THE INTERNATIONAL CRIMINAL COURT (ICC): JURISDICTIONAL BASIS AND STATUS

Abstract

The need for the prosecution of international crimes has long been mooted as far back at the end of World War I. After the conclusion of World War II, the International community was outraged with the atrocities committed by the Nazi and Japanese regimes. Even though it was generally felt that these crimes should be prosecuted, there was no international framework for prosecuting these crimes. On 17 July 1998, a conference of 120 States established the first treaty-based permanent International Criminal Court known as the Rome Statute of the International Criminal Court (ICC) which sets out its jurisdiction. This article therefore examined the jurisdiction of the ICC and the problems confronting the effective implementation of the Rome Statute as well as its domestication in Nigeria. Thus, this article relied heavily on the Rome Statute and most of the findings/results of this article were based on analysis of the Statute. The article found that even though the Rome Statute is significant for prosecution of international crimes, it has not been able to meet its objectives and therefore more is needed to be done by State parties to ensure that the ICC achieves its objectives.

Key words: *International law, Jurisdiction, Court, Crime, International Criminal Court*

1. Introduction

The earliest proposal for the establishment of an international criminal court came soon after the Franco-Prussian war of 1870. In 1873, the demand for the creation of such a court was first put forward by Louis Gabriel Gustave Moynier[1] who noted that "…a treaty was not a law imposed by a superior authority on its subordinates . . . but only a contract whose signatories cannot decree penalties against themselves since there would be no one to implement them. The only reasonable guarantee should lie in the creation of international jurisdiction with the necessary power to compel obedience"[2]. However, because of the concerns by most national governments over State sovereignty, the proposal was not adopted and no further steps were taken in this regard[3]. The next major reference was found in the Treaty of Versailles[4]that was signed after World War I. However, the treaty was not given any effect as all that took place was domestic prosecution in Germany[5]. In 1920, the League of Nations considered and dismissed the idea of an International Criminal Court but the idea was mentioned once again in 1937[6].

After the conclusion of World War II in 1945, both the Nuremberg and Tokyo Tribunals were established by the United Nations General Assembly[7] to investigate and prosecute war crimes

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[1]He was a Swiss Lawyer and Jurist who was active in many charitable organisations in Geneva. He was a co-founder of the "International Committee for Relief to the Wounded" which later became the "International Committee of the Red Cross (ICRC)" after 1876. See http://www.unesco.org/archives/sio/Eng/presentation_print.php?idOrg=1017 accessed 15 September 2014

[2]L Moreno-Ocampo, 'The International Criminal Court: Seeking Global Justice' (2008) 40 CASE W. RES. J. INT'L L. 216

[3]Y K Sabharwal, "The International Criminal Court—Its Role, Tasks and Performance" <http://www.supremecourtofindis.nic.in/.../icc.doc> accessed on 6 June 2015

[4]The Treaty of Versailles was one of the peace treaties at the end of World War I. It ended the state of war between Germany and the Allied Powers. It was signed on 28 June 1919, exactly five years after the assassination of Archduke Franz Ferdinand. <http://europeanhistory.about.com/od/treatyofversailles/p/overtofvers.html>accessed on 6 June 2015

[5] Y K Sabharwal., 'The International Criminal Court—Its Role, Tasks and Performance' (n. 3)

[6] Y K Sabharwal 'The International Criminal Court—Its Role, Tasks and Performance' (n. 3)

[7] The United Nations General Assembly is one of the six principal organs of the United Nations and the only one in which all member nations have equal representation. Its powers are to oversee the budget of the United Nations, appoint the non-permanent members to the Security Council, receive reports from other parts of the United

committed by the Nazi and Japanese regimes during the war[8].These trials were conducted under the relevant Hague[9] and early Geneva Conventions[10] and even though neither contained explicit penal provisions[11], these trials were able to achieve the purpose of signaling to the world that the criminal acts of the Nazi and Japanese regimes were totally unacceptable. These trials conducted by the Allies[12] of the World War II were however criticized because the trials were not based on any clearly defined international laws and the charges against the defendants were only defined as crimes after they were committed. The trials were therefore seen to be invalid[13], biased and a reflection of victors' justice[14].

According to Nicholls[15]' "the Nuremberg trials have not had a very good press. They are often depicted as a form of victors' justice in which people were tried for crimes which did not exist in law when they committed them, such as conspiring to start a war". The heavy criticisms that followed the conclusion of proceedings of the War Crimes Tribunals in Nuremberg and Tokyo in 1948 made the United Nations General Assembly to recognize the need for the establishment of a permanent international court to handle matters related to the kind of crimes that had been witnessed and committed in the course of the war[16]. Accordingly, the United Nations General Assembly gave the International Law Commission (ILC)[17] an assignment of examining the possibility of establishing a permanent international criminal court. Draft statutes were produced in the 1950s but the Cold War[18] made any significant progress impossible[19].In 1989, with the Cold War coming to a close, the ILC's post-Nuremberg and Tokyo project was revived unexpectedly when Trinidad and Tobago approached the General Assembly with the suggestion of the creation of an international judicial forum for drug trafficking prosecutions. In 1990, the ILC submitted a report and even though the report went beyond its limited scope[20], the report was well received and the ILC was encouraged, without a clear mandate, to continue its project. Thus,

Nations and make recommendations in the form of General Assembly Resolutions, See <http://www.un.org/en/ga/about/index.shtml> accessed on 5 June 2015

[8] M. K. Marler, 'The International Criminal Court: Assessing The Jurisdictional Loopholes in The Rome Statute' (1999) 49 Duke Law Journal 827

[9] The Hague Convention IV, Convention Respecting the Laws and Customs of War on Land, <http://www.archive.org/.../hagueconventions00inteuo> accessed on 5 June 2015

[10] The Geneva Convention III, Convention Relative to the Treatment of Prisoners of War <http://www.icrc.org/ihl/INTRO/375> accessed on 5 June 2015

[11] J Dugard, 'Bridging the Gap Between Human Rights and Humanitarian Law: The Punishment of Offenders' (1998) International Review of the Red Cross 445-46

[12] The Allies of the Second World War were the Countries that opposed the Axis Powers during the war. The major allies' countries include the United States of America, United Kingdom, Russia and Canada while the Countries of the Axis powers include Germany, Japan and Italy.

[13] M A Bekoff 'Nuremberg Trials', <http://en.m.wikipedia.org/wiki/Nuremberg_Trials#search> accessed on 16 June 2015

[14] D Zolo, Victors' Justice: From Nuremberg to Baghdad (London: Verso Books, 2009) p.39

[15] The Statement of Professor Nicholls of St. Anthony's College, in his paper titled 'The Nuremberg Trials: Victors Justice or a Categorical Imperative' delivered at an event organized by the University of Oxford <http://www.sant.ox.ac.uk/events/lecturesarchives/nicholls.html>accessed on 5 June 2015

[16] O Nelson, 'The Implication of the Jurisdiction of the International Criminal Court for African States" (2009) Journal of Law and Development p. 100

[17] The International Law Commission was established by the United Nations General Assembly in 1948 for the "promotion of the progressive development of international law and its codification". <http://www.legal.un.org/ilc/ilcintro.html>accessed on 5 June 2015

[18] The Cold War was a sustained state of political and military tension between powers in the Western Bloc (United States, its NATO Allies and others) and powers in the Eastern Bloc (the Soviet Union and its allies in the Warsaw Pact. Historians have not fully agreed on the dates, but 1947-1991 is common. For more history on Cold War, See British Broadcasting Corporation, Cold War Season, http://bbc.co.uk/history/worldwars/coldwar accessed on 5 June 2014

[19] R D Benjamin, 'The International Criminal Court: American Concerns About an International Prosecutor' (Canada: Parliamentary Research Branch 2002) p.5

[20] The scope of work of the ILC was limited to prosecution of drug trafficking

it was able to return to the task begun in the 1940s of preparing a draft statute for a comprehensive international criminal court[21].

