**Session 4**

**Jurisdiction and admissibility**

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# **CRYER – CHAPTER 8: THE INTERNATIONAL CRIMINAL COURT**

## **Introduction: the importance of the ICC and its Statute**

The creation of the ICC is one of the most important developments in international criminal law:

* ICC: creation of a permanent international court
* With potentially worldwide jurisdiction
* Statute: set out an influential, albeit incomplete code of international criminal law

## **Creation of the ICC**

* 1946: Nuremberg promise
* The Nuremberg trials set a precedent for others, to prosecute crimes at the international level
* 1948: permanent court proposed during the negotiations on the 1948 Genocide Convention
* Art. VI: only refers to possibility of such a court in the future
* 1989: proposal by Trinidad and Tobago creation of a permanent criminal court back on UN agenda
* 1994: ILC Draft Statute for a court
* 1998: Adoption Statute of the ICC
* US: consent of both State of nationality and the territorial requirement for Court’s jurisdiction
  + Other states: no, because it did not recognize other States’ jurisdiction over their own territories and their ability to pool that jurisdiction, just as Nuremberg Tribunal had done
* More ambitious than the ILC draft
* 1 July 2002: State received the requisite 60 ratifications and entered into force
* Court formally into existence
* Assembly of States Parties adopted important subsidiary instruments
* Elements of Crimes
* Rules of Procedure and Evidence (RPE)
* Assembly of States Parties was created by the Statute to oversee the administration of the Court

## **Structure and composition of the ICC**

* 18 judges
* Pre-Trial, Trial & Appeals Chambers
* PTC: compromise between common law prosecutorial system and French system of juges d’instruction
* Registry: provides non-judicial aspects of administration
* Office of the Prosecutor: carries out preliminary examinations, investigations and prosecution
* Governed by principle of objectivity = investigates incriminating and exonerating evidence equally
* Assembly of States Parties: provides management oversight, sets budget, adopts subsidiary instruments and elects the judges and the Prosecutor
* States selecting the judges must taken into account representation of the principal legal systems of the world, equitable geographical representation and a fair representation of female and male judges

## **Crimes within the jurisdiction of the ICC**

The Court has jurisdiction over the most serious crimes of international concern:

* Genocide, crimes against humanity, war crimes and aggression
* Article 5
* Elements of Crimes guide the Court in interpretation and application of the offences
* Largely conservative definitions of the crime: cus aim was codification of existing customary law
* But also helped develop customary law: crystallizing and clarifying certain provisions
* But also some provisions that are not as extensive as customary law
  + E.g., the provision on child soldiers
  + Article 10 attempts to address this point: provides that the Statute does not limit or prejudice existing or developing rules of IL for purposes other than this Statute
* Court must apply the provision in the Statute even if customary law creates wider offences

Sources that the Court can apply, Article 21:

1. The Statute

* Assisted by subsidiary instruments: the Elements of Crimes and the Rules of Procedure and Evidence
  + As long as those provisions are not found to be inconsistent with the Statute by the Court

1. Relevant treaties and rules of international law

* When there is still a lacuna in the relevant provisions

1. General principles of law

* = rules common to the legal systems of the world
* ICC Statute, Art. 21(1)(c); ICC PTC, Al Bashir Arrest Warrant, para. 44

## **Jurisdiction**

### ***Personal and territorial jurisdiction***

#### Territorial and active nationality jurisdiction

National systems have universal jurisdiction over serious international crimes: they can prosecute such crimes regardless of where they were committed

* Some wanted the same universal jurisdiction for the ICC

But territorial and nationality-based jurisdiction basis for ICC jurisdiction

* Territory of States accepting the Court’s jurisdiction; or
* Committed by nationals of State accepting the Court’s jurisdiction
* Two most uncontroversial bases for jurisdiction in IL
* Article 12

##### How states accept jurisdiction

States can accept the Court’s jurisdiction in two ways:

* By becoming States Parties; or
* By issuing a declaration accepting jurisdiction

