**THE INTERNATIONAL CRIMINAL COURT – THE MOMENT IT COMES INTO PLAY**

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**ABSTRACT**

*“…the most serious crimes of concern to theInternational Community as a whole must not go unpunished…”*

* Preamble to the *Roman Statute* of the *International Criminal Court*

For the first time in human history, nations decided to accept the jurisdiction of a permanent international body for the sake of prosecution of perpetrators of the most serious crimes committed within theirborders. It was *17 July 1998* when*120 nations* adopted a statute in *Rome* known as the *Roman Statute of the International Criminal Court* thus establishing the *International Criminal Court*. These Statutes dictate that every country must exercise its criminal jurisdiction over those responsible for global crimes.[[1]](#footnote-2)

The International Criminal Court (the *ICC*) can only intervene where a nation is unable or unwilling (in a genuine manner) to carry out the investigation and prosecutionof perpetrators. Its primary mission is to help put an end to the most serious crimes in question to the global community as a whole, and thus to contribute to their prevention. A well-informed public can contribute to guaranteeing lasting respect for and the enforcement of international justice.[[2]](#footnote-3)

**INTRODUCTION**

The *International Criminal Court* (*ICC*) is a *permanent international court*that was established to investigate, try and prosecute the accused of committing the most serious crimes of concern to the world community, which include*the crime of genocide*, *crimes against humanity*, *war crimes* and *crime of aggression*. The *Nuremberg Trial* and *Tokyo Trial* were established in the wake of the *2nd World War* in *1948* when the *Convention on the Prevention and Punishment of the Crime of Genocide* was adopted, the *United Nations General Assembly* recognized the need for a permanent international court to deal with the kinds of atrocities which had just been perpetrated. This idea of aninstitution of international criminal justice re-emerged after the end of the *Cold War*.[[3]](#footnote-4) However, while negotiations on the *ICC Statute* were underway at the *United Nations*, the world was witnessing the commission of heinous crimes in the territory of the former *Yugoslavia* and *Rwanda*. In response to these atrocities, the *United Nations Security Council* established an ad hoc tribunal for each of these situations and it was these efforts that established the ICC in *Rome* in the summer of *1998*. The countries which have accepted these rules were recognized as *States Parties* and are represented in the *Assembly of States Parties*.[[4]](#footnote-5) This Assembly meets *at least once a year*, sets the standard policies for the administration of this Court, and reviews its activities.Representations are categorized as: *Africa*, *Asia-Pacific*, *Eastern Europe*, *Latin America*, and the *Caribbean*, as well as *Western European* and *North America*.

Although the Court is in The *Hague* in the *Netherlands*[[5]](#footnote-6)*,* the Statute provides that it may sit anywhere the judges deem fit. On *4 October 2004*, the ICC and the UN signed an agreement governing their institutional relationship. States retain their primary responsibility for trying criminalsbut the Court may exercise its jurisdiction in situations where the alleged accused is a national of a State Party or where the crime was committed in the territory of a State Party. Also, a State not party to the Statute may decide to accept the jurisdiction of the ICC. These conditions do not apply when the Security Council, acting under *Chapter VII* of the United Nations Charter, refers a situation to the *Office of the Prosecuto*r. The ICC has jurisdiction only concerning events which occurred after the entry into force of its Statute on *1 July 2002*. However, the Court cannot exercise jurisdiction concerning events which occurred before *1 July 2002*. For a new State Party, the Statute enters into force on the first day of the month after the 60th day following the date of the deposit of its instrument of ratification, approval,acceptanceor accession.[[6]](#footnote-7)The ICC prosecutes individuals, not groups or States thus any individual who is alleged to have committed crimes within its jurisdiction may be brought before the Court.

*“The Court has no jurisdiction concerning any person who was under the age of 18 when the crimes concerned were committed”*

No one is exempt from prosecution because of his or her current functions or because of the position be it a *Head of State or Government*, *ministers* or *parliamentarians*. Likewise, amnesty cannot be used as a defence before the ICC thus it cannot bar the Court from exercising its jurisdiction.[[7]](#footnote-8) The ICC is a judicial institution with an exclusively judicial mandate so it is not subject to political control. As an independent court, its decisions are based on legal criteria and rendered by impartial judges following the provisions of its founding treaty. The Court is concerned with countries that have accepted its jurisdiction. In *1997*, the *Southern African Development Community* (*SADC*) was very active in supporting the proposed Court and its declaration on the matter was endorsed in *February 1998*, by the participants of the *African Conference* meeting in *Dakar*, *Senegal*, through the *Declaration on the Establishment of the International Criminal Court*.[[8]](#footnote-9)Without African support the Rome Statute might never have been adopted thus making it is the most heavily represented region in the Court.*The trust and support comes not only from the governments, but also from civil societies.*

**STRUCTURE**

The ICC is composed of 4 organs – the *Presidency*, the *Chambers*, the *Office of the Prosecutor*, and the *Registry*. Each of these organs has a specific role and mandate.