The disintegration of the former Yugoslavia and the violations of international humanitarian law that occurred in the process[22], as well as the 1994 genocide in Rwanda[23], sparked a strong international response to the humanitarian crisis and provided a dramatic confirmation that an international criminal court was indeed needed, perhaps more urgently than previously believed[24]. The creation of the ad-hoc tribunals for the former Yugoslavia (ICTY)[25] and Rwanda (ICTR)[26] followed the ILC's work and garnered worldwide recognition and credibility that gave support to the process for establishing the ICC. The ad hoc tribunals have a greater political autonomy than their Nuremberg and Tokyo counterparts; however, since the tribunals were created by the Security Council[27], they were beholden to it for funding and enforcement assistance[28]. As valuable a precedent as they constitute, they took over two years of negotiation and preparation to establish, thereby confirming the necessity of a permanent ICC. Not only would a permanent Court avoid the time-consuming establishment process, but also it could address smaller-scale incidents that might not garner the political will to establish another ad hoc tribunal[29].

In 1994, a draft statute for the establishment of an international criminal court was submitted by ILC to the General Assembly[30] and recommended that a conference of plenipotentiaries be convened to negotiate a treaty and enact the Statute[31]. To consider major substantive issues in the draft statute, the

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[21] M. Cherif Bassiouni, 'Historical Survey: 1919-1998," in Bassiouni, M. Cherif, (ed.), The Statute of the International Criminal Court: A Documentary History, (Ardsley, New York: Transnational Publishers 1998) p. 7.

[22] M. K Marler, 'The International Criminal Court: Assessing The Jurisdictional Loopholes In The Rome Statute' (1999) 49 Duke Law Journal p. 828, For a detailed historical description of the disintegration of the former Yugoslavia, see Deborah L. Ungar, "The Tadić War Crimes Trial: The First Criminal Conviction Since Nuremberg Exposes the Need for a Permanent War Crimes Tribunal", (1999) 20 *WHITTIER L. REV*. 677, 682-84 and Milborne One, "Breakup of Yugoslavia" <http://en.m.wikipedia.org/wiki/Breakup_of_Yugoslavia> accessed on 16 June 2014

[23] Rwandan Genocide was a genocidal mass slaughter of Tutsi and moderate Hutu in Rwanda by the Hutu majority. During the approximate 100-dat period from April 7 1994 to mid-July, an estimated 500,000-1,000,000 Rwandans were killed constituting as much as 20% of the Country's total population and 70% of the Tutsi then living in Rwanda. Material available online at <http://en.m.wikipedia.org/wiki/Rwandan_Genocide> accessed on 16 June 2014

[24] M. K Marler., 'The International Criminal Court: Assessing The Jurisdictional Loopholes in The Rome Statute' (1999) 49 Duke Law Journal p. 828

[25] Created pursuant to Security Council Resolution 827, U.N. SCOR, 48th Session, 3175th meeting, U.N. Doc. S/RES/827 (1993), the 'ICTY Statute' <http://www.unicty.org/.../> accessed on June 5 2014

[26] Created pursuant to Security Council Resolution 955, U.N. SCOR, 49th Session, U.N. Doc. S/RES/995 (1994), the 'ICTR Statute' <http://www.unictr.org/.../> accessed on June 5 2014

[27] The United Nations Security Council (UNSC) is one of the six principal organs of the United Nations and is charged with the maintenance of international peace and security. Its powers include the establishment of peacekeeping operations, the establishment of international sanctions, and the authorization of military action through Security Council resolutions; it is the only UN body with the authority to issue binding resolutions to member states. The Security Council held its first session on 17 January 1946. For more information on the Security Council, see <http://www.un.org/en/sc> accessed on 6 June 2014

[28] R D Benjamin, "The International Criminal Court: American Concerns About an International Prosecutor" (Canada: Parliamentary Research Branch 2002) p. 7

[29] R D Benjamin, "The International Criminal Court: American Concerns About an International Prosecutor" (n. 29) p. 7

[30] See ILC, Draft Statute for an International Criminal Court, UN GAOR, 49th Session, Supp No. 10, U.N. Doc. A/49/10 (1994). Text adopted by the Commission at its forty-sixth session, in 1994, and submitted to the General Assembly as a part of the Commission's report covering the work of that session. The report, which also contains commentaries on the draft articles, appears in Yearbook of the International Law Commission, 1994, vol. II (Part Two). Available online at <http://www.legal.un.org/ilc/text/.../7_4_1994.pdf> accessed on 12 June 2014

[31] Coalition for the International Criminal Court: 'History of the International Criminal Court' <http://www.iccnow.org/?mod=icchistory> accessed on 12 June 2014

General Assembly established an ad hoc committee on the establishment of an international criminal court. The committee met twice in 1996[32]and an amended draft statute was submitted in April 1998, setting the stage for the five-week conference in Rome. Against this background, at its fifty-second session, the General Assembly decided to convene the United Nations Diplomatic Conference of Plenipotentiaries on the establishment of an International Criminal Court which was held in Rome, Italy from 15 June 1998 to 17 July 1998 to finalize the statute for a permanent International Criminal Court[33]. Even though some Countries, most notably the United States and the People's Republic of China[34], were concerned that allowing the ICC to exercise powers traditionally reserved to States would negatively impact on national sovereignty, the Rome Statute of the International Criminal Court[35] was adopted on 17 July 1998 and came into force on 1 July 2002 after the 60thState deposited its instrument of ratification with the Secretary General of the United Nations on 11 April 2002[36]. In his opening remarks while declaring the conference open, the former Secretary General of the United Nations, Mr. Kofi Annan[37] said:

> For nearly half a century — almost as long as the United Nations has been in existence — the General Assembly has recognized the need to establish such a court to prosecute and punish persons responsible for crimes such as genocide. Many thought . . . that the horrors of the Second World War — the camps, the cruelty, the exterminations, the Holocaust — could never happen again. And yet they have. In Cambodia, in Bosnia and Herzegovina, in Rwanda. Our time — this decade even — has shown us that man's capacity for evil knows no limits. Genocide . . . is now a word of our time, too, a heinous reality that calls for a historic response[38].

As at April 2014, 122 countries are States Parties to the Rome Statute of the International Criminal Court[39]. Out of them 34 are African States, 18 are Asia-Pacific States, 18 are from Eastern Europe, 27 are from Latin American and Caribbean States, and 25 are from Western European and other States. Without doubt, Africa commands an important position in terms of number and bloc influence within the group of States parties to the ICC Statute[40].