Under ICL draft Statute, opt-in model: State could ratify the Statute and then those the crimes for which it would recognize the Court’s jurisdiction

* But ICC, automatic jurisdiction: upon ratification a State signifies its acceptance of jurisdiction for all core crimes
* Exceptions:
  + a State, upon ratification, is allowed to not accept the jurisdiction of the ICC over war crimes for a period of seven years
    - Article 124
  + Crime of aggression: opt-in system
* Non-State party is allowed to declare that it accepts the jurisdiction of the Court as well as the obligation to cooperate fully
  + Article 12(3)

##### Security Council referrals

Additionally, the Court has jurisdiction where a situation has been referred to the Court by the Security Council under Chapter VII of the UN Charter

* Maintaining international peace and security
* Jurisdiction even over crimes committed on the territory or by the nationals of non-party States
* Same power UNSC has used to create ad hoc Tribunals, but instead of creating a new institution from scratch, it refers the situation to the existing facility of the ICC

### ***Temporal jurisdiction***

* No jurisdiction over offences committed before entry into force of the Statute
* 1 July 2002
* If a State becomes a party to the Statute, the jurisdiction is only with respect to crimes committed after the Statute has entered into force for that State
* Article 11
* State may make declaration under Article 12(3) to fill this temporal gap

### ***Persons over the age of eighteen***

The Court’s jurisdiction is limited to persons at or over the age of eighteen at the time the alleged offence was committed

* Turning the question of age into a jurisdictional issue avoids having to choose between differential national age requirements for criminal responsibility

## **How the Court works: An overview**

### ***Trigger mechanisms: initiating proceedings***

A procedure is needed to ‘trigger’ the Court’s action in particular situation

Article 13 sets out three trigger mechanisms:

1. State party referrals: a referral by a State Party

* Only States which are Parties to the Statute may refer situations to the Court
* Early practice: States referred atrocities taking place on their own territories
  + = self-referral
  + = allowed, state party may refer a situation to the Prosecutor without any limitations
    - Art. 14(1)
* Good: indicates that an international investigation is welcomed and will be supported to by the full cooperation of the State concerned
* Bad: risks
  + Use of referral by a government as intervention against its own political opponents
  + Overburdening of the Court with cases States could handle themselves
    - if States are granted an unconditional right not to prosecute, this would seriously jeopardize any encouragement of States to prosecute domestically and would negate this persisting and primary responsibility for States to prosecute international crimes
      * Katanga and Ngudjolo, ICC AC, para. 63
    - Prosecutor is also not obliged to initiate an investigation when a referral is made (grounds of lack of gravity, complementarity and interests of justice)

1. Security Council Referrals: A referral by the Security Council

* UNSC rights
  + Require individual accountability as part of the response to threats to international peace and security
    - Establishment of ad hoc Tribunals
  + Obligations on States, such as the obligation to cooperate with the Court
  + Referring situations to the Court
* Darfur situation in Sudan, Resolution 1593
  + Issues: Security Council provided no funding, but Rome Statute anticipates that proceedings arising from UNSC referrals should be funded by the UN (denial UN funding) + no jurisdiction over forces of troops-contributing States that are not State Parties (no authorization over officials of non-states parties)
* Situation in Libya, Resolution 1970
  + Same issues
* Many arrest warrants have not been executed and the UNSC has taken no action to follow up on its own referral of the situation

1. Initiation by the Prosecutor: Opening of an investigation by the Prosecutor acting on his or her own initiative

* Investigations proprio motu (on his or her own initiative)
* Article 15
* With a check and balance of requiring authorization of the PTC
* Anyone may send information about crimes to the Prosecution
* Prosecution is obliged to assess such information to decide whether there is a reasonable basis to proceed with an investigation

#### Deferral by the Security Council: Article 16

Article 16 reads as follows:

