

Simplified Rome Statute of the International Criminal Court



This document was simplified by Advocates for Public International Law Uganda (APILU) with funding from Open Society Initiative for East Africa (OSIEA)



Acknowledgment

The production of this simplified copy of the Rome Statute has been made possible by the tireless contribution of many stakeholders. We are greatly indebted to all those who in one way or the other made it possible by their selfless contributions for APILU to have the final work published. We would like in particular to extend our most sincere gratitude to Ms. Pamela Mafabi for simplifying the literature from the original Rome Statute publication and producing an excellent working document.

Special thanks go to Dr. George Mugwanya and Mr. Brian Kalenge for reviewing the document. We also recognize the contribution of Ms. Rukia Nakamatte Mbaziira who ably edited the final document. We would also like to acknowledge the contribution of all APILU board members for their input and guidance. We are indebted to the staff at APILU secretariat under the leadership of Martha Nanjobe for timely coordination of the entire process.

Last but not least, our thanks goes to the Open Society Initiatives for Eastern Africa and in a very special way, we are obliged to mention Binaifer, Gladys, Richard for the financial and technical support. Those that we cannot mention here in person, we definitely are very grateful and recognize your enormous contribution.



Introduction

Proposals to set up an international Court to try crimes committed during conflicts started as far back as 1872. However, it was not until after the First World War that the major countries of the world considered this idea again in the agreement known as the Treaty of Versailles and also in other agreements after the Second World War. Although an international court was not set up, special courts were held at Nuremberg and Tokyo to try people who committed crimes against peace, war crimes, crimes against humanity and conspiracy during the Second World War .

After a long silence about the issue, the United Nations General Assembly decided in 1992 to prepare a law that would create a permanent International Criminal Court. As work on the proposed law progressed, one special court was set up in the Hague, Netherlands to try international crimes committed in the former Yugoslavia. Another Court was set up in Arusha, Tanzania to try serious crimes committed during the Rwanda Genocide and Rwanda. More recently, another special court was set up in Sierra Leone to try crimes committed in Sierra Leone.

The experience with the above special courts gave way to a general agreement in the international community that there was need to establish an independent and permanent international court to try very serious crimes committed against humanity.

In 1996 at the 49th session of the United Nations General Assembly, the General Assembly set up the Preparatory Committee on the Establishment of an International Criminal Court. The Preparatory Committee met over two years, amidst intense negotiations by States and a lot of pressure and lobbying by NGOs, before eventually submitting ‘a draft statute and draft final Act’¹. The draft was submitted to the Diplomatic Conference sitting in Rome in July 1998. The Rome statute was adopted by 120 votes to seven (USA, Libya, Israel, Iraq, China, Syria and Sudan. These seven countries did not vote in favour of the Rome Statute) with 20 abstentions, that is, these countries did not vote for or against the Rome Statute. African nations such as Ghana, Nigeria, Morocco, Kenya, Uganda, Zambia and South Africa played an important role in lobbying support especially among the so-called ‘underdeveloped’ countries of the world which were initially hesitant about the idea of an international court to undermine their national sovereignty and independence.

The Rome Statute set out the Court’s authority, structure and functions and stated that the statute would enter into force 60 days after 60 States had ratified or acceded to it. However, the Rome statute did not enter into force after 60 days because 60 states had not ratified it. The Rome Statute entered into force on 1 July 2002 after realizing the membership of 60

1 Cassese Antonio; International Criminal Law 4th Edition, Oxford Publications, Pg 342



countries. By October 2005, 100 states had ratified the Statute, with Mexico being the 100th state to ratify. Uganda became a member of the court in March 1999 and endorsed the Rome Treaty in June 2002.

In making this law, Member States recognise that all people are united by common bonds and share a common heritage. Member states are mindful of the fact that many children, women and men have been subjected to various forms of violence that have shocked the whole world, and they are determined to ensure that such crimes do not go unpunished. The Court has authority over the most serious crimes that cause concern in the international community, but operates side by side with national courts in exercising judicial power to punish those who are responsible for international crimes.

In July 2004, the International Criminal Court (ICC) Prosecutor announced that he was starting investigations into crimes committed in Northern Uganda since July 2002. This announcement was a result of Uganda government's referral of the situation in northern Uganda to the in December 2003. In October 2005, the ICC issued warrants of arrest for Lord's Resistance Army (LRA) leader Joseph Kony, his deputy Vincent Otti, Dominic Ongwen, Raska Lukwiya, Okot Odhiambo. They are alleged to have committed war crimes and crimes against humanity in Northern Uganda dating back to 2002.

The following is a simplified version of the Rome Statute.



TABLE OF CONTENTS

Introduction	iii
THE INTERNATIONAL CRIMINAL COURT.....	2
What Is the International Criminal Court?.....	2
Purpose of the Court.....	2
Who does the Court report/account to?.....	2
THE DEPARTMENTS OF THE COURT.....	4
How is the Court organised?.....	4
AUTHORITY OF THE COURT.....	5
What is the authority of the Court?.....	5
CRIMES UNDER THE ROME STATUTE.....	6
The Crime of Genocide.....	6
Examples of genocides in history:.....	8
The Holocaust.....	8
Rwanda Genocide.....	9
Bosnian Genocide:.....	11
The conflict in eastern Bosnia.....	11
War Crimes.....	14
What is an International Armed Conflict?.....	14
The following are offences (war crimes) in grave breach of the Geneva Conventions:.....	15
EXERCISE OF THE COURT’S AUTHORITY /ADMISSIBILITY OF A CASE.....	19
Factors to consider in exercise of authority.....	19
COMPLEMENTARITY.....	21
What is complementarity?.....	21
REFERRING CASES TO THE COURT.....	21
How are cases brought before the Court?.....	21
WHAT HAPPENS AFTER A CASE HAS BEEN REFERRED TO THE ICC?..	22
What is the method of investigation?.....	22
Role of the Pre-Trial chamber.....	23
Rights of the persons during Investigations.....	23
The role of the Security Council of UN.....	24
GENERAL PRINCIPLES OF CRIMINAL LAW.....	26
Reasons for excluding criminal responsibility.....	28
VICTIMS: RIGHTS AND ROLES.....	30
Protection of the victims and witnesses and their participation in the proceedings	30
THE TRIAL.....	32
What happens at the trial?.....	32



RIGHTS OF THE ACCUSED.....	34
THE TRUST FUND.....	35
REPARATION.....	36
Forms of reparations.....	36
SENTENCING.....	37
Right of Appeal.....	37
Responsibilities of member states.....	38
OTHER PROVISIONS.....	39
Review of the Rome Statute.....	39
Changes to the Rome statute (Amendments).....	39
Changes to the Rome statute (Amendments).....	26



THE INTERNATIONAL CRIMINAL COURT

Abstract

On 17 July 1998 in Rome, 120 States adopted a Statute establishing the ICC. For the first time in the history of international law, States agreed to accept the jurisdiction of a permanent international criminal court to prosecute the most serious crimes of international concern.

As of May 2009, the Court had investigated six 'situations' around the world and has issued arrest warrants for suspects in the Democratic Republic of Congo (arising out of investigations of crimes committed in the Eastern Province of the DRC), Uganda (arising out of atrocities committed in Northern Uganda by the Lord's Resistance Army) and Sudan (arising out of crimes committed in Darfur).

What Is the International Criminal Court?

The ICC was established to try persons who are alleged to have committed the most serious crimes that concern the international community. The ICC is located in The Hague in the Netherlands. However, when it is necessary to do so, the Court can hold its sessions anywhere².

The ICC is a permanent, treaty-based and independent court. It is not controlled by any government or organisation. It is not even part of the United Nations (UN) Organisations. It works in cooperation with the UN and other organisations that help it achieve its purpose.

The Court does not replace courts of the member countries. It only comes in when national courts are not able, or are not willing to exercise their authority over crimes listed in the Rome Statute. However, the Court can only apply the law in the Rome Statute, not the law of member countries. This is referred to as the Principle of Complementarity.

Purpose of the Court

The role of the Court is to investigate and try people accused of committing crimes that are outlined in the Rome Statute. These are: Genocide, War Crimes, Crimes against Humanity and the Crime of Aggression (although the Crime of Aggression is yet to be defined and agreed upon by the Assembly of State Parties (ASP)). The Court's other role is to punish those who are found guilty of committing international crimes under the Rome Statute. The Court also provides reparations towards victims of crimes.

Who does the Court report/account to?

The supreme decision making body of the Court is the Assembly of State Parties (ASP). Each state party has one representative to the ASP. Representatives have one vote and decisions are reached by consensus or by a majority vote.

² Article 62



The judges and prosecutors are appointed by the Assembly of State Parties (ASP). However, the Registrar is voted by the judges. The Court is comprised of the Presidency, an Appeals Division, a Trial Division, a Pre-Trial Division, the Office of the Prosecutor and the Registry. Eighteen judges are elected by the Assembly of State Parties for a nine year term. He/she must have strong personal and professional qualifications in the fields of international and criminal law.

Funding for the Court is provided by three sources: (a) assessed contributions by State Parties; (b) funds provided by the United Nations; (c) voluntary contributions from governments, international organisations, individuals and other entities.

The relationship between the ICC and the UN is governed by a cooperation agreement. The agreement is one of 'cooperation' rather than 'supervision.' The prosecutor of the ICC acts independently and that no member of his/her Office can seek or act on instructions from an external source³ .

3 Rome Statute, Art 42 (1)



THE DEPARTMENTS OF THE COURT

How is the Court organised?⁴

The Court has four departments: the Presidency, the Judicial Division, Office of the Prosecutor (OTP) and the Registry.

The Presidency⁵ is the office made up of the President, the First and Second Vice President who are elected by a majority of the judges for a period of three years. The Presidency is responsible for ensuring proper administration of the Court and representing the Court to the outside world.

The Judicial Divisions⁶ consists of Judges who hear cases before the Court. The Judges work in groups called Chambers. There are three Chambers: Pre Trial, Trial and Appeals chambers.

