprisonment for a specified number of years not exceeding 30 years; a term of life imprisonment;

[76] Rome Statute, Article 33(1)
[77] Rome Statute , Article 31(1)
[78] Rome Statute, Article 32(1)and (2)
[79] Rome Statute, Article 50
[80] Rome Statute, Article 110





and in addition to imprisonment the Court may order a fine or forfeiture of proceeds, property and assets derived from commission of a crime.[81]

## Organs of ICC

The ICC is composed of four organs namely (a) The Presidency; (b) An Appeals Division, a Trial Division and a Pre-trial Division; (c)The Office of the Prosecutor; (d) The Registry.[82]

## The Presidency and Judges

The President and the First and the Second Vice Presidents are elected by an absolute majority of the judges.[83] Subject to the power of the Presidency to propose an increase in the number of judges, the ICC is composed of eighteen judges. In the selection of judges, State Parties are required to take into consideration the need for representation of all the principal legal systems of the world; equitable geographical representation: and a fair representation of female and male judges. Every candidate for election to the ICC shall have established competency in the knowledge and practice of criminal law and procedure or relevant areas of international law such as international humanitarian law and the law of human rights. The judges are elected by secret ballot at a meeting of the Assembly of States convened for that purpose.[84]

## The Chambers

The Chambers is composed of the Appeal Division which consists of the President and four other Judges, The Trial Division of not less than six Judges and the Pre-Trial Division of not less than six Judges.[85] Judges assigned to the Trial and Pre-Trial Divisions are required to serve in those divisions for a period of three years and thereafter until the completion of any case commenced in their Division. Judges assigned to the Appeals Division shall serve in that division for their entire term of office.[86]

[81] Rome Statute, Article 77
[82] Rome Statute, Article 34
[83] Rome Statute, Article38
[84] Rome Statute, Article 36(2)(b)
[85] Rome Statute, Article 39(1)
[86] Rome Statute, Article 39 (3) (a) and (b)

## The Office of The Prosecutor

The Office of the Prosecutor is an independent organ responsible for receiving referrals and substantiated information relating to crimes. The Office examines them and conducts investigation and prosecution before the Court. The Prosecutor who is elected on a full-time basis heads the office with full authority, management and administration of the office. He is assisted by a deputy Prosecutor who must be of a different nationality .He or she has the power to appoint advisers with legal expertise on specific issues.[87] The present Prosecutor of the ICC is Luis Moreno Ocampo, who was previously an Argentinean State Prosecutor.[88]

## The Registry

The Registry is responsible for the non-judicial aspect of the administration and servicing of the Court. The Office is headed by Registrar who is the principal administrative officer of the Court and who exercises the function under the President of the Court. The Registrar is elected by the Judges for a term of five years and he/she is supported by a Deputy Registrar. The Registrar is also responsible for the setting up of a Victim and Witness Unit in the Registry to provide in consultation with the Office of the Prosecutor, protective measures, security arrangements, counselling and other assistance for witnesses.[89]

## Prospects and Challenges

The way and manner the ICC was created as well as the content of the Rome Statute, the constitutive instrument of the ICC, gives room to certain prospects and challenges which have implications for the implementation of the mandate of the Court. Some of these are highlighted below.

### Prospects

#### *1. Commitment towards Universal Justice*

The abiding presence of a judicial mechanism of an international status such as the ICC clearly evidences global commitment towards universal justice. For instance,

[87] Rome Statute, Article 42.
[88] Human Rights Watch , www.hrw.org
[89] Rome Statute, Article 43





the ICTY may be regarded as a vehicle of justice for the former Republic of Yugoslavia and the ICTR for the Rwandese, because these two courts have distinct mandates designed to address conditions and circumstances of specific conflicts. The ICJ is only responsive to conflicts involving nations.[90] On the other hand, the ICC, by being able to hold individuals from any part of the world responsible for crimes of international concern, represents global commitment towards justice for victims of crimes of international concern that may be found in all the nations of the world. Consequently, the establishment of the ICC will stop the proliferation of ad hoc Tribunals.

#### *2. Inspiring Collective Responsibility*

Unlike the ICTY and ICTR which, being creations of the Security Council Resolutions, are answerable to the Security Council in the operation and implementation of their Statutes, the ICC is not.[91] Therefore, the ICC is free from the Security Council politics of veto. The establishment of the assembly of states parties[92] under the Rome Statute of the ICC shall increase the awareness of citizens of nations about the activities of ICC and reinforce the belief that global peace is only attainable through collective responsibility and support by all nations of the world.[93]

#### *3. Useful Operational Definitions*

A feature of the Rome Statute of the ICC with significant implication for individual and command responsibility is Article 7 which offers statutory definitions for different phrases used in describing what may amount to crimes against humanity. This is a useful improvement on the Statutes of ICTY and the ICTR, neither of which contains the same. Perhaps the greatest prospect of this Article lies in the fact that it will guide the prosecution in the framing of its indictment to demonstrate individual or superior responsibility for crimes.