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

* A positive decision of the UNSC to defer a proceeding
* Has to act under Chapter VII of the Charter
  + Requires a threat to peace, breach of the peace or act of aggression
* Purpose: allowing the Council, under its primary responsibility for the maintenance of peace and security, to temporarily set aside the demands of justice when it considers the demands of peace to be overriding

### ***Preliminary examination, investigation and prosecution***

Preliminary examination: determining whether an investigation is warranted

* Relatively limited powers: amassing publicly available information, e.g., UN reports
* If situation warrants: field missions
* Three factors, Article 53:

1. Jurisdiction:
   * Are crimes within the subject matter jurisdiction of the Court + personal, territorial and temporal jurisdiction
2. Admissibility
   * Complementarity
     + Are national proceedings being genuinely carried out
   * Gravity
     + Are crimes grave enough to warrant action by the Court
3. Interests of justice
   * are there other grounds not to proceed

Because one of the issues that must be monitored is the progress of national proceedings, which can take considerable time, preliminary examinations may continue for years.

Preliminary examinations can be re-opened based on new information.

Once an investigation is opened, the Office of the Prosecutor has a more extensive set of legal powers

Investigations are opened in relation to situations

* defined in broad geographic and temporal terms
* might involve hundreds or thousands of crimes and numerous responsible persons

The Office of the Prosecutor investigates the crime based in order to select cases against the persons most responsible for the most serious crimes.

Once adequate evidence is acquired, the Prosecutor may approach the Pre-Trial Chamber seeking an arrest warrant

* at this point, the Court is dealing with particular cases
* i.e., particular accused persons in relation to particular crimes

If Chamber issues a warrant, responsibility falls on States to carry out the arrest

Once a person is arrested, they are brought to the ICC and the prosecution phase begins

## **Complementarity**

The ICC is complementary to national systems, it is intended to supplement, not supplant, national jurisdiction.

The ICC can take a case only where a national system fail to do so or are unwilling or unable to carry out proceeding genuinely

* Article 17
* States encouraged to carry out proceedings themselves; they have a responsibility
* Preamble

Two step test:

1. Are the ongoing investigations or prosecutions (proceedings) of the case at the national level

* Case is inadmissible if it is being investigated or prosecuted or has been investigated by a State with jurisdiction over it
  + Article 17(1)(a): ongoing proceedings
  + Article 17(1)(b): proceedings that were investigated and closed
    - State has decided not to prosecute the person concerned
  + Article 17(1)(c): completed trials
    - The person concerned has already been tried for the conduct
* Article 17 not just a one-step test requiring a finding of unwillingness or inability
  + Inaction scenario: where a state has brought no proceedings none of the explicit requirements of investigations or prosecutions in Article 17 are met
  + Would mean that if a State could take no action, the ICC would be precluded from acting as long as the state had not collapsed and was not acting for a purpose of shielding perpetrators
* Objection: too easy to shirk their responsibility (duty as in the Preamble) and to offload cases onto the ICC by simply failing to prosecute
* ICC could try to encourage proceedings and decline to exercise jurisdiction where there are good reasons to do so
  + On basis of interests of justice
  + Statute, Art. 53(1)(c) and (2)(c)
  + Also does so during preliminary examination: Prosecutor gives latitude and time to states to start investigation
* Being investigated requires: a state be taking concrete steps
  + General assurance of an intent to start investigating are not good enough
  + Muthaura et al., (Kenya Situation), ICC AC, paras.. 1, 2, 40
* Any State may invoked Article 17
  + Not just States on whose territory the crime occurred
  + As long as ‘with jurisdiction’ is doing the proceedings
  + Non-party states too