The **Pre-Trial Judges** make decisions on matters which come up before a trial starts. Such matters include issuing warrants of arrest, protecting the interests of victims and witnesses.

The **Trial Judges** are the ones who hear the evidence and decide if the accused person is innocent or guilty. They also decide on the punishment for the crime and any awards or compensation to be paid to victims.

The **Appeal Judges** review decisions taken by the other judges. They can agree with those decisions or change them. Their decision is final.

The Office of the Prosecutor⁷ is responsible for investigating and prosecuting crimes under the Rome Statute. The Prosecutor must establish the truth about a situation and must get all evidence even if that evidence is in favour of the accused person.

The Registry⁸ is responsible for undertaking administration functions which are not of a judicial nature. The Registry is headed by a Registrar who works under the authority of the President of the Court. The judges elect the Registrar for a term of five years by a majority vote.

The Registrar is also responsible for setting up a Victims and Witnesses Unit to provide protective measures and arrange for security, counseling and other suitable assistance for victims and witnesses who appear before the Court.

4 Article 34
5 Article 38
6 Article 39
7 Article 42
8 Article 43

AUTHORITY OF THE COURT⁹

What is the authority of the Court?

The Court has authority to try crimes that are contained in the Rome Statute. These are:

- The Crime of Genocide
- Crimes against Humanity
- War Crimes

In future, the Court will also have authority over a crime known as Aggression once it is agreed upon and defined. The authority of the court covers crimes that were committed after 1st July 2002.

What are state parties?

State parties to the Rome Statute are countries which have ratified or acceded to the Rome statute. **Ratification** refers to a situation whereby a country consents to be bound by a treaty at an international level, ratification indicates that a state is committed to undertake the obligations under a treaty. At national level, ratification includes the process of adopting an international treaty by the legislature, a Constitution or other document which binds the country.

Accession is the act in which a State that has not signed a treaty expresses its consent to become a party to that treaty by depositing an “instrument of accession”. Accession has the same legal effect as Ratification.

The court has authority over all state parties to the Rome statute both in regards to nationality and geographically. In addition, countries or States that are not party to the Rome Statute may accept the ICC’s authority in regards to specific situations by making a declaration to this effect¹⁰. The court also has authority over individuals from a non state party, if they commit atrocities which the ICC has authority to try¹¹.

Lastly the court can also get authority if a situation is referred to it by the United Nations Security Council. In such instances, the person(s) who is accused of committing crimes does not need to be a national(s) of a state party¹². An example is the situation in Darfur which was referred to the ICC by the UN Security Council. Sudan is not a state party of the ICC.

9 Articles 5, 6, 7 & 8

10 Article 12

11 Article 12(2)

12 Article 13(b)

CRIMES UNDER THE ROME STATUTE

1. The Crime of Genocide¹³

The crime of genocide exists to protect certain groups from being destroyed, exterminated or wiped out. It is committed against a particular group of people. This may be because of their nationality, tribe, common language, culture, race, geographical location or religion. The attacks on the group are usually of a wide scale and are undertaken systematically. For genocide to be proved, the prosecutor must prove the motive or intention to destroy the group as well as the actual commitment of the crime. In other words, genocide is the deliberate and systematic destruction, in whole or in part of an ethnic, racial, religious, or national group.

“

The Genocide Convention defines genocide as “any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, such as: 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; [and] forcibly transferring children of the group to another group.”¹⁴

The offence of genocide has the following underlying offences:

- **Genocide by killing members of the group.** This occurs when there is widespread killing of members of a specific group. The intention is to destroy that group. It can be proved through evidence that the dead people are from a specific group; or where the wounded in hospital are members of this particular group; or by the nature of attacks on the group or methods of killing them.¹⁵ It also includes killing of babies born to members of that group.
- **Genocide by causing serious injury to the bodies or minds of members of the group.** This is where acts of bodily and mental torture are used to persecute or discriminate against members of the group; and cause harm that

13 Article 6

14 Article 2, of the 1948 United Nations Convention on the Prevention and Punishment of the Crime of Genocide (CPPCG).

15 See the International Criminal Tribunal of Rwanda (ICTR) case of Prosecutor v. Akayesu (Trial Chamber) September 2, 1998 para. 114-116.

seriously injures health, disfigures, or causes serious injury to the internal or external organs or senses of members of the targeted group. Actions like rape and other related acts of sexual violence also amount to causing serious bodily and mental harm.

Rape as genocide

The use of rape as a weapon of war is the most notorious and brutal way in which conflict impacts on women. Rape is often used in ethnic conflicts as a way for attackers to perpetuate their social control and redraw ethnic boundaries because women are seen as the reproducers and care takers of the community. Therefore if one group wants to control another, they often do it by impregnating women of the other community because they see it as a way of destroying the opposing community.

On October 2nd, 1998, history was written in Arusha at the International Criminal Tribunal for Rwanda (ICTR) when rape was officially recognised as a crime of Genocide. The trial of Jean-Paul Akayesu by the ICTR found Mr. Akayesu guilty of genocide and made rape part of Akayesu's conviction. The court declared that rape may constitute genocide if committed with intent to destroy a particular group. In this case, Tutsi women were raped to increase their suffering before being killed. The court also made the first definition of rape under international law. It defined rape as "A physical invasion of a sexual nature, committed on a person under circumstances which are coercive." Coercive circumstances need not include physical force. Threats and intimidation would qualify.

The ICTR judges not only applied the 1948 Convention for the first time but also enriched its definition by arguing that rape, when perpetrated in a certain manner, could constitute as a criminal act within the wider genocide scheme. It underscored the fact that rape and sexual violence may constitute genocide just as any other act of serious bodily or mental harm as-long-as such acts were committed with the intent to destroy a particular group targeted.

- *Genocide by subjecting the group to conditions that lead to their physical destruction.* This is when the offender(s) use methods of destruction by which s/he does not kill the group members immediately but these methods slowly but surely destroy the group eventually. The methods used lead to slow death. Examples of such methods are starvation, expelling or displacing members of the group from

their homes, denying them proper clothing, housing, reducing or denying medical services and even intentional spreading of HIV through widespread rape.

- *Genocide by forcing conditions intended to prevent the birth of children in the group.* This is when actions are taken against the group to stop their increase in numbers through new births. Such methods or acts include sexual mutilation, forced birth control especially sterilization, separating men from women, and prohibiting marriage of the group members. The crime is also committed when the women of that group are deliberately made pregnant in order to affect the ethnic composition of their children.
- *Genocide by forcibly transferring children of the group to another group by force.* This involves use of force, threats or torture to achieve the purpose of transferring children from the group to another group. The crime is also committed when the offender authorises such a transfer.

Examples of genocides in history:

The Holocaust

The Holocaust is the term generally used to describe the killing of approximately six million European Jews during the 2nd World War. The Holocaust was part of a programme of deliberate and systematic extermination planned and executed by Nazi Germany under Adolf Hitler. The usual German term for exterminating Jews during the Nazi period was the phrase the: “Final Solution of the Jewish Question”. The persecution and killing of Jews were accomplished in stages: Throughout the 1930s, the legal, economic and social rights of Jews were steadily restricted. In 1933, a series of laws were passed to exclude Jews from key areas: the Civil Service Law; the Physicians’ law; and the Farm law which forbade Jews from owning farms or participating in agriculture. Jewish lawyers were disbarred, and in Dresden, Jewish lawyers and judges were dragged out of their offices and courtrooms, and beaten up. Jews were excluded from schools and universities and from belonging to the Journalists’ Association, or from being newspaper editors. Concentration camps were established in which inmates were used as slave labour until they died of exhaustion or disease. Where the Third Reich conquered new territory in Eastern Europe, specialized units murdered Jews and political opponents in mass shootings. Jews were crammed into ghettos before being transported hundreds

of miles by freight train to extermination camps where, if they survived the journey, the majority of them were killed in gas chambers.

Every arm of Nazi Germany's bureaucracy was involved in the logistics of the mass murder, turning the country into what has been termed "a genocidal state". For instance parish churches and the Interior Ministry supplied birth records showing who was Jewish; the Post Office delivered the deportation and denaturalization orders; the Finance Ministry confiscated Jewish property; German firms fired Jewish workers; universities refused to admit Jews, denied degrees to those already studying and fired Jewish academics; government transport offices arranged trains for deportation to camps; German pharmaceutical companies tested drugs on camp prisoners. As prisoners entered the death camps, they were made to surrender all personal property which was carefully catalogued and tagged before being sent to Germany to be reused or recycled.

Rwanda Genocide

The **Rwandan Genocide** was the 1994 mass killing of approximately 800,000 – 1,000,000 Rwanda's Tutsis and Hutu political moderates (10,000 murdered every day, 400 every hour, 7 every minute) by extremist Hutu under the Hutu power ideology. This was done over the course of about 100 days, beginning with the assassination of the President Juvenal Habyarimana who was of the Hutu ethnic group. The genocide had its roots in the Hutu-Tutsi ethnic divisions and related sporadic violence, which had resulted in a large number of Tutsi refugees in the nations around Rwanda by 1990. The Rwandan Civil War, fought between the Hutu regime and the RPF increased the ethnic tensions in Rwanda and led to the rise of a Hutu ideology that stressed that the Tutsi intended to enslave Hutus and must therefore be resisted at all costs. However, a plan for the genocide had existed since 1957, when the Hutu Emancipation Movement called the Parmehutu published the "Bahutu Manifesto", where it reported the monopoly of power held by the Tutsi minority. In the 1960s, these denunciations led to overthrowing of the monarchy and establishment of a Hutu regime which persecuted the Tutsi, who in many cases were forced to flee.

Before the genocide, a Hutu journal Kangura, was influential in inciting Hutu contempt for Tutsis because of their ethnicity. Hassan Ngeze, founder and editor of Kangura, published the widely read Hutu Ten Commandments, which called for the formal installment of Hutu power ideology in schools and establishment of an exclusively Hutu army. Among the commandments was the motto, "The Hutu should stop having mercy on Tutsis."