2. Significance of the Establishment of the ICC

The Rome Statute created the International Criminal Court which is the first permanent international court[41] that has the right to investigate and bring to justice individuals who commit the most serious violations of international law; war crimes, genocide, crimes against humanity and the crime of

[32] Coalition for the International Criminal Court: 'History of the International Criminal Court' (n. 31)

[33] M K Marler, 'The International Criminal Court: Assessing The Jurisdictional Loopholes In The Rome Statute" (1999) 49 Duke Law Journal p. 831, Xavier Baron, 'Statute for War Crimes Court Adopted', Agence France-Presse, July 18, 1998, available in 1998 WL 2323165, Rome Statute of the International Criminal Court: 'Overview' <http://legal.un.org/icc/general/overview.html> accessed on 12 June 2014

[34] O Nelson, 'The Implication of the Jurisdiction of the International Criminal Court for African States' (n.16) p. 103

[35] Rome Statute of the International Criminal Court U.N. Doc A/CONF.183/99 (July 17 1998)

[36] ICC overview <http://www.un.org/law/icc/statute/romefra.html> accessed 5 June2014

[37] He was the 7th Secretary-General of the United Nations and he held that position from 1 January 2000 to 31 December 2006

[38] Rome Statute of the International Criminal Court: 'Overview' <http://legal.un.org/icc/general/overview.html> accessed on 12 June 2014

[39] ICC at a glance, 'The States Parties to the Rome Statute' <http://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx> accessed on 20 June 2014

[40] O Nelson, 'The Implication Of The Jurisdiction Of The International Criminal Court For African States' (n.16) p. 102

[41] Rome statute of the International Criminal Court 1998 Article 1

aggression[42]. Unlike the International Court of Justice[43]which hears only cases between States or provides advisory opinions, the ICC prosecutes individuals and is also located in The Hague[44].The Rome Statute of the International Criminal Court was mindful of the fact that during last century, millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity and that such grave crimes threaten the peace, security and well-being of the world[45].

Determined to put an end to impunity of the perpetrators of these crimes and thus to contribute to the prevention of such crimes, the State Parties to the Rome Statute affirmed that, the perpetrators of the most serious crimes of concern to the international community as a whole must not go unpunished. They also hold their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation. There is also the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes[46]. The States Parties therefore resolved to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole and that the International Criminal Court thus established under the Rome Statute shall be complementary to national criminal jurisdictions[47].

3. Overview and Features of the Rome Statute of the International Criminal Court 1998

The Rome State is divided into 13 major parts which include, the establishment of the court[48], jurisdiction, admissibility and applicable law[49],general principles of criminal law[50], composition and administration of the court[51], investigation and prosecution[52], trial[53], penalties[54], appeal and revision[55], international cooperation and judicial assistance[56], enforcement[57], assembly of states parties[58], financing[59], and final clauses[60].The following represents a summary of some of the key provisions and features of the Rome Statute:

3.1 Structure of the ICC

The Rome Statute establishes the ICC's structure and provides rules for its limited governance by the States Parties to the Statute[61]. The ICC consists of the Presidency, three Trial Divisions, the Office of the Prosecutor, and the Registry[62]. A total of eighteen (18) judges are elected to serve nine-year terms

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42 The International Committee of the Red Cross (ICCC), "International Criminal Court (ICC) and International Humanitarian Law", American Red Cross Annual Report January 2013, p. 2, <http://www.icrc.org/eng, http://www.icc-cpi.int> accessed on 21 June 2014

43 The International Court of Justice commonly referred to as the World Court is the primary judicial branch of the United Nations, <http://www.icj-cji.org/homepage/> accessed on 25 June 2014

44 Article 1 of the of the Rome statute of the International Criminal Court 1998

45 Preamble to the Rome Statute of the International Criminal Court 1998

46 Preamble to the Rome Statute of the International Criminal Court 1998

47 Preamble to the Rome Statute of the International Criminal Court 1998

48 Rome Statute of the International Criminal Court 1998 Part 1

49 Rome Statute of the International Criminal Court 1998 Part 2

50 Rome Statute of the International Criminal Court 1998 Part 3

51 Rome Statute of the International Criminal Court 1998 Part 4

52 Rome Statute of the International Criminal Court 1998 Part 5

53 Rome Statute of the International Criminal Court 1998 Part 6

54 Rome Statute of the International Criminal Court 1998 Part 7

55 Rome Statute of the International Criminal Court 1998 Part 8

56 Rome Statute of the International Criminal Court 1998 Part 9

57 Rome Statute of the International Criminal Court 1998 Part 10

58 Rome Statute of the International Criminal Court 1998 Part 11

59 Rome Statute of the International Criminal Court 1998 Part 12

60 Rome Statute of the International Criminal Court 1998 Part 13

61 J Elsea, 'International Criminal Court: Overview and Selected Legal Issues' (2002) Congressional Research Service Report for Congress Received through the CRS Web, The Library of Congress, Order Code RL31437, <http://www.amicc.org/docs/CRSJune2002.pdf> accessed on 7 June 2014

62 Rome Statute of the International Criminal Court 1998 Article 34-49

on the ICC, subject to a possible increase in the number of judges upon recommendation by the President and its approval by the Assembly of States Parties[63]. States Parties to the ICC may nominate one qualified candidate for each election[64].The judges are divided among the Pre-Trial Division, the Trial Division and the Appeals Division of the ICC.[65]The Rome Statute established the Office of the Prosecutor (OTP) which is independent of the ICC and a separate organ of the ICC[66]. The Prosecutor is selected by an absolute majority of the Assembly of States Parties via secret ballot. The Prosecutor and Deputy Prosecutors are each eligible to hold office for one nine-year term, without the possibility of re-election[67].The Registry on the other hand is responsible for the non-judicial aspects of the administration and servicing of the ICC without prejudice to the functions and powers of the Prosecutor in accordance with article 42[68].

3.2 Accountability

The ICC is accountable to the Assembly of States Parties (ASP), which is composed of the States that have ratified or acceded to the Rome Statute. Those States that have not ratified the treaty will not be involved in decisions such as the nomination and selection of judges or the Prosecutor, determining the budget of the ICC or voting to dismiss judges or the Prosecutor. States not party to the treaty are not responsible for funding the court[69].

3.3 Definition of crimes

The Rome Statute and its subsidiary document, The Elements of Crimes[70], give detailed definitions of genocide, war crimes, crime against humanity and crime of aggression. These crimes will be discussed in the later part of the article.

3.4 Jurisdiction

The court only has jurisdiction over events that occur after July 1, 2002, the date when the Rome Statute entered into force. If a State becomes party to the Rome Statute after July 1, 2002, the court may only exercise jurisdiction with respect to crimes committed after ratification of the Rome Statute by that particular State, unless the State makes a declaration otherwise[71]. The jurisdiction of the ICC will be discussed later in this article.

3.5 Rights of suspects

The ICC and the Rome Statute provide almost all of the same due process protections as the U.S. Constitution, with the exception of trial by jury. Trial by jury is not a legal privilege in many nations. In a number of foreign legal systems, far fewer due process protections are guaranteed to citizens of other countries accused of crimes and who may be subject to trials abroad[72].