1. Is the state unwilling or unable genuinely to carry out that investigation or prosecution

* Prosecutor must show that State is unwilling or unable to carry out the proceedings genuinely
* Generous to states
  + Difficult for ICC to proceed where national efforts are underway
* Genuinely:
  + as long as the national proceedings are not a sham and are carried out with a basic level of quality to be genuine
* Unwilling:
  + Factors like: (a) a purpose of shielding persons from criminal responsibility; (b) unjustified delay inconsistent with an intent to bring the person concerned to justice; (c) lack of independence or impartiality inconsistent with an intent to bring the person concerned to justice
    - Article 17(2)
* Inability
  + Whether, due to a total or substantial collapse or unavailability of its national system, the state is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings
  + Serious impediments: collapse
  + Not states that are under-resourced or if the system does not meet the highest standards
* Primarily concerned with national proceedings that are too lenient: a sham to keep the ICC at bay
* If the national proceedings are too harsh: in extreme cases, where due process violations are so egregious that the proceedings cannot be regarded as providing any genuine justice the accused is not in fact being brought to justice ICC case
  + Gadaffi and Al-Senussi, ICC AC
* Katanga and Ngudjolo, ICC AC, paras. 1 and 75-9

### ***The same case: What is a case?***

Article 17: the case is being investigated or prosecuted at national level

To be the same case: the national investigations must cover:

* The same individual
* Substantially the same conduct as alleged in the proceedings before the Court
* Must be sufficient overlap
* Ruto et al., ICC AC, para. 1
* Ne bis in idem or double jeopardy

If same person but different case: the State and Court shall consult as to the sequencing of their respective cases

* ICC Statute, Arts. 89(4), 94(1), 97
* Consultation mechanism

In preliminary investigation, ICC itself does not have a case yet

* Admissibility is assessed by looking at the set of likely cases for ICC prosecution, in particular cases involving the persons most responsible for the most serious crimes
* Situation in the Republic of Kenya, ICC PTC, paras. 50, 182, 188
* Once Prosecutor seeks arrest warrant, he/she has identified a specific case
* The test can be applied more specifically

### ***Encouraging national proceedings***

One of aims of complementarity regime is to encourage genuine national proceedings

Other ways in the positive approach to complementarity:

* Serving as facility available to states: helping them address mass crimes
* Burden sharing in which ICC prosecutes the persons most responsible, but also national proceedings

## **Gravity**

Additional threshold of gravity: a case is inadmissible if it is not of sufficient gravity to justify further action by the Court

* Arts. 17(1)(d) & 53(1)(c)
* Relevant factors

1. The scale of the crimes
2. The nature of the crimes
3. The manner of their commission
4. Their impact

* Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia, PTC, para. 21
* Scale = number of crimes and victims
* Nature: prioritizes crimes such as killing, sexual violence and other attacks on personal autonomy
* Manner: includes systematicity, cruelty, discrimination, abuse of power and vulnerability of victims
* Impact: includes suffering increased vulnerability, and social, economic and environmental damage
* Focus on persons most responsibility, and thus seniority of officials, is more a matter of case selection policy rather than a mandatory legal threshold

## **Interests of justice**

Interests of justice = whether there are nonetheless substantial reasons to conclude that an investigation or prosecution would not be in the interests of justice

* Arts. 53(1)(c) & 2(c)
* Discretionary: allows prosecutor to take into account considerations such as:
* Age or infirmity of the accused
* Whether the person’s rights have been seriously infringed by a State
* Whether the person has already been prosecuted for other related crimes
* Interests of victims
  + Arts. 53(1)(c) & 2(c)
  + View of affected communities
* Traditional justice mechanisms
  + Not under Article 17 because would not be considered investigation and prosecution
* Not interests of peace
  + should be left to UNSC

## **Cooperation**

ICC relies on international community for the arrest and detention facilities

States Parties required to cooperate with the Court in various forms

* Surrender any person found within a State’s territory when the Court so requests
* Article 89(1)
* States can declare willingness to accept sentenced persons
* No obligation
* Article 103
* If State Party fails to comply with a request from the Court to cooperate: Court may refer the matter to the Assembly of States Parties
* Or in case of Security Council referral, to the Council
* Article 87(7)
* Assembly has no enforcement powers, relies on public expressions of concern and informal good offices
* Collection evidence very difficult
* And no requirement of cooperation in this respect