The news media also played a big role in the genocide: local print and radio media fuelled the killings. The print media in Rwanda is believed to have started hate speech against Tutsis which was later continued by radio stations. The state-owned Kangura newspaper started an anti-Tutsi and anti-RPF campaign in October 1990. From late October 1993, the Rwanda Television repeatedly broadcast themes underlining the inherent differences between Hutu and Tutsi, the foreign origin of Tutsi, the disproportionate share of Tutsi wealth and power, and the horrors of past Tutsi rule. The television also repeatedly stressed the need to be alert to Tutsi plots and possible attacks and called upon Hutu to prepare to 'defend' themselves against the Tutsi.

The assassination of President Habyarimana in April 1994 was the immediate cause of mass killing of Tutsi and moderate Hutus carried out primarily by two Hutu militias: the Interahamwe and the Impuzamugambi. The genocide was directed by a Hutu Power group known as the Akazu. By the time the killing started, the Rwandan militias were about 30,000 - one militia for every ten families. The militias were organised nationwide, with representatives in every neighbourhood. Some militia members were able to acquire AK-47 assault rifles. Other weapons, such as grenades were widely distributed. Many members of the Interahamwe and Impuzamugambi were armed only with machetes and these were some of the most effective killers. When the killing began in 1994, authorities used the TV and Radio Rwanda to incite and mobilise, then to give specific directions for carrying out the killings.

The killings were quickly implemented throughout most of Rwanda. The first to organise killings on the scale characterizing genocide was the mayor of the northwestern town of Gisenyi, who called a meeting on April 6 to distribute arms and send out militias to kill Tutsis. Most of the victims were killed in their villages or in towns, often by their neighbours and fellow villagers. The militia members usually murdered their victims by cutting them with machetes although some army units used rifles. The victims were often found hiding in churches and school buildings where Hutu gangs massacred them. One such massacre occurred at Nyarubuye. On April 12, 1994, more than 1,500 Tutsis sought refuge in a Catholic church in Nyange, in then Kivumu commune. Local Interahamwe acting in concert with the priest and other local authorities then used bulldozers to knock down the church building. People who tried to escape were cut down with machetes or shot. Ordinary citizens were called on by local officials and government-sponsored radio to kill their neighbours. Those who refused to kill were often killed.

Sexual assault formed an integral part of destroying the Tutsi as an ethnic group. The rape was systematic and was perpetrated against Tutsi women only, showing the specific intent for those acts to constitute genocide. Military leaders encouraged or ordered their men to rape Tutsi as well as condoned the sexual violence, without making efforts to stop them. Sexual violence against women and girls during the Rwanda genocide included rape, gang rape, sexual slavery (either collectively or individually through "forced marriages"), rape with objects such as sticks and weapons often leading to the victim's death, sexual mutilation of, in particular, breasts, vaginas or buttocks, often during or following rape. Pregnant women were not spared from sexual violence and on many occasion victims were killed following rape. The sexual violence in Rwanda stands out in terms of the organised nature of the propaganda



that significantly contributed to fueling sexual violence against Tutsi women, the public nature of the rapes and the level of brutality towards the women. War rape occurred across the country and was frequently perpetrated in plain view of others, at sites such as schools, churches, roadblocks, government buildings or in the bushes.

Bosnian Genocide:

The term **Bosnian Genocide** refers to either the genocide committed by Serb forces in Srebrenica in 1995, or to ethnic cleansing that took place during the 1992-1995 Bosnian War. The **Srebrenica Massacre**, also known as the **Srebrenica Genocide**, was the July 1995 killing of an estimated 8,000 Bosniak men and boys in the area of Srebrenica in Bosnia and Herzegovina, by units of the Army of the Republika Srpska (VRS) during the Bosnian War.

The conflict in eastern Bosnia

After declaring independence from Yugoslavia on October 15, 1991, the Republic of Bosnia and Herzegovina was formally recognized. A fierce struggle for territorial control then ensued among the three major groups in Bosnia: Bosniaks (commonly known as ‘Bosnian Muslims’), Serb and Croat. In the eastern part of Bosnia, close to Serbia, the conflict was particularly fierce between Serbs and Bosniaks.

The predominantly Bosniak area of Central Podrinje (around Srebrenica) was of strategic importance to Serbs, as without it there would be no territorial integrity within their new political entity of Republika Srpska. They then proceeded with ethnic cleansing of Bosniaks from Bosniak ethnic territories in Eastern Bosnia and Central Podrinje. The International Criminal Tribunal for the Former Yugoslavia observed that:

“Once towns and villages were securely in their hands, Serb forces - military, police, the paramilitaries and, sometimes, even Serb villagers systematically applied the same pattern: they ransacked or burnt down Muslim houses and apartments, rounded up or captured; or sometimes beat up and killed Muslim villagers. They separated the men from the women. In neighbouring regions, Bosniaks were either killed or forced to flee to Srebrenica, resulting in 1,156 deaths, according to Bosnian government data. Thousands of Bosniaks were also killed in Foca Zvornik, Cerska and Snagovo.

In 2004, in a unanimous ruling on the “Prosecutor v. Krstić” case, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) ruled that the Srebrenica massacre was genocide, the Presiding Judge stated that ‘by seeking to eliminate a part of the Bosnian Muslims [Bosniaks], the Bosnian Serb forces committed genocide. They targeted the forty thousand Bosnian Muslims living in Srebrenica for extinction, a group which was emblematic of Bosnian Muslims in general. They stripped all the male Muslim prisoners, military and civilian, elderly and young, of their personal belongings and identification, and deliberately and methodically killed them solely on the basis of their identity.



2. Crimes against Humanity¹⁶

Crimes against humanity comprise a serious attack on human dignity or grave humiliation of one or more human beings. The offender must have knowingly done acts or omissions that contribute to committing the crime. To be a crime against humanity, an “attack directed against any civilian population” must have five elements:

1. There must be an attack,
2. The acts of the perpetrator must be part of the attack,
3. The attack must be “directed against any civilian population,”
4. The attack must be widespread and systematic,
5. The perpetrator (one who commits an offence or crime) must know the wider context in which his acts occur and know that his acts are part of the attack

The following offences amount to crimes against humanity:

- **Murder:** This is when civilians are killed in an attack on discriminatory grounds. The offender kills civilians **as part of a widespread and well coordinated plan to do so**. The crime is also committed when a civilian dies as a result of unlawful acts or omissions of the offender or his/her subordinate. The unlawful attack or omission must be intended to cause the death of civilians.
- **Extermination:** This crime is different from murder. Unlike murder, it involves the element of mass killing of civilians. It is committed when the offender unlawfully and intentionally kills people **as part of a widespread attack against a civilian population**. Extermination also involves intentionally inflicting conditions of life, like withdrawing access to food and medicine from the affected population which is intended to cause the destruction of part of the population.
- **Enslavement:** This crime is committed when the offender completely controls a person and exercises a right of ownership over that person. The crime is also committed when civilians are bought and sold (human trafficking), especially women and children, as part of such attacks. The offender completely takes away the freedom of the civilians.
- **Deportation or forcibly transferring the population:** This is when people are displaced by force from the area where they reside lawfully by expelling them or through using other forceful actions. The expulsion is done without any reasons justified under international law. The crime is also committed when the offender forcefully moves an individual from where they reside, to a place that is not of their choice, with no hope of their return. Such a move or transfer is neither justified by military reasons nor by reason of security of the population.
- **Imprisonment or other severe deprivation of physical liberty:** This is when the offender imprisons civilians in circumstances that are against rules of international law.
- **Torture:** This crime is committed when the offender intentionally administers severe pain or suffering on a person who is under his/her control. However, torture does not include pain or suffering which is part of lawful authorizations.

16 Article 7

- **Rape:** the rape must be carried out in a systematic and organised manner against a civilian population on national, political, ethnic, racial or religious grounds.
- **Sexual violence:** This includes forcible sexual penetration of the vagina, anus or oral cavity by a penis and/or the vagina or anus by some other object, and sexual abuse such as forced nudity.
- **Sexual slavery and forced prostitution:** Here, the offender forces a civilian under his/her control to engage in acts of a sexual nature. All serious abuses of a sexual nature inflicted upon the physical and moral integrity of a person through force, threat of force, or intimidation in a way that is degrading and humiliating for a victim's dignity are prohibited by international law.
- **Forced pregnancy and forced sterilization:** This crime is committed when the offender impregnates a woman by force and detains her with the intention of affecting the ethnic makeup of any population. In enforced sterilization, the offender carries out activities that are meant to affect the victim's ability to bear children.
- **Persecution:** This refers to a situation where a person(s) intentionally deprives another of his/her fundamental rights because of their identity of his/her group.
- **Enforced disappearance of people:** This means arresting, detaining or abducting a person(s) followed by refusal to acknowledge such actions, or to provide information on the whereabouts or fate of the victims. The intention must be to keep the victims away from protection of the law for a prolonged period of time. It must be shown that the offender acted on behalf of a State or political organisation.
- **Apartheid:** This is when acts similar to those that are referred to above are carried out in an institutionalized regime that systematically oppresses and dominates another racial group(s). The intention is to maintain the dominant racial group in political power.
- **Other inhumane acts as crimes against humanity:** Any act which is cruel and inhumane in nature and character can amount to a crime against humanity. The intention of such acts is to cause serious mental suffering or injury to the victim.

Crimes become crimes against humanity when they are committed **as part of a widespread attack or systematic practice**. Murder, extermination, torture, rape, political, racial, or religious persecution and other inhumane acts become crimes against humanity when they are part of a widespread or systematic practice. Isolated inhumane acts of this nature may constitute grave infringements of human rights, or depending on the circumstances, war crimes, but may fall short of falling into the category of Crimes against humanity.

An individual may be liable for committing crimes against humanity even if s/he commits one or two of the offences mentioned above, or engages in one such offense against only a few civilians, as long as **those offenses are part of a consistent pattern of misbehavior by a number of persons linked to that offender** (for example, if they

engage in armed action on the same side or because they are parties to a common plan or for any similar reason). Therefore, when one or more individuals are not accused of planning or carrying out a policy of inhumanity, but of undertaking specific crimes or vicious acts, then one ought to look at these atrocities or acts in their context and identify whether they could be part of an overall policy or a consistent pattern of an inhumanity, or whether they instead constitute isolated or sporadic acts of cruelty and wickedness.