#### *4. Broad concept of Criminal Responsibility*

With a broad concept of criminal responsibility, covering individual, command and other superior responsibilities, it appears that it is becoming increasingly worthless

[90] Rome Statute, Article 25(4) provides as follows: "No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law."
[91] Rome Statute, Article 112
[92] *ibid*
[93] Rome Statute, Preambles

for any individual, whether a military commander or not, associated with crimes of international concern to hide under the defence of "helplessness in the face of situations". The concepts of aiders and abetters, participants in joint criminal enterprise, superior and subordinate relationship clearly demonstrate that the global community demands of individuals or persons exercising control, a responsibility to ensure that the caucuses, political groups, associations, networks, clubs to which they belong are far away from crimes which stand punishable under the Rome Statute.

### 5. *Irrelevancy of Official Capacity and Traditional Concepts*

Article 27 of the Rome Statute demonstrates the irrelevance of official capacity and traditional concepts such as immunities of person, pardon during accords and peace process under national or international law. The implication of this is that no single nation can decide to forgive or forget crimes of international concerns committed within its shores.[94] This is further reinforced by Article 29 of the same Statute which provides in clear terms that the crimes within the jurisdiction of the ICC shall not be subject to any statute of limitations.

### 6. *Broad Prosecutorial Powers*

Although the Rome Statute of the ICC operates on the principle that it is the primary responsibility of states to prosecute crimes under international law,[95] the ICC will exercise its jurisdiction if states have chosen not to proceed, if they are inactive or unwilling to pursue a case. Article 15(1) of the Rome Statute provides that "the prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court."

[94] Rome Statute, Article 27(1) and (2) provide respectively: "This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence. (2) Immunities or special procedural rules which may attach to the official capacity of a person , whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

[95] Rome Statute, Preamble





### 7. *Reparative Justice*

Finally, one great prospect for universal criminal justice relates to the provisions under the Rome Statute which demonstrate the international commitment towards rehabilitative justice for victims of crimes. Unlike the ICTY and ICTR which merely deliver penal justice, the effect of Articles 75[96] and 79[97] of the Rome Statute of the ICC is that the post-crime situations of the victims and their families is considered as an international concern deserving reparations.

## Challenges

### 1. *No-ratification by some States*

It is noteworthy that in spite of the popular appeal of the ICC, the United States of America did not deliver her instrument of ratification.[98] This may well pose a major challenge to the implementation of the Rome Statute of the ICC as it may be starved of fund and the logistics which the political will of the nation of America may influence. The failure of the United States of America to ratify the Rome Statute is also a poor reflection of the commitment of that nation towards human rights and humanitarian laws. Often, the activities of the United States aimed at the rule of law and the fight against terrorism in nations of the world have been criticized as amounting to aggression. It is respectfully submitted that these aims will be better achieved if the United States submits its passion, will and support to the implementation of the letter and spirit of the Rome Statute.

### 2. *Indictment procedure against incumbent leaders*

It appears that there is no clear procedure on how to initiate indictment procedure against incumbent leaders who are perpetrators of crimes of international concern. Apparently, aggression by one state against the alleged perpetrators in another

[96] Rome Statute, Article 75 generally provides for reparations to victims.

[97] Rome Statute, Article 79 promises the establishment of a Trust Fund for the victims

[98] In May 2002 the Bush administration chose to "unsign" the statute, a practice that is foreign to the Vienna Convention on the Law of Treaties. Usually when a nation has signed a treaty and does not wish to go ahead with ratification, it simply lets it languish without ever depositing the instruments for ratification. The Bush administration sent a formal notification to Secretary General Kofi Annan stating that "the United States has no legal obligations arising from its signature on December 31, 2000.For further reading in this regard see Emily Krasnor, "*American Disengagement with the International Criminal Court: Undermining International Justice and U.S. Foreign Policy Goals*" Online Journal of Peace and Conflict Resolution (OJPCR) ISSN 1522-211X.

state is out of it now, as same will be punishable under the Statute. In addition, the Security Council cannot so resolve to infringe on the sovereignty of a nation without its proceedings of veto and the politics associated with it as basis. A negative trend which may result from this lack of statutory procedure under the Rome Statute is that perpetrators of these crimes, especially those in positions of leadership will be unwilling to relinquish power for the fear of indictment at the ICC; therefore, this may mean more misery for victims under their control. No doubt, making such incumbent leaders answerable for the crimes committed by them while still in office remains the greatest challenge of the ICC.