The *Presidency* consists of *3 judges* (the *President* and 2*Vice-Presidents*) elected by an absolute majority of the *18 judges* of the Court for a maximum up to *twice* of3-year terms. The Presidency is responsible for the administration of the Court, except for the *Office of the Prosecutor*. It represents the Court to the outside world and helps with the organization of the work of the judges and is also responsible for carrying out other tasks, such as ensuring the enforcement of sentences imposed by the Court.[[9]](#footnote-10)

The 18 judges, including the three judges of the Presidency, are assigned to the Court’s three judicial divisions: the *Pre-Trial Division* (composed of *7 judges*), the *Trial Division* (composed of *6 judges*), and the *Appeals Division* (composed of *5 judges*). The judges ensure the fairness of proceedings and the proper administration of justice.[[10]](#footnote-11)

The *Pre-Trial Chambers*, each of which is composed of either 1 or 3 judges, resolves all issues which arise before the trial phase begins. Their role is essentially to supervise how the Office of the Prosecutor carries out its investigatory and prosecutorial activities, to guarantee the rights of suspects, victims and witnesses during the investigatory phase, and to ensure the integrity of the proceedings. The Pre-Trial Chambers then decide whether or not to issue warrants of arrest or summons to appear at the Office of the Prosecutor's request and whether or not to confirm the charges against a person suspected of a crime.[[11]](#footnote-12)

The *Office of the Prosecutor* is an independent organ of the Court. Its mandate is to receive and analyse information on situations or alleged crimes within the jurisdiction of the ICC, to analyse situations referred to it to determine whether there is a reasonable basis to initiate an investigation into a crime of genocide, crimes against humanity, war crimes or the crime of aggression, and to bring the perpetrators of these crimes before the Court. To fulfil its mandate, the Office of the Prosecutor is composed of three divisions[[12]](#footnote-13) :

* The Investigation Division, which is responsible for conducting investigations (including gathering and examining evidence, questioning persons under investigation as well as victims and witnesses).
* The Prosecution Division has a role in the investigative process, but its principal responsibility is litigating cases before the various Chambers of the Court.
* The Jurisdiction, Complementarity and Cooperation Division, which, with the support of the Investigation Division, assesses information received and situations referred to the Court, analyses situations and cases to determine their admissibility and helps secure the cooperation required by the Office of the Prosecutor to fulfil its mandate.

Finally, the core function of the *Registry* is to provide administrative and operational support to the Chambers and the Office of the Prosecutor. It also supports the *Registrar*'s activities about defence, victims, and communication along with security matters. It ensures that the Court is properly serviced and develops effective mechanisms for assisting victims, witnesses, and the defence to safeguard their rights under the Rome Statute and the *Rules of Procedure and Evidence*.[[13]](#footnote-14) The mandate of the Court is to try individuals (rather than States), and to hold such persons accountable for the most serious crimes of concern to the international community as a whole, namely the crime of genocide, war crimes, crimes against humanity, and the crime of aggression, when the conditions for the exercise of the Court’s jurisdiction over the latter are fulfilled.[[14]](#footnote-15)

**CRIMES WITHIN THE JURISDICTION OF**

**THE INTERNATIONAL CRIMINAL COURT**

1. Genocide[[15]](#footnote-16)

* Killing members of the group;
* Causing serious bodily or mental harm to members of the group;
* Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
* Imposing measures intended to prevent births within the group;
* Forcibly transferring children of the group to another group.

1. Crimes against humanity[[16]](#footnote-17)

* Murder;
* Extermination;
* Enslavement;
* Deportation or forcible transfer of population;
* Imprisonment;
* Torture;
* Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
* Persecution against an identifiable group on political, racial, national, ethnic, cultural, religious or gender grounds;
* Enforced disappearance of persons;
* C rime of apartheid;
* Other inhumane acts of a similar character intentionally causing great suffering or serious bodily or mental injury.