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[63]The ICC management, oversight and legislative body. It is composed of representatives of States that have ratified and acceded to the Rome Statute <http://www.icc-cpi.int/en_menus/asp/assembly/Pages/assembly.aspx> accessed on 11 June 2014

[64] Rome Statute of the International Criminal Court 1998 Article 36

[65] Rome Statute of the International Criminal Court 1998 Article 34(b) and 39

[66] Rome Statute of the International Criminal Court 1998 Article 34 (c) and 42

[67] Rome Statute of the International Criminal Court 1998 Article 42

[68] Rome Statute of the International Criminal Court 1998 Article 43

[69] Rome Statute of the International Criminal Court 1998 Article 112

[70] The Elements of Crimes are reproduced from the Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3-10 September 2002 (United Nations publication, Sales No. E.03.V.2 and corrigendum), part II.B. The Elements of Crimes adopted at the 2010 Review Conference are replicated from the Official Records of the Review Conference of the Rome Statute of the International Criminal Court, Kampala, 31 May -11 June 2010 (International Criminal Court publication, RC/11) <http://www.icc-cpi.int/.../elementsofcrimeseng> accessed on 14 June 2014

[71] Rome statute of the International Criminal Court 1998 Article 11 (1) and (2)

[72] The International Committee of the Red Cross (ICCC), 'International Criminal Court (ICC) and International Humanitarian Law', American Red Cross Annual Report January 2013, <http://www.icrc.org/eng, http://www.icc-cpi.int> p. 2 accessed on 21 June 2014

3.6 Official and working languages

The official languages of the Court shall be Arabic, Chinese, English, French, Russian and Spanish while the judgments of the Court, as well as other decisions resolving fundamental issues before the Court, shall be published in the official languages. The Presidency shall, in accordance with the criteria established by the Rules of Procedure and Evidence, determine which decisions may be considered as resolving fundamental issues for the purposes of this paragraph. The working languages of the Court shall be English and French. The Rules of Procedure and Evidence shall determine the cases in which other official languages may be used as working languages[73].

4. Jurisdiction of the International Criminal Court

The question of jurisdiction of the International Criminal Court has been, and still is, very closely bound up with issues of State sovereignty and it is a controversial one. At its inception in 1998, some States (notably the United States and Peoples Republic of China) voted against the Rome Statute for fear of erosion of their territorial influence and the likelihood of interference with their domestic affairs[74]. It is important to note that the International Criminal Court does not have a universal jurisdiction, at least not in the strict sense of the word. The ICC's jurisdiction is strictly circumscribed, albeit, it only has jurisdiction on the basis of the "territoriality principle" (i.e., in case the crimes have occurred in the territory of a State party, or on board a vessel or an aircraft registered in a State party) and on the basis of the "nationality principle" (i.e., in case the crimes have been committed by a national of a State party)[75].

The ICC can also exercise jurisdiction in other, rather exceptional circumstances, namely in case a State party consents to the jurisdiction of the ICC over crimes committed on its territory or by its nationals[76], and in case the United Nations Security Council refers a case to it[77].In order to resolve the controversy over the jurisdiction of the ICC and to allay the fear of States who are opposed to its creation, the Rome Statute provides that the jurisdiction of the ICC shall be complementary to States Parties' national criminal courts or tribunals' jurisdictions[78]. Under the complementarity principle enshrined in the Rome Statute, the ICC is intended to be a court of last resort, investigating and prosecuting only where national courts or tribunals have failed to do the needful. Accordingly, a case will be inadmissible for the prosecution of the ICC where the case is being investigated or prosecuted by a State Party which has jurisdiction over it, unless the State Party is unwilling or unable to genuinely carry out the investigation or prosecution[79]. Furthermore, a case will be inadmissible for the prosecution of the ICC where such case has been investigated by a State Party which has jurisdiction over it and the State Party has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State Party to genuinely prosecute[80]. A case will also be inadmissible where the person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the ICC is not permitted under Article 20 (1-3) of the Rome Statute and when the case is not of sufficient gravity to justify further action by the ICC[81].

The principle of complementarity thus assigns primary responsibility for prosecuting serious crimes of international concern on the national criminal courts or tribunals while providing for certain standards

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73 Rome statute of the International Criminal Court 1998 Article 50 (1-3)

74 O Nelson, 'The Implication Of The Jurisdiction Of The International Criminal Court For African States' (n. 16) p. 103

75 Rome statute of the International Criminal Court 1998 Article 12 (2) (a) & (b), Cedric Ryngaert, "The International Criminal Court And Universal Jurisdiction" Working Paper No. 46 - March 2010 Leuven Centre for Global Governance Studies <http://www.globalgovernancestudies.eu>accessed on 4 June 2014

76 Rome statute of the International Criminal Court 1998 Article 12 (3)

77 Rome statute of the International Criminal Court 1998 Article 13 (b)

78 Rome statute of the International Criminal Court 1998 Article 13 (b)

79 Rome statute of the International Criminal Court 1998 Article 17 (1)

80 Rome statute of the International Criminal Court 1998 Article 17 (1) (b)

81 Rome statute of the International Criminal Court 1998 Article 17 (1) (d)

that they have to meet[82].The affirmation of the complementarity character of the ICC jurisdiction implies the idea that the primary responsibility in repressing serious crimes of international concern falls on national criminal courts or tribunals[83]. As long as a national criminal court is able and willing to genuinely investigate and prosecute the matter which has come to the ICC's attention, the ICC does not have jurisdiction. This is in furtherance of the provision in the Rome Statute which affirms that the most serious crimes of concern to the international community must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation[84]. The principle of complementarity is therefore meant to ensure that the ICC will complement, and not replace, national criminal courts or tribunals.

The definition of crimes over which the ICC has jurisdiction reflects widely accepted international norms, based on existing treaties on international humanitarian law and customary international law[85]. By virtue of Article 5(1) of the Rome Statute, the jurisdiction of the ICC shall be limited to the most serious crimes of concern to the international community as a whole and those crimes that fall under the jurisdiction of the ICC have been clearly identified as the crimes of genocide[86], crimes against humanity[87], war crimes[88] and the crime of aggression[89]. These crimes are discussed briefly below:

4.1 Crime of Genocide

The Rome Statute defined the crime of genocide to mean any act committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such, killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; forcibly transferring children of the group to another group[90]. It is important to note that the definition of the crime of genocide agrees with the definition in Article 2 of the Genocide Convention[91]. The definition of genocide is also replicated in the ILC Draft Code against the Peace and Security of Mankind[92], and the Statutes of the ad hoc Tribunals for the former Yugoslavia[93] and Rwanda[94].As important as the definition of genocide, it is also the

[82] B C Olugbuo., 'Domestic Implementation Of The Rome Statute Of The International Criminal Court: A Comparative Analysis Of Strategies In Africa', being a Dissertation submitted in partial fulfillment of the requirements of the degree of LLM (Human Rights and Democratization in Africa) Prepared under the Supervision of Professor Lovell Fernandez at the Faculty of Law, University of the Western Cape October 2003, p. 9

[83] B C Olugbuo., 'Domestic Implementation of the Rome Statute of the International Criminal Court: A Comparative Analysis of Strategies in Africa' (n. 82) p. 9

[84] B C Olugbuo., 'Domestic Implementation of the Rome Statute of the International Criminal Court: A Comparative Analysis of Strategies in Africa' (n. 82) p. 10

[85] B C Olugbuo., 'Domestic Implementation of the Rome Statute of the International Criminal Court: A Comparative Analysis of Strategies in Africa' (n. 82) p. 12

[86] Rome statute of the International Criminal Court 1998 Article 5 (1) (a)

[87] Rome statute of the International Criminal Court 1998 Article 5 (1) (b)

[88] Rome statute of the International Criminal Court 1998 Article 5 (1) (c)

[89] Rome statute of the International Criminal Court 1998 Article 5 (1) (d), Article 5(2) of the Rome Statute further provide that the Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.