War Crimes¹⁷

War crimes exist to protect people who are not taking part in the war from crimes committed during war time or a conflict situation. A war crime is a violation of established laws that govern war, and include failures to stick to standards of procedure and rules of battle. The laws of war are based on the principle that the right of warring parties to inflict harm to the enemy IS NOT UNLIMITED, and are subject to certain constraints.

For an offence to be classified as a war crime, it must be committed as part of the war, and must therefore be connected to the war. In other words, the crime may be committed in the location where the armed conflict is taking place, or by a person who is actively taking part in the war situation, or both. The war situation must have influenced the offender's decision to commit the crime, the manner in which s/he committed the crime, and even the purpose for which s/he committed it.

War crimes include the following:

(a) War Crimes that are grave breaches of the Geneva Conventions of 1949 – article 8(2) (a)

Geneva Conventions protect people and property from crimes committed in connection to war. The war crimes that constitute grave breaches of the Geneva Conventions are committed when four conditions exist:

1. There must be an armed conflict;
2. There must be a connection between this conflict and the crimes;
3. The armed conflict must be international in scope; and
4. The persons or property which fall victim to the grave breaches must be 'protected' in the Geneva Conventions.

What are Geneva Conventions?

Geneva Conventions are made up of four treaties that were formulated in Geneva, Switzerland. The Conventions were the results of efforts by one Henri Dunant who was motivated by the horrors of war which he witnesses at the Battle of Solferino in 1859. Geneva Conventions are the basis of humanitarian law in that they concern the treatment of the wounded, civilians, shipwrecked and prisoners of war¹⁸. In 1977 and 2005, three separate amendments were made part of the Geneva Conventions.

17 Article 8

18 http://en.wikipedia.org/wiki/Geneva_Conventions

What is an International Armed Conflict?

A conflict is classified as an international armed conflict when it is between two or more sovereign nations or is being contested on the territory of two or more sovereign nations.

Protected persons in this category are those who are not engaged in the conflict, as well as those who have surrendered or laid down arms and find themselves in the hands of a party to the conflict. They include civilians, religious personnel, and members of the armed forces who have surrendered or laid down their arms and those who are sick, in detention, injured in battle, or who are no longer actively participating in war for any reason.

The following are offences (war crimes) in grave breach of the Geneva Conventions:

- **Willful killing:** willful killing is committed when a protected person dies as a result of actions or omissions of the offender during an armed conflict. The victim must be a person who is not taking part in the war.
- **Torture or inhuman treatment, including biological experiments:** Under this crime, torture is directed against a 'protected person' who is not taking part in the war. Similarly, inhuman treatment occurs when the offender causes serious pain and suffering on a protected person which amounts to an attack on human dignity. On the other hand, the war crime of biological experiments is committed when the offender uses biological experiments on a person who is not involved in the war. The experiment is not for medical reasons and is not in the interest of the victim.
- **Willfully causing great suffering and serious injury to someone's body or health:** under this offence, the offender intentionally causes **serious mental or physical pain and suffering to the victim**, who is a protected person.
- **Destruction and appropriation of property:** The crime is committed when the offender recklessly destroys property which is protected by the Geneva Conventions. Such property includes civilian hospitals, medical aircraft and ambulances, and other property whose destruction is not necessary for military operations. The destruction of property must be on a large scale. However, one single act of destruction can be enough to qualify as a war crime, for example, bombing a hospital.
- **Compelling service in hostile forces:** In this case, the offender forces a protected person to take part in military operations against that person's own country or forces.
- **Denying a fair trial:** The crime is committed when the offender prevents a protected person from having a fair trial by denying him/her the rights due to him/her in a judicial process. These include:
 - Having a fair and public hearing within a reasonable time
 - The right to an independent and impartial judge or tribunal
 - The right to a public hearing (although there are circumstances when the public can be excluded)
 - The right to a public judgment (although this may be restricted in certain types of cases)
 - The right to be presumed innocent until you have been proved to be guilty
 - The right to be informed promptly, in a language which he or she understands and in detail, of the



nature and cause of the accusation against him.

- The right not to be forced to answer questions, although the court may be able to draw conclusions from your failure to answer questions.
 - The right to adequate time to prepare your defence
 - The right to defend him/herself in person or the right to have legal aid for a lawyer if you cannot afford one and it is in the interests of justice for you to have one.
 - The right to question the main witnesses against the accused person and to call witnesses of his/her own
 - The right to be present at his/her trial
 - The right to put your side of the case at your trial
 - The right to an interpreter if s/he needs one
- **Unlawful deportation, transfer or confinement:** this is when a person forcefully moves an individual from where they reside, to a place that is not of their choice, with no hope of their return. Such a move or transfer is neither justified by military reasons, nor by reason of security of the transferred people. Similarly, unlawful confinement occurs when the offender detains a person to a certain location without any reasonable grounds, and without observing safeguards required for detained civilians. Such safeguards include:
 - **Taking hostages:** This is when a person holds another as prisoner to ensure that another party meets some specific demands or in order to have a condition fulfilled.

War Crimes also include other serious violations of the laws and customs that apply during an armed conflict of an international nature. These include any of the following acts¹⁹:

- (i) Intentionally directing attacks against the civilian population or against individual civilians who are not directly participating in hostilities;
- (ii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in providing humanitarian assistance or peacekeeping mission, as long as they are entitled to protection given to civilians or civilian objects under the law of international armed conflict;
- (iii) Intentionally launching an attack when the offender is fully aware that the attack will lead to death or injury to civilians; or lead to widespread, long-term and severe damage to the natural environment; and this damage would be clearly excessive in relation to the direct overall military advantage expected to result from the attack;
- (iv) Attacking or bombarding towns, villages, dwellings or buildings which are not defended, and which are not military targets;
- (v) Killing or wounding a combatant who has surrendered after having laid down his/her implements of war, or one who no longer has a way of defending him/herself;

¹⁹ Article 8 (2)(b) of the Rome Statute

- (vi) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, hospitals and places where the sick and wounded are collected;
- (vii) Committing cruel acts that violate personal dignity, especially humiliating and degrading treatment;
- (viii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;
- (ix) Intentionally starving civilians as a method of warfare by taking away from them the items necessary for their survival, including willfully obstructing relief supplies;
- (x) Enrolling or enlisting children under the age of fifteen years into the national armed forces or using them to actively participate in hostilities.

War Crimes that take place during a civil war, that are serious violations of common Article 3 of the Geneva Conventions²⁰

For war crimes that result in serious violation of common Article 3 of the Geneva Conventions to apply, there must be an armed conflict **within** the borders of a State, which does not involve the participation of another sovereign state. In other words, the conflict is not of an international character, but is between forces of a sovereign State and an organised armed group. Crimes under this part are those that are committed against people who are not actively taking part in the domestic armed conflict or civil war. Such persons include civilians, religious personnel, and members of the armed forces who have surrendered or laid down their weapons and those who are sick, in detention, injured in battle, or who are no longer actively participating in war for any reason. Any person fitting such a description is a 'protected person' in this category of war crimes.

The underlying offences under this category of war crimes include the following:

- *Committing violence to life and person*, in particular murder of all kinds, injuries that deprive the victim of a limb or other important body part, cruel treatment and torture;
- *Cruel acts on personal dignity*: This crime is committed when the offender subjects a protected person to treatment which may be considered as a lesser form of torture. The offender subjects the victims to treatment designed to lower their self-esteem and self-regard, causing humiliation, degrade the victims, and seriously attacks the victim's human dignity. The humiliation must be so severe that any ordinary person would be outraged by it.
- *Taking hostages*: This refers to taking a **protected person** as prisoner to ensure that the other party meets certain specified demands.
- Sentencing or executing a person when there is no Court judgment that is in place and pronounced by a regularly constituted Court, that is, a Court with a judge, prosecutor and defence; and one which ensures that the accused's person(s) rights to a fair trial are respected. Such rights include the right to know the offence s/he is charged with, a right to defend oneself and produce witnesses, right to a lawyer.

These provisions do not apply to internal disturbances and tensions like riots, or isolated acts of violence and other similar acts²¹.

In addition there are other serious violations of international laws and customs that apply to non-international

20 Article 8(2)(c)

21 Article 8(2)(d)

armed conflicts²². These include:

- Intentionally attacking civilians who are not directly participating in the conflict
- Intentionally attacking buildings, medical units and transport, and workers using the distinctive emblems of the Geneva Conventions – like the Red Cross;
- Intentionally attacking workers, installations, material, units or vehicles involved in providing humanitarian assistance or peacekeeping mission;
- Intentionally attacking buildings dedicated to religion, education, art, science or charitable purposes, hospitals and places where the sick and wounded are collected, provided they are not military targets;
- Committing rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and any other form of sexual violence;
- Enrolling or enlisting children under the age of fifteen years into armed forces or groups or using them to actively participate in hostilities;
- Ordering the displacement of the civilians for reasons related to the conflict, unless the displacement is to ensure security of the civilians involved, or other necessary military reasons so require;
- Subjecting people in the hands of another party to the conflict to physical injuries that deprive the victims of limbs or other important body parts; or causing them to undergo medical or scientific experiments of any kind which are not warranted by medical, dental or hospital treatment of the victim; and are not carried out in his or her interest, and which cause death to or seriously endanger the health of the victim;
- Destroying or seizing an enemy's property unless it is a necessary demand of the conflict;
- *Denying quarter*: This crime occurs when the offender makes a declaration or order that there will be no survivors. The order or declaration is made to threaten the opposing forces, or to justify the manner in which the war is executed. The offender must have been in an effective command or control position over the subordinates to whom the order or declaration was directed.

These above crimes do not apply to internal disturbances and tensions like riots, or isolated acts of violence and other similar acts²³. They apply to armed conflicts that take place in the territory of a State between the government and organized armed groups or between such groups.