1. War crimes[[17]](#footnote-18)

* Murder;
* Mutilation, cruel treatment and torture;
* Taking of hostages;
* Intentionally directing attacks against the civilian population;
* Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historical monuments or hospitals;
* Pillaging;
* Rape, sexual slavery, forced pregnancy or any other form of sexual violence;
* Conscripting or enlisting children under the age of *15 years* into armed forces or groups or using them to participate actively in hostilities.

1. Crime of Aggression[[18]](#footnote-19)

As adopted by the *Assembly* during the *Review Conference*, held in *Kampala* (*Uganda*) between *31 May* and *11 June* of *2010*, a *Crime of Aggression* means the planning, preparation, initiation or execution of an act of using armed force by a State against the sovereignty, territorial integrity or political independence of another State. The act of aggression includes, among other things – *invasion*, *military occupation*, and *annexation by the use of force*, *blockade of the ports or coasts*, if it is considered being, by its character, gravity and scale, a manifest violation of the Charter of the UN.

**OPERATION OF THE ICC**

If the UN Security Council determines that an act of aggression has been committed, the ICC Prosecutor can decide to open an investigation, under the conditions mentioned above. If within 6 months of being notified by the Prosecution, the UN Security Council does not decide on whether or not an act of aggression has been committed, the Prosecutor may still proceed with an investigation into a crime of aggression, subject to authorization by the ICC's Pre-Trial Division.[[19]](#footnote-20)Any State can request the Office of the Prosecutor to carry out an investigation. A State not party to the Statute can also accept the jurisdiction of the ICC concerning crimes committed in its territory or by one of its nationals, and request the Office of the Prosecutor to carry out an investigation.[[20]](#footnote-21)If the Office of the Prosecutor receives reliable information about crimes involving nationals of a State Party or of a State which has accepted the jurisdiction of the ICC or about crimes committed in the territory of such a state, and concludes that there is a reasonable basis to proceed with an investigation. The Prosecution must, however, obtain permission from the Pre-Trial Chamber judges before initiating an investigation under such circumstances.[[21]](#footnote-22)The Prosecution must also ascertain whether any national authorities are conducting a genuine investigation or trial of the alleged perpetrators of the crimes. Lastly, it must notify the States Parties and other States which may have jurisdiction of its intention to initiate an investigation.[[22]](#footnote-23)The prosecutorial policy of the Office of the Prosecutor is to focus its investigations and prosecutions on those who, having regard to the evidence gathered, bear the greatest responsibility for such crimes. Under the *principle of complementarity*, national judicial systems retain their responsibility for trying perpetrators of crimes. After the initiation of an investigation, only a Pre-Trial Chamber may, at the request of the Prosecution, issue a warrant of arrest or summons to appear if there are reasonable grounds to believe that the person concerned has committed a crime within the ICC’s jurisdiction.[[23]](#footnote-24)

The Prosecution must prove the guilt of the suspect and a Trial Chamber will convict someone only if it is satisfied that the charges have been proven beyond reasonable doubt. Suspects have the right to legal assistance in any case where the interests of justice so require and, if the suspect does not have the means to pay for it, to legal assistance assigned by the Court. All detainees are entitled to apply for interim release pending trial. In the event of rejection, the decision is periodically reviewed by the competent chamber, at least every *120 days* and maybe reviewed at any time at the request of the detained person or the Prosecution.[[24]](#footnote-25)

**THE TRIAL**

The accused must be present at his or her trial, which is held in public, unless the Chamber determines that certain proceedings be conducted in closed session to protect the safety of victims and witnesses or the confidentiality of sensitive evidentiary material. At the commencement of the trial, the Trial Chamber causes the charges against the accused to be read out to him or her and asks whether he or she understands them.[[25]](#footnote-26) Where the Trial Chamber is satisfied that these conditions have been met, it may convict the accused of the crime charged. If it is not satisfied that the conditions have been met, the Chamber shall consider the admission of guilt as not having been made, in which case it shall order that the trial be continued.[[26]](#footnote-27)This evidence may be in the form of documents, other tangible objects, or witness statements. The Prosecution must also disclose to the accused any evidence which may show that he or she is innocent. The Prosecution presents its case first and calls witnesses to testify. All parties to the trial may present evidence relevant to the case. Everyone is presumed innocent until proven guilty according to law.[[27]](#footnote-28) The accused has the right to examine the Prosecution's witnesses, and to call and examine witnesses on his or her behalf under the same conditions as the Prosecution's witnesses. When the personal interests of victims are affected, the Court allows their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.[[28]](#footnote-29) This right is subject to stringent conditions, namely proving that the victims have a personal interest in doing so, and to the request's consistency with the rights of the defence and the requirements of a fair trial. Also, the appropriateness of the victims’ request is subject to the judges’ assessments.[[29]](#footnote-30)