[90] Rome statute of the International Criminal Court 1998 Article 6(a-e)

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

[92] Draft Code of Crimes against the Peace and Security of Mankind Article 19. See Report of the International Law Commission on the work of its forty-eight session, 6 May - 26 July 1996, U.N Doc. A/51/10, <http://www.legal.un.org/.../draft%20articles/7_4_199... > accessed on 2 June 2014

[93] Created pursuant to Security Council Resolution 827, U.N. SCOR, 48th Session, 3175th meeting, U.N. Doc. S/RES/827 (1993), the 'ICTY Statute' <http://www.unicty.org/.../> accessed on June 5 2014

[94] Created pursuant to Security Council Resolution 955, U.N. SCOR, 49th Session, U.N. Doc. S/RES/995 (1994), the 'ICTR Statute' <http://www.unictr.org/.../> accessed on June 5 2014

definition of what does not count as genocide. It is not considered genocide when a sovereign state goes to war in order to annihilate an enemy nation and the threat or use of force against a state is not itself an act of genocide[95]. However, according to Robertson[96], such behavior by the State of this sort should be made part of the definition of crime of aggression, but it is not currently part of the Rome Statute[97].

4.2 Crimes against Humanity

The crimes against humanity as provided under the Rome Statute is the first comprehensive multilateral definition of crimes against humanity as it clearly goes far beyond what is contained in the Nuremberg, ICTY and ICTR definitions[98].For a crime to be recognised as crime against humanity under the Rome Statute, it must be committed as part of widespread or systematic attack directed against any civilian population with knowledge of the attack[99]. The Rome Statute listed eleven acts that could constitute crimes against humanity in the context of such an attack. They include murder[100], extermination[101], enslavement[102], deportation or forcible transfer of a population[103], imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law[104], torture[105], rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity[106], persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other universally recognized grounds[107], enforced disappearance of persons[108], apartheid[109], and other inhumane acts of a similar character intentionally causing great suffering or serious injury to body or to mental or physical health[110].An important point to note is that it is not only States that can commit crimes against humanity under the Rome Statute. Individuals can be prosecuted, but only insofar as they are instruments of a State or organization[111].The Rome Statute specifically excluded certain types of crimes from the definition of crimes against humanity, which includes Terrorism and drug trafficking[112]. The reason that both of these crimes were not included is that they were not considered as serious as the crimes of genocide and crimes against humanity, and they were covered under other treaties[113]

4.3 War Crimes

War crimes have been defined as a violation of the most fundamental laws and customs of war[114].War crimes constitute a traditional category of international crimes and the existence of universal jurisdiction over war crimes is generally recognized. Traditionally, war crimes have been regarded as serious

[95]R Geoffrey, "Crimes against Humanity". (New York: The New Press' 2006) p. 467

[96] He is a human rights barrister, academic, author and broadcaster. He holds dual Australian and British citizenship

[97] R Geoffrey, "Crimes against Humanity" (n.95) p. 465

[98] B C Olugbuo., 'Domestic Implementation Of The Rome Statute Of The International Criminal Court: A Comparative Analysis Of Strategies In Africa' (n. 82) p. 16

[99] Rome statute of the International Criminal Court 1998 Article 7

[100] Rome statute of the International Criminal Court 1998 Article 7 (1) (a)

[101] Rome statute of the International Criminal Court 1998 Article 7 (1) (b)

[102] Article 7 (1) (c) of the Rome statute of the International Criminal Court 1998

[103] Article 7 (1) (d) of the Rome statute of the International Criminal Court 1998

[104] Article 7 (1) (e) of the Rome statute of the International Criminal Court 1998

[105] Article 7 (1) (f) of the Rome statute of the International Criminal Court 1998

[106] Article 7 (1) (g) of the Rome statute of the International Criminal Court 1998

[107] Article 7 (1) (h) of the Rome statute of the International Criminal Court 1998

[108] Article 7 (1) (i) of the Rome Statute of the International Criminal Court 1998

[109] Article 7 (1) (j) of the Rome Statute of the International Criminal Court 1998

[110] Article 7 (1) (k) of the Rome Statute of the International Criminal Court 1998

[111] B C Olugbuo., 'Domestic Implementation of the Rome Statute of the International Criminal Court: A Comparative Analysis of Strategies in Africa' (n. 82) p. 3

[112] R Geoffrey, 'Crimes against Humanity' (n. 85) p. 464.

[113] R Geoffrey, 'Crimes against Humanity' (n. 85) p. 460

[114] International Centre for Criminal Law Reform and Criminal Justice Policy (ICCLR) "International Criminal Court: Manual for the Ratification and Implementation of the Rome Statute" p. 120 <http://www.coalitionfortheicc.org> accessed on 1 June 2014

violations of the law applicable to international armed conflict[115].Article 8 of the Rome Statute defines four categories of war crimes. These are grave breaches under the 1949 Geneva Conventions which apply to international armed conflict[116], serious violations of the laws and customs applicable to international armed conflict[117], violations of Article 3 common to the Geneva Conventions[118] which applies to non-international armed conflict and other serious violations of laws and customs applicable in non-international armed conflict[119].The definition of war crimes under the Rome Statute also includes specific sexual and gender-based offences[120], conscription and enlistment of children under fifteen[121] and attacks against humanitarian personnel as war crimes[122]. This Rome Statute also provides that the intentional starvation of civilians as a method of warfare is a war crime[123].

4.4 Crime of Aggression

During the negotiation of the Rome Statute in 1998, members of the Rome Conference could not agree on a definition of crime of aggression[124]. Although, the Rome Statute does include a provision giving the ICC jurisdiction over the crime of aggression but this crime will come into effect only once a definition is approved at a later review conference. Thus, the ICC jurisdiction in this respect will not be exercised until there is a consensus on the definition of the crime.

The Assembly of States Parties ("ASP")[125] created a Special Working Group on the Crime of Aggression ("the Special Working Group"), which met from 2003-2009 primarily at The Hague, the United Nations, and Princeton, New Jersey and deliberated on the definition of the crime of aggression as well as the conditions precedent for the exercise of the ICC jurisdiction[126]. The definition of the crime of aggression reached by the end of the work of the Special Working Group in February 2009[127]became the definition that was ultimately adopted at the resumed Eighth Session in March 2010[128] and Review Conference of the Rome Statute[129] as most States Parties were generally satisfied with the draft definition of the crime, as well as the draft elements of the crime[130]. To be inserted in the Rome Statute is a new Article "8(b)" which defines Crime of aggression as follows:

> 1. For the purpose of this Statute, "crime of aggression" means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.

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115 B C Olugbuo., 'Domestic Implementation Of The Rome Statute Of The International Criminal Court: A Comparative Analysis Of Strategies In Africa' (n. 82) p. 16

116 Rome Statute of the International Criminal Court 1998 Article 8 (2) (a)

117 Rome Statute of the International Criminal Court 1998 Article 8 (2) (b)

118 Rome Statute of the International Criminal Court 1998 Article 8 (2) (c)

119 Rome Statute of the International Criminal Court 1998 Article 8 (2) (e)

120 Rome Statute of the International Criminal Court 1998 Article 8 (2) (b) (xxii)

121 Rome Statute of the International Criminal Court 1998 Article 8 (2) (b) (xxvi)

122 Rome Statute of the International Criminal Court 1998 Article 8 (2) (b) (xxiv)

123 Rome Statute of the International Criminal Court 1998 Article 8 (2) (b) (xxv)

124R Geoffrey, "Crimes against Humanity". (n. 85) p. 462

125R Geoffrey, "Crimes against Humanity". (n. 85) p. 462

126 J Trahan, 'The Rome Statute's Amendment on the Crime of Aggression: Negotiations at the Kampala Review Conference', (2011) 11 International Criminal Law Review 54

127Report of the Special Working Group on the Crime of Aggression, February 2009, Resolution ICC-ASP/7/20/Add.1, Annex II., at Annex to Appendix, reproduced in The Princeton Process, p. 60-61.