## **Opposition to the ICC**

Legal and political objections

ICC’s jurisdiction over nationals of a non-State Party without that State’s consent

Complementarity principles not being a reliable safeguard against ICC proceedings; political bias of the ICC

Prosecution not accountable to outside agency or authority in exercising his or her power of initiating investigators

US opposition:

* Concerns effect on US military operations and risk of frivolous proceedings against US service members
* Added but wanted more checks and balances
* American Service-Members’ Protection Act: prohibits US cooperation with the ICC, provides for the cessation of military and other aid to State Parties which do not sign a non-surrender agreement with the US, and authorizes the use of military force to release persons arrested by the ICC
* Threatening to veto UNSC resolutions
* Bilateral agreements with many countries to not surrender US nationals or officials to the ICC
* Arguing that Article 98(2) of the Statute permitted this
* But no, this is about allowing a State sending troops to another state to retain criminal jurisdiction over its troops for certain kinds of offences

African Union:

* AU has adopted resolutions critical of the Court and urging non-cooperation
* Argues that the Court applies double standards
* First 10 out of 11 situations being located in Africa
* But:
  + Most African situations were on request of African states themselves
  + Considering Statute factors – jurisdiction, gravity and complementarity – many of the gravest admissible situations within the Court’s jurisdiction are concentrated in parts of Africa that are currently undergoing instability
  + Court’s involvement is in support of African victims
  + Court has begun to act in situations outside of Africa
* Court too focused on crimes in less powerful countries
* Bad influence on peace and security in the region
* And heads of state should not be prosecuted while in office
* Disagrees Court’s view of immunity
* Countries refusing to arrest Al Bashir did so in conformity with their obligations to the AU and with Article 98 of the ICC Statute

### ***Appraisal***

So criticisms of the Court:

* The paucity of concrete results
* Only three convictions for core crimes
  + Many acquittals or withdrawals due to insufficient evidence (witness intimidation) or charges not being confirmed
  + Acquittals part of normal justice system, but low rate of successful prosecution suggests systemic dysfunctions
* Extensive focus on situations in Africa
* Bias
* But now investigations Russia and US
  + Both criticisms of the Court being tool of the powerful to attack the weak (AU) and vice versa (the US)

One should not have high and contradictory expectations of the Court

Successes: At the moment, the most tangible successes in international criminal law lie in national implementation and prosecution.

* The Rome Statute system has contributed to an increase in national legislation and judicial capacity.
* Several countries, in all geographic latitudes, are engaging in prosecutions of international crimes, with assistance and encouragement from the ICC and States Parties.
* The Rome Statute system has contributed to an upsurge in accountability for mass atrocities.

# **BBC NEWS: WHY IS THE ICC UNDER ATTACK?**

Goal: to bring to justice perpetrators of genocide, war crimes, crimes against humanity and the crime of aggression

Effectiveness and legitimacy in question

US: no jurisdiction, legitimacy and no authority

123 members

But many states not (incl. US, Russia and China) and do not accept its jurisdiction

US threatened tough action against ICC if it attempts to prosecute Americans for alleged war crimes in Afghanistan and also objects ICC investigation of Israeli actions in occupied Palestinian territory

Court undermines national sovereignty according US

Other criticism: unfairly targeting African countries

Of the 26 cases brought before the court so far, all have dealt with crimes committed in Africa

Verdicts in 6 cases and 8 convictions and 2 acquittals

Court says it examines many crimes outside of Africa

In 2018: Rohingya Muslims in Myanmar ethnic violence

But Myanmar not member of ICC and does not accept its jurisdiction

Court found a way around this: elements of alleged crimes against the Rohingya took place in Bangladesh which is member of ICC

Court opening preliminary examination

But even so it is not certain perpetrators can be brought to trial

ICC no police and enforcement body. It would rely on Myanmar to extradite perpetrators

Demonstrates difficulty for court to carry out work, especially without support of some of the world’s most powerful nations