**JUDGMENT, APPEAL & REVISION**

Once both the parties have presented their evidence, they are invited to make their closing statements, while the Defence always has the opportunity to speak last. The judges may order reparations to victims, including restitution, compensation, and rehabilitation. To this end, they may make an order directly against a convicted person. After hearing the victims and the witnesses called to testify by the Prosecution and the Defence and considering the evidence, the judges decide whether the accused person is guilty or not guilty. The sentence is pronounced in public and, wherever possible, in the presence of the accused, and victims or their legal representatives, if they have taken part in the proceedings. The maximum sentence is *30 years*. However, in extreme cases, the Court may impose a term of life imprisonment.[[30]](#footnote-31)

Any party may appeal the decisions of a Pre-Trial or Trial Chamber. The Prosecution may appeal against a conviction or acquittal on any of the following grounds: procedural error, error of fact or error of law. The convicted person or the Prosecution may also appeal on any other ground that affects the fairness or reliability of the proceedings or the decision, in particular on the ground of disproportion between the sentence and the crime.[[31]](#footnote-32)

Anyone who has been the victim of unlawful arrest or detention has an enforceable right to compensation. The Court can award compensation if a grave and manifest miscarriage of justice is conclusively shown. The convicted person or the Prosecution may apply to the Appeals Chamber to revise a final judgment of conviction or sentence where[[32]](#footnote-33) :

* New and important evidence has been discovered;
* It has been newly discovered that decisive evidence, taken into account at trial and upon which the conviction depends, was false, forged or falsified;
* One or more of the judges has committed an act of serious misconduct or serious breach of duty of sufficient gravity to justify the removal of that judge or those judges from office under the Roman Statute.

**CONCLUSION**

1. Victim ParticipationProgramme[[33]](#footnote-34)

A victim is a person who has suffered harm as a result of the commission of a crime within the ICC's jurisdiction. The Roman Statute ensures that several rights are accorded to victims, as outlined in detail below, the most groundbreaking of which is the right to participate in proceedings independently of the *Prosecution* or *Defence*.[[34]](#footnote-35)Victims are individuals who have suffered harm as a result of the commission of any crime within the jurisdiction of the ICC. Victims may also include organizations or institutions that have sustained harm to any of their property which is dedicated to *religion*, *education*, *art*, *science*, or *charitable purposes*.[[35]](#footnote-36)If the Court considers it appropriate, victims may present their point of view directly to the judges at various stages in the proceedings. Such participation is generally through a legal representative who presents their views and concerns to the Court, since criminal proceedings are quite complex. Although the Court has limited resources for legal assistance, it may be able to provide some financial assistance. The *Office of Public Counsel for Victims* can also provide legal assistance to victims without charge.[[36]](#footnote-37)

1. Witness ProtectionProgramme[[37]](#footnote-38)

The Office of the Prosecutor, the Defence, or victims participating in the proceedings can ask experts, victims, or any other person who has witnessed crimes to testify as a witness before the Court. Various measures have been put in place to prevent false testimony. Before testifying, each witness makes an undertaking, to tell the truth. The judges have the authority to freely assess all evidence submitted to determine its relevance or admissibility. If a witness gives false testimony, the Court may sanction him or her by a term of imprisonment not exceeding five years and/or by imposing a fine. Witnesses who appear before the Court are provided with information and guidance. For this purpose, the *Victims and Witnesses Unit* (*VWU*) support team offers services including the provision of psychosocial support, crisis intervention, and access to medical care when needed.[[38]](#footnote-39)Operational protective measures can be implemented where witnesses reside; for example the *Initial Response System* is a *24/7 emergency response system* that enables the Court, where feasible, to extract witnesses to a safe location should they be targeted or in fear of being targeted. Other operational protective measures include educating witnesses on the importance of confidentiality and cover stories or agreeing on an emergency backup plan.[[39]](#footnote-40)