128 Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Resumed eighth session, New York, 22 - 25 March 2010 (International Criminal Court publication, ICC-ASP/8/20/Add.1), annex II, <http://www.icc-cpi.int/iccdocs/.../ICC-ASP-8-Re...> accessed on 11 June 2014

129 Review Conference of the Rome Statute was held in Kampala (Uganda) between 31 May and 11 June

130 Ibid

> 2. For the purpose of paragraph 1, "act of aggression" means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.

Other acts which will constitute crime of aggression are provided for under the United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974[131].It should be noted that the ICC may exercise jurisdiction over the crime of aggression subject to a decision to be taken after 1 January 2017 by a two-third majority of the States Parties and subject to the ratification of the amendment concerning this crime by at least 30 States Parties[132].

5. Limitations to the Jurisdiction of the ICC

It is important to note that there are certain limitations to the jurisdictions of the ICC. These limitations can either be general limitations, limitations to prosecute nationals of non-party States or limitations under international law. These limitations are discussed briefly below:

5.1 General Limitations to the Jurisdiction of the ICC

One of the general limitations to the ICC's jurisdiction is that the competence of the ICC to prosecute all of the crimes stipulated under Article 5 of the Rome Statute does not apply retrospectively[133]. The ICC will only have jurisdiction over crimes committed effective from 1 July 2002, when the Statute came into force[134] and with regards to States that became party after the coming into force of the Statute, the ICC will exercise jurisdiction only after the date the Statute became applicable to such States**.** The jurisdiction of the ICC is also limited by the provision contained in Article 16 of the Rome Statute, titled '*deferral of investigation or prosecution*'. It provides thus:

> No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same condition.

This provision was included in the Statute to ensure limited political control over the work of the prosecutor. Thus, the Security Council acting under Chapter VII of the United Nations Charter may demand that the requirements of peace and security are to take precedence over the immediate demands for justice[135].Another general limitation is that the jurisdiction of the ICC is limited to natural persons[136]; therefore, States and other collective bodies are not liable under the Statute[137]. The ICC shall have jurisdiction over "natural persons" and any person who commits a crime within the ICC's jurisdiction shall be individually responsible and liable for punishment. However, the provisions of the Statute relating to individual criminal responsibility do not affect the responsibility of States under international law[138].

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131 J Trahan, "The Rome Statute's Amendment on the Crime of Aggression: Negotiations at the Kampala Review Conference", (n. 126) p. 55, S C Roger, 'Amendments to the Rome Statute of the International Criminal Court Considered at the first Review Conference on the Court, Kampala, 31 May-11 June 2010' (2010) Gottingen Journal of International Law 692

132 International Criminal Court Report 2010, 'Understanding the International Criminal Court' Registry, International Criminal Court, p. 14

133 O Nelson, 'The Implication of the Jurisdiction of the International Criminal Court for African States' (n. 16) p. 109, Rome Statute of the International Criminal Court 1998 Article 4

134 Rome Statute of the International Criminal Court 1998 Article 11(1)

135 D Akande, 'The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits' (2003) 1 Journal of International Criminal Law 646

136 Rome Statute of the International Criminal Court 1998 Article 25 (1) (a)

137 M Baros, 'The Establishment of the International Criminal Court: Institutionalizing Expedience?' (2003) 1 Hertfordshire Law Journal 60-61

138 Rome Statute of the International Criminal Court 1998 Article 25 (4)

5.2 Limitation to Prosecute Nationals of Non-Party States

The jurisdiction of the ICC to try nationals of States that are not party to the Rome Statute is not automatic. Under the Statute, the ICC will exercise jurisdiction over nationals of non-party States only in certain circumstances. The ICC may try nationals of non-party States in situations referred to the ICC Prosecutor by a State party[139]or by the United Nations Security Council[140].In this case, the ICC may exercise its jurisdiction despite the fact that the State where the crime was committed or the State which the individual is a citizen is not a party of the Statute. Initiating an investigation under these circumstances is not a mandatory jurisdiction, but is left to the discretion of the Security Council. The Security Council is entitled to bring a case to the ICC or to request abandoning an investigation. The first example of this provision was experienced after the incidents in the Darfur region of Sudan[141].The person alleged to have committed the defined crimes against the people of Sudan was the President of Sudan[142]. Although Sudan, which is the country where the actions took place and its President, was a citizen, was not a party to the Statute; nevertheless, the Security Council in March 2005, formally referred the situation in Darfur to the Prosecutor of the ICC taking into account the report of the International Commission of Inquiry on Darfur authorized by the United Nations Security Council Resolution 1564 of 2004[143].

It is expected that Al-Bashir will not face trial at The Hague until he is apprehended in a nation which accepts the ICC jurisdiction as Sudan is not a party to the Rome Statute which it signed but did not ratify[144]. However, Al-Bashir had, since his indictment by the ICC, visited some States who are parties to the Rome Statute and he was not arrested. These countries include Nigeria[145], Chad[146], Qatar[147], and Turkey[148].

5.3 Limitations under International Laws

One limitation in this respect is the immunity granted by the international law on State officials when abroad[149]. It is generally accepted that senior State officials may be held criminally liable for crimes under international law as reflected under Article 27 (1) and (2) of the Rome Statute. This suggests that State officials cannot rely on immunity provided by international law to avoid jurisdiction of the ICC.

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139 Rome Statute of the International Criminal Court 1998 Article 13(a)

140 Rome Statute of the International Criminal Court 1998 Article 13(b)

141 The War in Dafur was a major armed onslaught in the Darfur region of Sudan which began in February 2003

142 Omar al-Bashir was the 7th President of Sudan until the South Sudan gained independence from Sudan in 2011. Al-Bashir is the first incumbent head of state charged with crimes under the Rome Statute. He rejected the charges and said "whoever has visited Darfur, met officials and discovered their tribes…will know that all of these are lies", See, War in Darfur, available online at http://en.m.wikipedia.org/wiki/War_in_Dafur (accessed on 12 June 2014)

143 E Coban-Ozturk, 'The International Criminal Court, Jurisdiction and The Concept Of Sovereignty' (2014) 10 European Scientific Journal148-149

144 Walker Peter, "Dafur genocide charges for Sudanese President Omar al-Bashir", The Guardian (London) 14 July 2008 available online at <http://www.theguardian.com/world/2008/ jul/14/sudan.warcrimes1? gusrc=rss&feed=worldnews> accessed on 11 June 2014

145 Premium Times, Sudan's al-Bashir arrives Nigeria to red-carpet welcome, July 14, 2013, <http://premiuntimesng.com/news/140945-sudans-al-bashir-arrives-in-nigeria-to-a-red-carpet-welcome.hmtl> accessed on 4 June 2014

146Xan Rice, Chad refuses to arrest Omar al-Bashir on Genocide Charges 22 July 2010, <http://www.theguardian.com/world/2010/jul/22/chad-refuses-arrest-omar-al-bashir> accessed on 4 June 2014