²² Article 8(2) (e)

²³ Article 8(2) (f)

EXERCISE OF THE COURT'S AUTHORITY / ADMISSIBILITY OF A CASE²⁴

Factors to consider in exercise of authority

Factors which guide the Court in exercising its authority:

(1) The Court can only try offences outlined in the Rome Statute if they were committed after 1st July 2002²⁵. It cannot deal with crimes committed before this date, even if they are very serious.

(2) The Court can only try people who commit these crimes when they are above 18 years of age²⁶. Those who were below 18 years of age at the time they commit these crimes cannot be tried for offences under the Rome statute because they are considered to have been children at the time.

(3) The Court cannot exercise its authority in a case where the offender has already been tried by another court for the same conduct. This is the principle known as 'double jeopardy'²⁷.

(4) The Court can only exercise its authority when the country responsible does not have the capacity to try the offender; or, is unwilling to arrest, investigate and genuinely prosecute the offender(s) for these crimes²⁸. Where the concerned country has begun national trials in respect of crimes under the Rome Statute, the ICC would have to hold back. However, if these national proceedings are biased and aimed at protecting the offender from being held responsible for the crimes, the ICC can come in. This is the principle known as 'Complementarity'.

Similarly, where the concerned country has investigated and decided not to prosecute the person concerned, the ICC cannot exercise its authority, except where the decision is aimed at protecting the offender(s) from being held responsible for the crimes²⁹.

Another factor for the Court to consider before exercising its authority is the **interests of justice**. This comes in after a case has been referred to the ICC. Under the Rome statute, the prosecutor is required to evaluate information available in relation to a crime and then initiate an investigation. An exception is where the prosecutor decides that there is no reasonable basis to investigate or try someone under the Rome Statute. To decide whether or not to investigate, the prosecutor must consider whether the available information provides a ground to believe that a crime was committed. However, the prosecutor could consider that despite the fact that the offence is of a grave nature, but there are substantial reasons to believe that undertaking an investigation would not be in the interests of justice³⁰. This may be based on the seriousness and circumstances of the crime, the role of the offender in the crime, and the interests of victims.

If the prosecutor determines that s/he will not proceed with the investigations because there are not enough legal

24 Articles 11, 12, 17, 20 & 26
25 Article 11
26 Article 26
27 Article 20 & article 17 (c)
28 Article 17 (a)
29 Article 17 (b)
30 Article 53



grounds or facts to seek for the arrest of the alleged offender; or that the case cannot be tried under the Rome statute because

- (a) it is already being **genuinely** investigated or prosecuted by a state which has authority over it
- (b) the case was investigated by a state with authority over it, but the state **genuinely** decided not to prosecute the person concerned
- (c) the offender has already been tried in respect of the behavior which is complained of
- (d) the case is not grave enough to justify further action under the Rome statute; or
- (e) it is not justifiable to proceed with the case in the interests of justice,

then the prosecutor must inform the Pre-Trial Chamber and the State which referred the case to the ICC, or the UN Security Council of his or her conclusion and the reasons for the conclusion³¹. However, the state which made the referral or the UN Security Council may request the pre-trial chamber to review the decision of the prosecutor not to proceed and may request the Prosecutor to reconsider that decision. Alternatively, the pre-trial chamber may, on its own, review the prosecutor's decision not to proceed and the prosecutor's decision becomes effective only when the Pre-Trial Chamber confirms it³².

31 Article 53(1)(c)

32 Article 53 (3)(a)

COMPLEMENTARITY³³

What is complementarity?

Complementarity refers to the ICC's relationship with national courts. The ICC is supposed to be a Court of last resort, that is, it only comes in when the national Courts are unwilling or unable to prosecute persons who are alleged to have committed offences under the Rome statute³⁴. It is the responsibility of States to investigate and prosecute people who commit these serious crimes. Therefore, State parties are required to put in place national laws for implementing the Rome Statute.

Where a country is willing and able to investigate and prosecute offenders for these crimes, the ICC is expected to allow the national Court of the country to try the offences committed under the Rome Statute. However, the national proceedings must be genuine, and must not be intended to protect persons from being held responsible for crimes. The trials must fit within the international standards expected under the Rome statute; and must guarantee the rights of accused persons.

REFERRING CASES TO THE COURT³⁵

How are cases brought before the Court?

There are three ways in which cases can be brought to the attention of the Court:

1. A State can ask the Prosecutor of the Court to carry out an investigation³⁶ of crimes that have been committed, and for which the ICC has authority. This was the method used when the Government of Uganda referred the situation in northern Uganda to the Prosecutor in 2003. This method can be used by countries which are signatories to the Rome Statute.
2. The Security Council of the United Nations can refer a case to the Prosecutor for investigation³⁷. This method is useful for pursuing people who commit these serious crimes in countries which have not signed the Rome Statute. This is the method which was used to refer the situation in Darfur to the ICC even though Sudan has not signed the Rome Statute.
3. The Prosecutor can start an investigation when s/he receives reasonable information that requires him/her to conduct an investigation³⁸. In this case, the Prosecutor must obtain permission of the pre-trial Judges before s/he can carry out an investigation.

33 Article 17

34 Article 17(2) & 17(3)

35 Article 13

36 Articles 13(a) & 14

37 Article 13(b)

38 Article 13 (c) & 15

For crimes other than those referred by the UN Security Council, the Court can only exercise its authority if the offender is a citizen of a member State or a State which has accepted the Court's authority in respect of the crime³⁹. Similarly, the Court can exercise its authority if the crime was committed within the borders of a member State, or a State which has accepted the Court's authority in respect of that crime⁴⁰.

Where the case is referred to the Court by the UN Security Council, the Court can exercise its authority without any limitation as to the citizenship of the offender, or where the crime was committed.

WHAT HAPPENS AFTER A CASE HAS BEEN REFERRED TO THE ICC?

Role of the Office of the Prosecutor⁴¹

The Office of the Prosecutor (OTP) – which is not supposed to be under the direction and control of any person or organisation - must establish the truth of accusations by collecting all evidence, whether it favours the Prosecution or the offender. The OTP has a duty to reveal information which is favorable to the suspect⁴²; and is also required to agree not to disclose information obtained in confidence, for purposes of obtaining more evidence. The OTP must fully respect all rights of people arising under the Rome Statute. The OTP also has the duty to ask for cooperation of any country or inter-governmental organization⁴³.

What is the method of investigation?

When the prosecutor receives information relating to commission of a crime under the Rome Statute, the OTP checks all information to determine if there is a reasonable ground to investigate the situation⁴⁴. If the Prosecutor decides that there is a reasonable ground, then s/he will make arrangements for international cooperation to assist in investigating the case.

If the prosecutor determines that there is reasonable ground to undertake an investigation, then the investigation division of the OTP will go to the field to gather evidence of the crimes. The investigation is meant to establish the truth of accusations and determine whether the person accused of committing the crimes assumes any criminal responsibility under the Rome Statute. In investigating, the prosecutor must make an effort to respect interests and personal circumstances of witnesses and victims, considering the nature of the crime, especially if it involves sexual or gender violence, or violence against children⁴⁵.

In undertaking investigations, the Prosecutor may collect and examine evidence, request the presence of, and question persons being investigated, victims and witnesses; gain the cooperation of any State or intergovernmental organisation, get into agreements to facilitate cooperation, agree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely to facilitate

39 Article 12(2)(b)

40 Article 12(2)(a)

41 Article 42

42 Article 67(2)

43 Article 54

44 Article 53(1)

45 Article 54

generation of new evidence, unless the provider of the information consents; and take necessary steps to ensure confidentiality of information, protection of any person or preservation of evidence.

Role of the Pre-Trial chamber

Each investigation is assigned to a Pre-trial Chamber of the Court. The role of the pre-trial judges at this stage relates to the following:

- Issuing warrants of arrest or summons to appear in the Court⁴⁶: This follows an application by the Office of the Prosecutor.
- Initial Proceedings⁴⁷: The pre-trial judges make sure that the person who appears in the Court is informed of the charge(s) and his or her rights.
- Confirmation of Charges⁴⁸. The pre-trial chamber holds a hearing to confirm the charge for which the accused person will be tried. It can confirm the charge if the evidence is sufficient. If not, it can refuse to confirm the charge and instead direct that further investigations be made, or that another crime be charged based on the evidence.
- Protecting evidence⁴⁹. The pre-trial chamber can take measures necessary to protect and preserve evidence that is important to the trial.
- Protection and privacy of witnesses, victims and arrested suspects or persons who have appeared in answer to summons⁵⁰. The pre-trial chamber works to ensure that this protection is given.
- Seeking cooperation of States where a Warrant of arrest has been issued⁵¹. The OTP works with the pre-trial chamber to achieve this cooperation.

After confirming the charge, the case is given to a Trial Chamber which will then try the accused person in accordance with the provisions of the Rome statute.

Rights of the persons during Investigations⁵²

A person has the following rights during investigations:

- Not to be forced to associate himself/herself with the crime(s) or to confess guilt
- Not to be forced, pressurized, intimidated, threatened, tortured or to be treated with other forms of cruel treatment or punishment;
- To be provided with free interpretation and translation services, if questioned in a language s/he does not understand to ensure fairness
- Not to be arrested or detained without reason; and a person's liberty is not to be taken away except on grounds and following procedures that are permitted by the Rome Statute.

46 Article 57(c)(i)

47 Article 60

48 Article 61(1)(2)(3)(4)

49 Article 56

50 Article 57(c)(iii)

51 Article 57 (d)

52 Article 55

Where the investigator has reason to believe that a person has committed a crime under the Rome statute and that person is about to be questioned by the Prosecutor, or by national authorities, that person shall also have the following rights of which he or she shall be informed before being questioned:

- To be informed, before being questioned, that there are grounds to believe that s/he has committed an offence under the Rome statute;
- To remain silent, and not to be implicated for such silence
- To have a lawyer of his or her choice, or have a lawyer assigned to him or her free of charge;
- To be questioned in the presence of a lawyer, unless the person chooses not to have a lawyer present during questioning.