1. Lack of Acceptance resulting infrastructural weakness[[40]](#footnote-41)

The ICC has been a controversial issue since people began talking about its possible existence. Now that it has been an international judicial entity for 10 years, the consequences seem to be becoming real and some countries continue to avoid ratifying the Statute. For example, though the United States signed the Statute, they have not ratified it because it is viewed as giving up an important piece of state sovereignty.[[41]](#footnote-42)However, it may be the states that have ratified the Statute that should be the most worried about their sovereignty, as people are beginning to wonder if the investigations are biased, looking at only some parties to a conflict rather than all of them.[[42]](#footnote-43). Additionally, the amount of time that the investigations and trials take, can allow the suspects to find ways to remain at large, even after a warrant is issued for their arrest.[[43]](#footnote-44)These issues also raise questions about the Court achieving what organizations like *Human Rights Watch* (*HRW*)[[44]](#footnote-45) believe its mission to be, which they describe as bringing *to trial those most responsible for the gravest crimes representative of underlying patterns of ICC crimes*. HRW criticizes the ICC for not conducting thorough enough investigations to go up the chain of command to reach the true leaders who are committing heinous crimes against humanity. There are also criticisms on the way the Court is treating gender, because they are not including rape and sexual violence in the charges against the accused.[[45]](#footnote-46)The receptiveness and cooperation of the local populations can be important to the work of the ICC in achieving justice. However, if the ICC cannot provide appropriate protections for the physical and economic safety of victims, they may be reluctant to come forward with evidence or to participate in the trial.[[46]](#footnote-47) Victims may therefore never have the opportunity to see justice happen or to reclaim their lives after the traumas they or their families experienced.[[47]](#footnote-48)These issues are important and their neglect by the Court has rendered it less successful than many had hoped.[[48]](#footnote-49) However, its task is highly complex and political, and it would have been unreasonable to expect it to achieve all its aims without difficulty or controversy.[[49]](#footnote-50) It will be interesting to see how the court addresses these issues in the future, and if it can be made more effective, more broadly accepted, and more cost-effective.[[50]](#footnote-51)

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41. The legal relationship between the ICC and the Netherlands is governed by a headquarters agreement, which entered into force on 1 March 2008. (See International Criminal Court, 2008: Headquarter Agreement between the International Criminal Court and the Host State [↑](#footnote-ref-42)
42. Beyond Complementarity: The International Criminal Court and National Prosecutions, a View from Haiti, Brian Concannon 32 Columbia Human Rights Law Review 201 (2000) https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=271965 [↑](#footnote-ref-43)
43. Statement of the Prosecutor of the International Criminal Court, Ms. Fatou Bensouda, regarding the situation in the Kasaï provinces, Democratic Republic of the Congo, 31 March 2017, <https://www.icc‐cpi.int/Pages/item.aspx?name=170331‐otp‐sta, 10 April 2017 [↑](#footnote-ref-44)
44. International Criminal Court. "Victims and witnesses" [↑](#footnote-ref-45)
45. Situation in Georgia, Public Document with Confidential, EX PARTE, Annexes A, B, C, D.2, E.3, E.7, E.9, F, H and Public Annexes 1, D.1, E.1, E.2, E.4, E.5, E.6, E.8, G, I, J, ICC‐01/15‐4 13‐10‐2015 1/160 EO PT, pp. 132‐133, 150‐151, https://www.icc‐cpi.int/CourtRecords/CR2015\_19375.PDF [↑](#footnote-ref-46)
46. Tim Cocks (30 May 2007). "Uganda Urges Traditional Justice for Rebel Crimes" [↑](#footnote-ref-47)
47. Jean-Marie Henckaerts & Louise Doswald-Beck, 2005. Customary International Humanitarian Law, Volume I: Rules, pp. 613–614. Cambridge: Cambridge University Press [↑](#footnote-ref-48)
48. International Criminal Court. "Rights of the Defence [↑](#footnote-ref-49)
49. Alena Skodova (12 April 2002). "Czech Parliament Against Ratifying International Criminal Court" [↑](#footnote-ref-50)
50. https://www.lawteacher.net/free-law-essays/criminal-law/international-criminal-court.php [↑](#footnote-ref-51)