147 Spiegel Online, Al-Bashir Arrest Warrant: Qatari Emir Warns of Chaos in Sudan, 28 March 2009, <http://m.spiegel.de/international/world/a616058.html#spRedirectedFrom=www&referrrer=http://www.google.com/search?client=ms-rim&hl=en&q=omar%20al-bashir%20visit%20to%20qatar&ie=UTF-8&oe=UTF-8&channel=browserhttp://www.theguardian.com/world/2010/jul/22/chad-refuses-arrest-omar-al-bashir> accessed on 4 June 2014

148 Amnesty International 2009 Annual Report, Turkey: No to safe haven for fugitive from international justice, <http://www.amnesty.org/en/news-and-updates/news/turkey-no-safe-haven-fugitive-internaional-justice-20091106> accessed on 4 June 2014)

149 D Akande, "The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits" (n. 135) p. 640

However, the jurisdiction of the ICC in this respect is limited by the provision of Article 98 (1) and (2) of the Rome Statute which granted immunity to States' officials while abroad. The limitation provided under Article 98(1) and (2) of the Rome Statute is of particular importance for States that are not parties to the Rome Statute because it prevents parties to the Statute from arresting and surrendering officials or diplomats of non-party States to the ICC as those officials or diplomats enjoy immunity under international law[150].

6. Rights of an Accused under the Rome Statute of the ICC

The Rome Statute contains a comprehensive set of procedural safeguards for the rights of the accused[151].The Preparatory Commission completed its draft of the Rules of Procedure and Evidence[152] at its Fifth Session in June 2000. These rules implement and embellish the procedural aspects of the Rome Statute, and contain the rights of accused persons. Below are some of the rights of accused persons:

6.1 The Presumption of Innocence

Under the Rome Statute an accused person is presumed innocent until his guilt is proven. Article 66 (1) of the Rome Statute provides thus, "everyone shall be presumed to be innocent until proven guilty before the Court"[153].Article 66(2) and (3) of the Rome Statute further places the burden of proof on the Prosecutor and sets the standard of proof for a conviction to be beyond a reasonable doubt[154].

6.2 The Right to Confront Witnesses

Under the Rome Statute, an accused person shall be entitled to examine, or to have examined the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf[155]. There is an exception however in cases where the alleged crime involves sexual violence or violence against children[156].

6.3 The Protection against Double Jeopardy

The Statute bars the ICC from trying any person who has been tried and convicted or acquitted by another court, unless that trial was for the purpose of shielding the person concerned from criminal responsibility or was otherwise inconsistent with intent to bring the person concerned to justice[157].

6.4 The Right to Be Present at Trial

The Rome Statute provides that an accused person shall be present during his trial[158]. The Trial Chamber may order the accused person be removed from the courtroom in exceptional circumstances when the accused person causes continuous disruption, but only for such duration as is necessary, and may make provision for the accused to observe the trial and direct counsel from outside the courtroom through applicable communications technology[159]

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150 D Akande, "The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits" (n. 135) p. 641

151 J Elsea, 'International Criminal Court: Overview and Selected Legal Issues' (2002) Congressional Research Service Report for Congress Received through the CRS Web, The Library of Congress, Order Code RL31437, , <http://www.amicc.org/docs/CRSJune2002.pdf> accessed on 7 June 2014, p. 29

152 The Draft Rule of Procedure and Evidence (RPE) Report of the Preparatory Commission for the International Criminal Court; Addendum: Finalized Draft Text of the Rules of Procedure and Evidence, U.N. Doc. PCNICC/2000/INF/3/Add.1 (2000), <http://www.iccnow.org/html/un.html> accessed on 3 June 2014

153 This provision is in consonance with Nigerian 1999 Constitution Section 36(5)

154 This provision is also in consonance with the Nigerian Evidence Act 2011 Section 135(1)

155 Rome Statute of the International Criminal Court 1998 Article 67(1) (e)

156 Rome Statute of the International Criminal Court 1998 Article 68

157 Rome Statute of the International Criminal Court 1998 Article 20

158 Rome Statute of the International Criminal Court 1998 Article 63 and 67(1) (d)

159 Rome Statute of the International Criminal Court 1998 Article 63 (2)

6.5 The Right to Effective Assistance of Counsel

Under the Rome Statute, an accused person shall be entitled to have legal assistance assigned by the Court where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it[160]. Defence counsel must also be well-qualified according to criteria to be established[161].

6.6 Right to Appeal

Either an accused person or the prosecutor can appeal a decision of the Trial Chamber to the Appeals Chamber based on procedural error, error of fact or law, or disproportion between the crime and the sentence[162]. The accused or his heirs may bring an appeal at any time based on new evidence or information that the conviction is based on false evidence, or that any of the judges or prosecutors committed any misdeeds[163]

7.Domestication of the Rome Statute of the International Criminal Court in Nigeria

Nigeria signed the Rome Statute on 1 June 2000 and deposited its instrument of ratification of the Rome Statute on 27 September 2001 becoming the 39th State party[164]. Even though Nigeria has ratified the Statute, the Statute will only be applicable in Nigeria if it is domesticated or incorporated into Nigerian law or enacted into law by an Act of the National Assembly. Section 12(1-3) of the Nigerian 1999 Constitution (as amended) provide thus:

1. No treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly
2. The National Assembly may make laws for the Federation or any part thereof with respect to matters not included in the Exclusive Legislative list for the purpose of implementing a treaty.
3. A bill for an Act of the National Assembly passed pursuant to the provisions of subsection (2) of this section shall not be presented to the president for assent, and shall not be enacted unless it is ratified by a majority of all the Houses of Assembly in the Federation.

The domestication process in Nigeria therefore, requires the provisions of the Rome Statute to be enacted into law by the National Assembly. In order to domesticate the Statute in Nigeria, the Federal Ministry of Justice submitted a Bill for an Act to enable effect to be given in the Federal Republic of Nigeria to the Rome Statute of the International Criminal Court and for purposes connected therewith to the National Assembly. After many deliberations, the Rome Statute of the International Criminal Court, the Rome Statute (Ratification and Jurisdiction) Bill 2005[165] was passed by both houses of the National Assembly, but because it was not harmonized[166], President Olusegun Obasanjo could not give his assent to the Bill. The Nigerian Coalition on the International Criminal Court (NCICC)[167] in Abuja on 7 September 2006 at a meeting attended by over 63 participants comprising of National Assembly members, Federal and State Ministry of Justices, Federal Ministry of Foreign Affairs, Legal

[160] Rome Statute of the International Criminal Court 1998 Article 67(1)(d)

[161] J Elsea, "International Criminal Court: Overview and Selected Legal Issues" (n. 151) p. 30

[162] Rome Statute of the International Criminal Court 1998 Article 81, 82 and 83

[163] Rome Statute of the International Criminal Court 1998 Article 82(4)

[164] ICC at a glance, "The States Parties to the Rome Statute" <http://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx>accessed on 20 June 2014

[165] Rome Statute of the International Criminal Court, the Rome Statute (Ratification and Jurisdiction) Bill was passed by House of Representative on 1 June 2004 and the Senate on Thursday 19 May 2005

[166] Both the House of Representatives and the Senate were supposed to harmonise the Bill that was passed by respective houses for the President's assent.