The role of the Security Council of UN

The main role of the UN Security Council is that it helps to extend the authority of the Court to countries that may not be parties to the Rome statute. An example is the situation in Darfur where the UN Security Council used its authority to refer the situation in Darfur to the ICC even when Sudan has not ratified the Rome statute.

The Security Council can request the Prosecutor to investigate a situation⁵³, and it can also ask the Court to defer or postpone an investigation or prosecution of a case for a period of 12 months, based on a resolution to that effect. Such a request can be renewed on the same conditions⁵⁴. The reason for this authority stems from the UN Charter and the role of the UN as the guardian of international peace and security.

Issuing summons and Warrants of Arrest⁵⁵

At any time after investigations have started, the prosecutor can formally request the pre-trial chamber to send out a warrant of arrest against the alleged offender⁵⁶. The Pre-Trial Chamber will issue the warrant of arrest after it studies the evidence and is satisfied that there are reasons to believe that the person committed a crime under the Rome statute; that it is necessary to arrest the person to ensure that they attend the trial and that the person does not interfere in investigations; or to prevent the person from continuing to commit crimes under the Rome statute. The warrant of arrest remains in force until the Court makes an order in relation to it. Alternatively, the Prosecutor can request the Court to call the person to appear before the Court as long as it is satisfied that the person committed the crime s/he is accused of, and that summoning him/her to the Court is sufficient to ensure the person's appearance. The Court relies on the cooperation of States to enforce warrants of arrest⁵⁷.

Arrest of persons⁵⁸

The Court can request for the arrest and surrender of a person on the basis of a warrant of arrest. The State which is undertaking the arrest must follow its national laws while arresting and surrendering a person to the Court. The

Rome Statute can also be followed where it applies.

53 Article 13 (b)

54 Article 16

55 Article 58

56 Article 58

57 Articles 89, 91 & 92

58 Article 58(5) & 59



The judicial authority of the arresting country must ensure that proper procedures are/were followed and that the rights of the suspects were respected. However, the national judicial authority cannot decide on whether or not the warrant of arrest was properly issued.

What is the difference between ‘Surrender, Extradition and Rendition?’⁵⁹

Under the Rome Statute, “Surrender” means to hand over a person by a State to the Court in accordance with the Rome Statute. On the other hand “Extradition” means to hand over a person by one State to another as required by treaty, convention or national legislation.

Although Rendition is not specifically provided for in the Rome Statute, it has gained prominence with the ‘American war on terror’ and the enactment of the US Patriot Act. It refers to the transportation of suspects to a different jurisdiction for purposes of extracting incriminating evidence, usually by means of torture or cruel and degrading treatment.

59 Article 102

GENERAL PRINCIPLES OF CRIMINAL LAW

(a) No Double Trial/Double Jeopardy⁶⁰

Under the Rome Statute, a person cannot be tried in respect of conduct or behavior for which the person has already been tried and convicted or acquitted of by the ICC. In addition, a person cannot be tried by another Court for Genocide, War Crimes, Crimes against Humanity or Aggression if that person has already been tried and convicted or acquitted by the ICC.

Where another Court has tried a person for conduct amounting to Genocide, War Crimes, Crimes against Humanity or Aggression, then the ICC cannot try the person for the same conduct unless it is shown that the trial in the other Court was conducted with the intention of protecting or safeguarding the concerned person from taking criminal responsibility for crimes under the Rome Statute; or if the proceedings were not undertaken independently or fairly according to fair trial procedures that are recognized by International Law and the trial was conducted in a manner that contradicted an intention to bring the person to justice.

Double jeopardy is a procedural defense that forbids a defendant from being tried twice for the same crime on the same set of facts. A person may inform court that s/he has already been acquitted or convicted of the same offense. Where this issue is raised, evidence will be placed before the court, and if the Court finds that the defence is true, then the subsequent trial will not be allowed to go on.

(b) No Responsibility for Crimes committed before this Law- Also referred to as the Principle of Non-Retroactivity.⁶¹

A person cannot be charged for a crime under the Rome Statute unless the crime or conduct charged was committed AFTER the Rome statute came into force, that is, after 2nd July 2002. In addition, a crime has to be clearly defined and cannot be interpreted by its similarity or equivalence to another crime. In case the definition of a crime is not clear, then any ambiguity shall favor the person being investigated, prosecuted or convicted.

The rationale for this principle is that there can be no crime committed, and no punishment given out unless there is a violation of a written law as it existed at the time the crime was committed. Another consequence of this principle is that only those penalties that had already been established for the offence at the time when it was committed can be imposed. This basic legal principle thereby prohibits the creation of laws after a person has done an act, to the disadvantage of the defendant.

60 Article 20

61 Articles 22, 23 & 24

(c) **Individual Responsibility for Crimes**⁶²

A person who commits a crime under the Rome statute is personally responsible for the crime. The Court has authority over natural persons; and a person who commits a crime that is within the authority of the Court will be held individually responsible for the crime, and will be punished according to the Rome statute

A person will be held responsible for committing a crime under the Rome statute if s/he:

- Commits the crime alone or together with another person, or uses another person to commit the crime;
- Orders, requests or persuades another person(s) to commit the crime, or attempt to commit the crime
- Helps or provides assistance to commit the crime; or provides the means to commit the crime
- Knowingly helps a group of people to commit or attempt to commit the crime
- Directly and publicly forces others to deliberately kill members of a given group
- Tries to commit a crime by doing something that begins the commission of the crime, although the crime does not take place because of circumstances outside the person's intentions.

However, a person who cancels the commission of the crime or prevents the crime from being completed shall not be punished under the Rome statute for attempting to commit the crime as long as that person willingly gave up the criminal purpose.

According to the law, a **natural person** is a natural human being who becomes aware through his/her senses. A natural person is distinguished from a company or corporation which is usually treated at law as a fictitious person.

(d) **Responsibility of Commanders and other superiors**⁶³

A military commander or a person acting as a military commander is criminally responsible for crimes under the Rome statute that are committed by forces under his/her effective command and control, or effective authority and control as the case may be. The commander's criminal responsibility arises if s/he fails to take proper control of such forces, where s/he:

- Knew, or, under the circumstances, ought to have known that his/her forces were committing or about to commit the crimes
- S/he failed to take all necessary and reasonable measures within his or her powers to prevent or suppress commission of the crimes; or to submit the matter to competent authorities for investigating and prosecuting

According to judicial decisions⁶⁴, there must be a superior-subordinate relationship of effective control between the accused person and the one who actually committed the crime. This part of the Article i.e. Art 28 (a), limits responsibility to military personnel although Art 28 (b) extends it to non-military personnel.

62 Articles 25

63 Article 28(a)

64 Prosecutor v Kallon, Case No. SCSL-2003-07-PT, 16 June 2003; Prosecutor v Kamra, Case No SCLS-2003-10-PT, 16 June 2003



(e) Superior Authority and Responsibility for ICC Crimes⁶⁵

A person acting in superior authority, which is not of a military nature, is criminally responsible for crimes committed by the subordinates under his/her control as a result of his/her failure to control such subordinates if:

- S/he knew, or deliberately ignored information which clearly showed that the subordinates were committing or about to commit the crimes;
- The crimes related to activities that were within the control of the superior;
- S/he failed to take all reasonable measures to prevent commission of the crimes.

Effective command or control means that one has a level of direction and supervision over others. It does not refer to a formal military chain of command and hence militias and even quasi-political organizations will still be liable under the principle of command responsibility. As an example, the Interahamwe during the Rwandese genocide received their orders over the radio from people they had never seen or interacted with prior to the commencement of the genocide. Despite this, they (the 'commanders') are still culpable for the genocidal acts of their 'subordinates' who were evidently following their orders and instructions⁶⁶.

(f) Acting in Official Capacity is Irrelevant⁶⁷

The Rome statute applies equally to all persons without distinction. No one can be excused from criminal responsibility on grounds that s/he was acting in official capacity; whether as Head of State or Government, as a member of a Government or parliament, as an elected representative or government official. The privileges, immunities and special procedures available to such a person under national or international law cannot stop the ICC from exercising its authority over that person. A person's official capacity shall also not be used as ground to reduce their sentence if found guilty.

This provision cancels out presidential immunities (provided for under Art 98 (4) of the Ugandan Constitution) and other official immunities protected by national legislation, for instance, Diplomatic Immunity. As evident from the indictments of sitting Sudanese President Omar Bashir and before that, former presidents Charles Taylor and Slobodan Milosevic, international law has clearly established itself above national legislation in this aspect.

(g) Statutes of Limitation Do not Apply⁶⁸

The crimes under the Rome statute law are not subject to any law of limitations: it does not matter how much time has passed since the crime was committed. A person who commits crimes under the Rome statute can be tried for those crimes at anytime after that.

(h) Mental Capacity⁶⁹

A person shall be held responsible for crimes, and punished under the Rome statute only where s/he committed the crimes intentionally with full knowledge and understanding. A person can be said to have the intention to commit a crime if s/he means to engage in behavior that constitutes the crime; or, in relation to the effect of the crime, that person intends to cause that consequence or is aware that the consequence/effect will result in the ordinary course of events. .

(i) Court not to try persons below 18 years⁷⁰

The Court has no authority to try a person who was below 18 years at the time the crime is said to have been committed.

65 Article 28 (b)

66 See Akayesu, supra.

67 Article 27

68 Article 29

69 Article 30

70 Article 26

Reasons for excluding criminal responsibility⁷¹

In addition to other reasons for excluding criminal responsibility, a person will not be responsible for a crime if, at the time of that person's conduct;

- S/he is suffering from a mental illness or deficiency which eliminates his/her ability to understand the unlawfulness or nature of his/her conduct, or that the mental illness prevents the person's capacity to control his/her conduct to conform to the law
- The person is in a state of intoxication which eliminates his/her ability to understand the unlawfulness or nature of his/her conduct, or that the intoxication prevents the person's capacity to control his/her conduct to conform to the law; **UNLESS** the person became voluntarily intoxicated under circumstances whereby s/he knew or ignored the risk that the intoxication could lead him/her to engage in behavior that would amount to a crime under the Rome statute.
- The person acts reasonably to defend him/herself or another person, or, in case of war crimes, the person acts reasonably to defend property that is important for survival, against an imminent and unlawful use of force. The manner of self defense should be proportionate to the extent of danger to the person or property protected. However, the fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility
- The accused person's conduct was caused by threat or pressure that was a result of threat of looming death or serious bodily harm against the accused person or another person; and the accused acts reasonably and necessarily to avoid the threat.