### 3. *Reviewing of National laws may take a longer time*

The principle of complementariness recognizes that states have primary responsibility towards the workability of the ICC provisions. This principle appears to suggest that states that ratified the Rome Statute should review their national laws to ensure compatibility with the Rome Statute. Genocide, war crimes and crimes against humanity should be incorporated into the national laws, while national laws that allow for immunity should be reviewed. State signatories will also be expected to impose penalties under their national laws which reflect the seriousness of these crimes. However, efforts to ensure this will be quite challenging considering the time, fund and level of awareness that legislative amendments often demand. It is also unlikely that review of legislation will be taken seriously by the leaders of states where wrongs of international concern are being committed.

### 4. *Construing certain orders as manifestly unlawful*

The Rome Statute pursuant to Article 5 (1) lists crimes within the jurisdiction of the ICC as genocide, crimes against humanity, war crimes, and aggression. However, Article 33(2) of the Rome Statute excludes war crimes and aggression from its list of crimes regarded as manifestly unlawful. The effect of this provision is that crimes such as War crimes and Aggression seem to be trivialized as not being manifestly unlawful. It is respectfully submitted that whereas it is debatable whether an act of aggression is manifestly unlawful, the same can not however be said of war crimes. Under the Rome Statute, war crimes comprise a list of crimes of no less effect or significance in international humanitarian law than the crimes of genocide and crimes against humanity mentioned under Article 33(2).

### 5. *Exclusion of Child Offenders*

Article 26 provides that "the Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime." This





provision exempts child offenders from individual criminal responsibility under the Rome Statute of ICC. Although most wars are adult wars into which children are often conscripted, it is not unlikely that children may now in circumstances of wars bear great responsibility. Therefore it would appear that without juvenile accountability of some sort in an alternative child-friendly mechanism, the applicability of Article 26 of the Rome Statute may exempt victims of activities of child from the benefits in the operation of Article 75 which deals with reparation of victims.

### 6. *Determination of nature of Conflict*

A major challenge for the applicability of Article 8(2) (c) of the Rome Statute of the ICC is how to distinguish armed conflict not of international character from internal disturbances and tensions as most internal disturbances particularly in this part of the world are characterized by the use of heavy ammunitions and commands.[99]

### 7. *Limited Jurisdiction*

The lack of jurisdiction of the ICC over non-signatory States may hamper effective functioning.

## Recommendations

### 1. *Well equipped facilities and Infrastructures*

A major challenge faced by the ICTR at its initial stage was inadequate facilities and infrastructures. It is recommended that the ICC should have well equipped facilities and infrastructure for effective take-off of its activities.

### 2. *Interpreters with Legal Training*

Although the Rome Statute specifies the official languages and working languages of the ICC and provides for interpretation of languages, it is recommended that these interpreters be trained legally. This will contribute greatly to the integrity of the proceedings at the ICC.

[99] Rome Statute, Article (2) (d)

*3. Well-Defined Responsibilities*

The responsibilities of the Judges, Prosecutor and the Registrar in certain areas of administration appear interwoven and may create clash of organs.[100] It is recommended that the duties in such regards should be well defined to avoid clashes.

***4. Need for more Human Rights advocacy at the national level***

Like war, justice begins in the heart of men; it is not merely achievable by the signing of Treaties or by establishment of a Court. For universal justice to be attainable, enlightenment of the citizens of nations remains a veritable tool. Therefore, human rights and development advocates at the national level must be empowered to increase awareness about the ICC and ensure that national criminal law system becomes compatible with the Rome Statute.

***5. Need for Domestication of the Provisions of the Rome Statute***

The Rome Statute in its preamble enjoins signatory states to ensure and facilitate the exercise of the ICC's criminal jurisdiction over those responsible for international crimes. This can only be possible by domesticating the provisions of the Statute. It is commendable that at present in Nigeria there is a progressive attitude towards the domestication of International Instruments. It is recommended that in the same spirit, the provisions of the Rome Statute should be domesticated in Nigeria.

## Conclusion

The Rome Statute of the International Criminal Court represents true universal attempts to codify international humanitarian laws and vest accountability for criminal responsibility in an independent permanent court. However like every other Statute, for effective implementation, it will require the goodwill of all the ratifying states. It appears rather early to say whether it will fail or not. However, considering its prospects, it could be safely said that the entire world stands to benefit quite a lot if it is allowed to succeed.

[100] Rome Statute, Article 38(3)