[167] NCICC is a coalition of civil society organizations, human rights defenders and activist who are committed to promoting the understanding and awareness in Nigeria of the statute of International Criminal Court (ICC) also known as the "Roman Statute of the ICC", For other functions of the NCICC, see http://ww.ncicc.org.ng/ accessed on 15 June 2014

practitioners, Directors of Public Prosecution, Media and Civil Society representatives in Nigeria, as well as diplomatic staff, called upon both arms of the National Assembly, House of Representatives and the House of Senate to quickly harmonize the Rome Statute Bill pending at the Assembly, for speedier assent and final signing into law by President Olusegun Obasanjo[168]. However, the National Assembly was not able to harmonize the Bill and President Olusegun Obasanjo was not able to give his assent before his administration came to an end. The Federal Ministry of Justice however promised to resubmit the bill as soon as possible during the 10th anniversary of the Rome Statute[169].

The Federal Government sent another bill titled "Crimes against Humanity, War Crimes, Genocide and Related Offences Bill 2012" to the National Assembly. The proposed law is seen essentially as another move to domesticate the Rome Statute of the International Criminal Court[170]. According to the Minister of Information, Mr. Labaran Maku, Nigeria though is a signatory to the statute, the country had not been able to domesticate it before now and that doing so would give additional benefit of demonstrating to the international community that Nigeria was playing its part in the global fight against such crimes[171].On 1 January 2014, the Nigerian Coalition on the International Criminal Court (NCICC) in its NCICC New Year Press Statement called on the Federal Government of Nigeria to tackle impunity in Nigeria by investigating and prosecuting all cases of unlawful killings and implement report of the committees set up to investigate massive violation of human rights. Most importantly, it urged the National Assembly to pass the Bill aimed at domesticating Rome Statute of the International Criminal Court in Nigeria before the end of the legislative year[172].

We can only hope that being a prominent member of the African Union, the Nigerian Government will domesticate the Rome Statute of the International Criminal Court as soon as possible. The incorporation of the Rome Statute will offer Nigeria an opportunity to address the issue of incorporating the Statute into domestic law and also to update the definition of War Crimes to reflect the provisions of the Rome Statute[173].

8. Problems Confronting Implementation of the Rome Statute

An effective International Criminal Court will be one that encourages individual criminal accountability by providing a back-up mechanism in case States do not prosecute human rights abuses[174]. However, the Rome Statute has been confronted with various challenges and problems which have significantly hindered its effective implementation. Some of these challenges and problems will be discussed briefly below:

8.1 The Opposition of the United States

The biggest problem confronting an effective implementation of the ICC is perhaps the fundamental opposition of the United States to the ICC.The US withdrew its signature to the Statute of Rome in May 2002 due to the fact that the exercise of jurisdiction by the ICC over US nationals without the consent

[168] NCICC Press Statement, National Dialogue On Strengthening The Rome Statute In Nigeria Rockview Hotel, Abuja, September 2006, Abimbola Akosile, "NASS Enjoined On Rome Statutes' Harmonisation" THISDAY NEWSPAPER 12 SEPTEMBER 2006, <http://allafrica.com/stories/200609130437.html?maneref=http%3A%2F%2Fwww.google.com%2Fsearch%3Fclient%3Dmsrim%26hl%3Den%26q%3Dhas%2520the%2520nigerian%2520government%2520domesticated%2520the%2520%2520rome%2520statute%26ie%3DUTF-8%26oe%3DUTF-8%26channel%3Dbrowser&mstac=0> accessed on 15 June 2014

[169] Nigerian Coalition for the International Criminal Court, "Facts on International Criminal Court" <http://www.ncicc.org.ng/> accessed on 13 June 2014

[170] Genocide Watch Nigeria: "The Proposed Law On Genocide By All Africa" <http://www.genocidewatch.org/.../Nigeria,_12_> accessed on 12 June 2014

[171]Genocide Watch Nigeria: "The Proposed Law On Genocide by All Africa (n. 170)

[172] Press Statement available http://www.ncicc.org.ng/ncicc%20documents/ (accessed on 20 June 2014)

[173] The Implementation Of The Rome Statute Of The International Criminal Court In African Countries, Compiled by Lee Stone and Max du Plessis, available online at http://www.issafrica.org/.../pages/document.pdf (accessed on 12 June 2014)

[174] S. R Ratner., 'The International Criminal Court and the Limits of Global Judicialisation', (2003) 38 Texas International Law Journal 447

of the US negates the fundamental principles of international law and the universal rule on treaty obligations[175].

8.2 Enforcement

Article 9 of the Rome Statute incorporates comprehensive provisions in relation to international co-operation and judicial assistance between national authorities and the ICC. It must however be noted that the ICC has no police force or prison to enforce its judgments. The ICC is highly dependent on the co-operation of the State parties[176]. Therefore, the ICC will be helpless if any national authority refuses to co-operate in enforcing its judgments. Accordingly, the ICC should devise a means to enforce its judgment independently; otherwise, it will be referred to as a "toothless bulldog".

8.3 Individual Accountability

Another fundamental constraint on the effectiveness of the ICC is the personal nature of the accountability[177]. The ICC only has jurisdiction to prosecute individuals for crimes under the Rome Statute; it remain to be seen which Country will surrender its own leader or citizen to the ICC[178]. There remains a danger that unless all the challenges and problems facing the effective implementation of the Rome Statute are addressed as soon as possible, perpetrators of the crimes under the Statute might go unpunished.

9. Conclusion and Recommendations

The accomplishments of the Rome Conference marked an historic and important step toward ending the traditional impunity of those who commit the most offensive crimes. Its unprecedented jurisdictional reach, the principle of complementarity, its multilateral nature, its independence and its stringent due process provisions are meant to ensure the success of the ICC and that no individual is above the law in the area of the crimes of gravest concern to the international community as a whole. However, in spite of its unique features as well as its flaws, the Rome Statute marks an indisputable advance in international procedural criminal law. It is only hoped that more countries will ratify the Statute in the nearest future including, the United States, so as to strengthen the prosecutorial profile of the ICC. In the light of the above discussions, the ICC must continue to consolidate its ongoing development into an efficient and professional international organization and, at the same time, into a functioning and credible international court. It also remains essential that the ICC continues to show through the way it conducts all its activities, that it is a purely judicial, objective, neutral and non-political institution. States Parties and the ICC must in a foreseeable future develop a new system of best practices of effective criminal cooperation, direct, flexible, without unnecessary bureaucracy, with a fast flow of information and supportive measures. There should be continuous development of professional (including the judges) and efficient working methods, with clear goals and priorities, in particular with regard to investigations. State Parties must therefore fulfill their commitment of enforcing the decisions of ICC. Finally, the United States government should ratify the Rome Statute so as to give the necessary morale boost to the ICC.

[175] O Nelson, 'The Implication Of The Jurisdiction Of The International Criminal Court For African States' (n. 16) 110, D Akande, "The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits", (n. 135) p. 619

[176] Coalition for the International Criminal Court, ICC Implementing Legislation, <http://www.iccnow.org/pressroom/factsheets/FS-CICC-Implementation.pdf> accessed on 12 June 2014

[177] The Implementation Of The Rome Statute Of The International Criminal Court In African Countries, Compiled by Lee Stone and Max du Plessis, <http://www.issafrica.org/.../pages/document.pdf> (accessed on 12 June 2014), p. 449

[178] An example is the Sudanese President Omar al-Bashir who has been indicted by the ICC but his Country has refused to either arrest or surrender him to the ICC.