The Court will determine the applicability of grounds for excluding criminal responsibility

(j) Mistake of fact or mistake of law⁷²

A mistake will be a reason for excluding criminal responsibility only if it removes the mental intention required to commit the crime.

A mistake of law regarding whether specific behavior is a crime under the Rome statute will not be a ground to remove criminal responsibility. However, a mistake of law may be a ground for removing criminal responsibility if it removes the mental intention required to commit the crime.

(k) Acting under superior orders⁷³

A person who commits a crime under the Rome statute as a result of a government order, or an order from his/her superior shall be held criminally responsible for the crime unless the person can show that

- S/he was required by law to obey the orders of government or the superior
- S/he did not know that the order was unlawful;
- The order did not appear unlawful

Orders to commit genocide or crimes against humanity are clearly unlawful.

This position has long been established in International Criminal Law stemming from the Nuremburg and Tokyo prosecutions of the Nazi's after the Second World War. The defense of Superior Orders, that is, that one was simply following orders from above is unacceptable.

71 Article 31

72 Article 32

73 Article 33

VICTIMS: RIGHTS AND ROLES

Protection of the victims and witnesses and their participation in the proceedings⁷⁴

Court will take the necessary steps to ensure that witnesses and victims are safe; and protect their physical and mental well being, dignity and privacy. In doing so, the Court will consider relevant factors like age, gender, health and nature of the crime, especially where the crime involves sexual or gender violence, or violence against children. However, these measures should not compromise the rights of the accused person or affect his/her right to a fair trial.

To protect victims and witnesses or an accused person, the Court may carry out any part of the proceedings in private or allow evidence to be presented by electronic or other special means. Such measures will especially be implemented in cases involving victims of sexual violence; a child or witness who is a victim.

Court will allow victims to present their views and concerns in cases where victims' personal interests are affected. However, this shall not compromise the rights of the accused, and a fair and impartial trial. Victims' views may be presented by their legal representatives in cases where Court deems fit.

In cases where a witness or his/her family's security becomes endangered as a result of disclosing information or evidence, then the Prosecutor may withhold the witness' evidence or information and submit a summary of such evidence or information instead. Such measures shall, however, not affect the rights of the accused or his right to a fair and unbiased trial.

Who is a victim under the Rome statute?

A victim under the Rome statute is person who has suffered harm in regards to a specific crime under the Rome Statute. A 'person' can also be an organization or institution which has been harmed by the commission of a crime under the Rome statute. The harm suffered can be physical harm to a person's body or organs, emotional suffering or loss of property. For organizations or institutions, the property lost must be that which was dedicated to religion, culture, education, art, science or charitable purposes. It can also be historic monuments, hospitals, or other places and objects existing for humanitarian purposes. In Uganda, the Kasubi Tombs are a UNICEF protected site and harm to such a 'property' will constitute a 'War Crime' under the Rome Statute.

What are the rights of victims?⁷⁵

Victims have the following rights:

- *The right to participate in proceedings started against an accused person:* They participate as independent interested parties. This is not the same as being a witness. The Court is under the duty to allow victims to present their views at suitable stages of the proceedings. However, not all victims can participate. The Judges decide when and how a victim can participate.
- *The right to protection, for their safety, physical and psychological well-being:* The right to protection also extends to their privacy.

74 Article 68

75 Article 68



- *The right to be represented by a lawyer:* The Court has an office which is responsible for assigning lawyers to victims who require one. The Court trains and keeps a list of lawyers for this purpose.
- *The right to claim reparations for harm suffered:* Reparations can be in form of restitution, rehabilitation or compensation. The Court has a Trust Fund, set up to manage the money required for payment of reparations to victims. The trust fund is under the Victims Reparations Unit and funded by the State Parties under the ASP.

The above rights are in accordance with the principle that true justice is achieved when the voices of victims are heard and their suffering is addressed. The Court has the duty to inform victims of the remedies available to them under this law.

What is the role of a victim?

Victims can play different roles in the proceedings.

- They can provide information to the Prosecutor concerning crimes that have been committed
- They can testify before the Court as witnesses, either in favor of the Prosecutor, or of the accused person
- They can present their views and concerns to the Court during the proceedings. This is possible where their interests are affected.
- They can ask for Reparations for their suffering to be ordered by Court.

How does a victim participate in proceedings?

A victim and/or his/her lawyer⁷⁶ can participate in the proceedings in any of the above roles. However, the victim's lawyer can also:

- Make statements to the Court at the beginning or at the end of a trial,
- Ask a witness questions, and
- Propose suitable reparation in the case.

Victims who wish to participate in proceedings must apply to the Court to be allowed to participate.

76 Rules of Proceedings



THE TRIAL

Trial to be conducted in the presence of the Accused⁷⁷

The accused person must be present during his/her trial, unless his/her presence disturbs the trial proceedings. In case the accused person is present at the trial but continues to disrupt the Court, then Court can remove him/her from Court and make arrangements for him/her to observe the trial from outside the courtroom using communications technology if required, and instruct his/her lawyer from outside the Court room.

However, removing the accused from the Court room shall only be done after alternatives to prevent the accused from disrupting the Court have proved inadequate; and it shall be undertaken only for the time that is strictly required.

Trial to be conducted in public

The Trial must be held in public except in cases where the Trial Chamber decides that there are special circumstances that require certain parts of the trial to be conducted in private, for instance to protect victims and witnesses, or to protect confidential or sensitive information.

What happens at the trial?

At the beginning of the trial, the Trial Chamber will have read to the accused person the charges against him/her. These charges will have already been confirmed by the Pre-Trial Chamber. The Trial Chamber must ensure that the accused person understands the charges, and will provide him/her a chance to admit his/her guilt or state his/her innocence.

Functions and powers of the Trial Chamber⁷⁸

The Trial Chamber must ensure that the trial is fair; is conducted speedily; is conducted with respect of the accused person's rights; and that care is taken to protect victims and witnesses.

When a case is assigned to the Trial Chamber, the Chamber will discuss with the parties and adopt procedures that the necessary to ensure a speedy and fair conduct of the case; determine the language to be used during the trial and make arrangements to disclose documents or information that had not been previously disclosed.

While undertaking its duties before or during the trial, the Trial Chamber may require the presence and testimony of witnesses, production of documents and/or other evidence; make arrangements for protecting confidential information. The Trial Chamber may also make arrangements for protecting the accused person, witnesses and victims.

What happens if the accused person admits the charge?⁷⁹

When the accused person admits the charge, the trial Judges record the admission and can convict him/her of that crime. The accused person must fully understand the consequences of admitting the charge. The plea must not be obtained by any promise. The only expectation can be that of receiving consideration for a reduced sentence. The Judges will then pass a sentence that is suitable in the circumstances.

77 Article 63

78 Article 64

79 Article 65

In case the accused person admits that s/he is guilty, the Trial Chamber must verify that the accused person understands what it means for him/her to admit guilt, and the consequences of admitting guilt. The Trial Chamber must also ascertain that the accused person has voluntarily admitted guilt; and that his/her admission of guilt is supported by the facts of the case that are contained in the charges against him/her. If the Trial Chamber is satisfied, then it will convict the accused person of the crime(s).

In case the Trial Chamber is not satisfied that the accused person understands the nature of the charges, or the consequences of admitting the charge, or that the admission of guilt was not made willingly; or that the admission of guilt is not supported by the facts of the case that are contained in the charges against him/her; then the Trial Chamber will consider it that the accused has not pleaded guilty. The Trial Chamber will then go on with the trial under ordinary trial processes.

Presumption of Innocence⁸⁰

Anyone charged with a crime under the Rome statute is assumed to be innocent until it is proved to the Court that the person is guilty beyond reasonable doubt according to the law applying to the crime. It is the duty of the Prosecutor to prove that the accused person is guilty; and the Court can only convict a person if it is convinced that the accused is guilty beyond any reasonable doubt.

The presumption of innocence means that:

1. With respect to the critical facts of the case—
 - a) Whether the crime charged was committed and whether the accused was the person who committed the crime—the prosecutor has the entire responsibility to prove the case against the accused
 - b) The accused does not have any responsibility to prove anything whatsoever. S/he does not have to testify, call witnesses or present any other evidence, and if the accused person decides not to testify or present evidence, this decision cannot be used against him/her.
2. The judge shall not draw any conclusion against the accused just because the accused has been charged with a crime and is present in court and represented by an attorney. The judge must decide the case solely on the evidence presented during the trial.

Offences against the administration of Justice⁸¹

The Court has authority to try offences against the way it administers justice if the offences are committed intentionally:

- Giving false testimony when the witness is obliged to tell the truth
- Presenting evidence which the witness knows to be false
- Corruptly influencing a witness, getting in the way of the witness or interfering with the attendance or testimony of a witness, getting revenge against a witness for giving a testimony or destroying, interfering with evidence.
- Obstructing, threatening or corruptly influencing an official of the Court so as to force or convince the official of

80 Article 66

81 Articles 70 & 71



Court not to perform his/her duties, or to perform his/her duties in an improper manner;

- Revenging on a Court official because of official duties performed by that official
- Seeking for, or accepting a bribe by a Court official in connection with his or her official duties.

If a person is found guilty of any of the above offences, the Court may imprison him/her for a period of not more than 5 years or ask him/her to pay a fine. The Court can also decide to order both a fine and a period of imprisonment.

RIGHTS OF THE ACCUSED⁸²

In deciding any charge against an accused person, the accused person is entitled to a public hearing, a fair hearing conducted without bias; and to the following:

- To be informed without delay, and in detail of the nature and substance of the charge. This must be done in a language s/he fully speaks and understands
- To be given enough time and services to prepare to defend him/herself and to communicate freely and privately, with a lawyer of his or her choice.
- To be tried without unnecessary delay.
- To be present at the trial, to defend himself or herself personally or through a lawyer of his/her choice, and to be informed that the Court can provide him or her with a lawyer free of charge if he or she cannot afford one;
- To examine or have examined, the witnesses who have testified against him/her and to have the witness testifying in his/her favor to attend Court and be examined. The accused person also has the right to raise defences and present other evidence as is allowed under the Rome statute;
- To have the free assistance of an interpreter and any translations that are necessary to ensure fairness of the proceedings. The accused person is also entitled to free translation of any documents presented to Court into a language which s/he fully speaks and understands;
- The accused person has the right not to be forced to give evidence against him/herself or to admit that s/he is guilty. The accused person has the right to remain silent without having such silence being considered when deciding whether or not s/he is guilty or innocent.
- To make unsworn oral or written statement(s) in his or her defence;
- The accused person has no duty to prove his/her innocence in any circumstance. The duty to prove the guilt of the accused person lies with the prosecutor.
- The accused person is entitled to obtain any evidence in possession of the prosecutor which shows or tends to show is/her innocence or lessen the guilt of the accused; or which might affect the trustworthiness of prosecution evidence.

82 Article 67

THE TRUST FUND⁸³

What is the Trust Fund?

This is money which is used for the benefit of victims of crimes under the Rome Statute, and their families. The Court can also make an order that money and other property received from fines or forfeiture be transferred to the Trust Fund. The money in the Trust Fund comes from fines ordered by the Court, from property attached from people convicted of ICC crimes, voluntary contributions and also from contributions from countries which are state parties.

This money can be used for the benefit of victims at various stages of the proceedings in the case before the court. It can be used in situations of urgent need, like medical care of victims whose appearance is necessary during the trial. It can also be used to pay for awards made by the Court at the end of the trial, like compensation.

The Trust Fund is independent from the Court. It has managers elected from all over the world. The managers of the money can also decide on how to use this money. However, the Registry of the Court assists the Fund in its operations.

During the negotiations of the Rome Statute, several countries felt that real justice should not end at a proclaiming the guilt of an accused person or imposing a sentence but should address the interests of the victims as well. Therefore in an attempt to achieve 'real justice', victims may be awarded compensation or other forms of reparation. The Victims Trust Fund helps the Court to distribute awards to victims. It also helps the many victims who would otherwise not receive reparations because the perpetrators have no money or have evaded the reach of the Court altogether.

83 Article 79



REPARATION S⁸⁴

What are Reparations?

Reparations refer to compensations, damages, amends, reimbursements made by a party that caused harm to the party that incurred that harm. The purpose is to repair harm done to the victim. They are meant to restore to the victim what was lost. Principles to be applied for reparations are to be established by the Court. In relation to victims, Reparations may include restoration, compensation and rehabilitation. Court may also directly order a convicted person to make specific reparations to victims. These could take the form of restitution, compensation and rehabilitation.

Forms of reparations

Reparations can take various forms:

- Compensation: This is normally in form of money to an individual or to a group.
- Restitution: The purpose here is to re-establish the situation as it was before the victim suffered harm. For example, it can be restoration of property.
- Rehabilitation: This is intended to allow the victims to continue their lives as normally as possible. Rehabilitation may cover costs of medical, psychological or psychiatric care, as well as social, legal and other services which could help to improve the well-being of the victim.
- Symbolic Measures, such as public apologies or commemorations: The purpose of these is to respond to the desire of victims for a public and transparent acknowledgment of the causes, effects, and remedies of the crimes and the harm suffered by the victims.

When are reparations available?

Reparations are available ONLY at the end of a case, after the Court finds an accused person guilty. In general, a victim must apply for reparation in writing, using a form that is prepared for that purpose. The application must be made to the Court. However, Judges can make an order of reparation even where there is no application by victims.

84 Article 75

SENTENCING

Sentencing⁸⁵

When an accused person is found guilty of a crime under the Rome Statute, the Trial Chamber will consider a suitable sentence, and will consider the evidence presented and other submissions that are relevant to the sentence. Except in cases where the accused person has pleaded that s/he is guilty, the Prosecutor or the accused person may request the Trial Chamber to hear additional evidence or proposals relating to the sentence. After deciding the sentence, the Trial Chamber must announce the sentence in public and in the presence of the accused person.

Applicable sentences/penalties⁸⁶

Where a person is convicted of a crime under the Rome statute, the Court can impose any of the following penalties:

- Imprisonment for a specific number of years, but which do not exceed a maximum of 30 years; or
- Where the crime is extremely grave, or where the personal circumstances of the convicted person warrant, the Court can order life imprisonment for the accused
- The Rome Statute is opposed to the death penalty and enjoins all its signatories that still provide for the death penalty to abolish it and domesticate the statute as a standard for punishing similar offences at a national level.

In addition to imprisonment, Court may order the accused person to pay a fine or surrender property, earnings or assets that s/he acquired directly or indirectly from that crime

How is a sentence of imprisonment enforced?⁸⁷

The Court relies on the cooperation of member states to enforce a sentence of imprisonment. The Court has a list of States which are willing to accept sentenced persons. Before choosing a country where the sentence will be served, the Court considers factors like views of the sentenced person; his or her nationality; and the circumstances of the crime. Then it will name the country where the prison sentence will be served. The sentence must be served in a prison in the named country, called the enforcing State.

The Court can at any time decide to transfer a sentenced person from the enforcing State to a prison in another country. This may be done following the sentenced person's request or by the Court's own considerations⁸⁸.

Which law applies when enforcing an ICC prison sentence?⁸⁹

The laws of the enforcing State govern the conditions of imprisonment. Such conditions must be the same as those applied to prisoners convicted of similar offences in the enforcing State. However, the sentence cannot be modified by the enforcing State; neither can any application be made and heard in the enforcing State, in respect of the sentenced person.

Right of Appeal

An appeal can be made against a conviction or by the Prosecutor in case the Trial Chamber decides that the accused person is not found guilty⁹⁰. The accused person or the prosecutor can appeal on grounds that:

- There was an error in conducting the trial

85 Article 76

86 Article 77

87 Articles 103 & 104

88 Article 104

89 Articles 105 & 106

90 Article 81



- There are some errors in the facts as presented during the trial, or
- There has been an error in applying the law

In addition, the accused person can appeal on any other reason that affected the fairness or reliability of the conduct of the trial or the Court's decision. The Appeal Judges can change a sentence or confirm it⁹¹.

What happens when an accused person escapes from custody?⁹²

Where a sentenced person escapes from custody and flees the State where the sentence is being enforced, the enforcing State can directly request the arrest and surrender of that person under an existing agreement. Alternatively, the enforcing State can request the Court to pursue the surrender of that person in accordance with the Rome statute. The Court can direct that the person is delivered back to the enforcing State, or to another State to complete the prison term.

What happens after completion of the Sentence?⁹³

When the prison sentence has been completed, the person can be transferred to the country which is under duty to receive him or her. This may be his or her country of birth. However, s/he can be transferred to another country which is willing to receive him or her. The enforcing State can also decide to authorize such a person to stay in that State.

Enforcement of Fines and Forfeiture Measures⁹⁴

Orders made by the ICC for fines or forfeiture of property are enforced by member States in accordance with their national laws. All property or money from sales of property or assets ordered by the Court must be transferred to the Court.

Responsibilities of member states⁹⁵

General cooperation

Member States are required to fully cooperate with the Court in its investigation and prosecution of crimes under the Rome statute. Requests for cooperation are made through diplomatic channels or through the International Criminal Police Organization (Interpol) or any suitable regional organization. The Court can also invite any State which is not a member to the Rome statute to provide assistance on a private arrangement or agreement.

It is the duty of member States to ensure that there are procedures in their national laws for all forms of cooperation with the ICC.

Arrest and Surrender of Persons⁹⁶

Upon the Court's request, a State where a person resides is required to arrest and hand over such a person to the Court. This arrest and hand over must comply with both this law, and the national law of the cooperating country

Other Forms of Cooperation⁹⁷

Other forms of cooperation with the ICC involve providing assistance in investigations and prosecutions. This cooperation may take any of the following forms:

-
- 91 Article 83
 - 92 Article 111
 - 93 Article 107
 - 94 Article 109
 - 95 Articles 86, 87 & 88
 - 96 Articles 89, 91 & 92
 - 97 Article 93



- To identify the whereabouts of people or the location of items
- To take evidence, including testimony under oath, and to produce evidence, expert opinions and necessary reports to the Court
- To question any person being investigated
- To serve documents, including judicial documents
- To facilitate the voluntary appearance of people before the Court, as witnesses or experts
- To transfer people as provided in this law
- To examine places or sites, including the exhumation and examination of grave sites
- To carry out searches and seizures
- To provide records and documents, including official records and documents
- To protect victims and witnesses and preserve evidence
- To identify, trace and freeze or seize proceeds, property and assets and instruments of crime for the purpose of eventual forfeiture
- Any other type of assistance which is not prohibited by the law of the requested State, with a view to facilitating the investigation and prosecution of crimes under this law.

OTHER PROVISIONS

Review of the Rome Statute⁹⁸

The Rome Statute provides for a mandatory review of the Rome Statute to take stock and evaluate the effect and progress of the Rome Statute.

Changes to the Rome statute (Amendments)⁹⁹

Member countries can propose changes to the Rome statute at the review conference . All proposed changes must be given to the Assembly of State Parties through the Secretary-General of the UN. Changes must be made by agreement/consensus or by a two-thirds majority.

98 Article 123

99 Articles 121 & 122



Produced by Advocates for Public International Law Uganda
Rainbow Arcade, Plot 2C Kampala
Tel: 0414231676
Email: apilu.Uganda@gmail.com
Website: www.apilu.org