

Summary of ICC Mechanism¹

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1. Introduction

The international criminal court was conceived as a response to the culture of impunity enjoyed by the powerful perpetrators of the offences of gravest nature. It was established through the adoption of the Rome Statute of the International Criminal Court by 120 states on 17 July 1998. The International Criminal Court (ICC) is the first ever permanent, treaty based, international criminal court established to promote the rule of law and ensure that the gravest international crimes do not go unpunished.

The Rome Statute sets out the Court's jurisdiction, structure and functions and it provides for its entry into force 60 days after 60 States have ratified or acceded to it. The 60th instrument of ratification was deposited with the Secretary General on 11 April 2002, when 10 countries simultaneously deposited their instruments of ratification. Accordingly, the Statute entered into force on 1 July 2002. Anyone who commits any of the crimes under the Statute after this date will be liable for prosecution by the Court.

The efficiency of the International Criminal Court lies in its structural and procedural sustainability. Unlike the Tribunals for the former Yugoslavia and Rwanda which were created by the United Nations Security Council, the ICC is established by a global treaty. These tribunals were created in response to specific situations and will be in existence for a limited time period. Compared to that, the ICC is a permanent international criminal tribunal and therefore it would avoid the delays and costs of creating ad hoc tribunals.

The ICC also compromises the irrelevancy of the International Court of Justice (ICJ) that does not have any criminal jurisdiction to prosecute individuals. It is a civil tribunal that deals primarily with disputes between States. The ICJ is the principle judicial organ of the United Nations, whereas the ICC would act independently of the UN in dealing with most serious criminal offences.

After its establishment at the Hague of the Netherlands, the Office of the Prosecutor (OTP) of the ICC has currently opened two investigations in Africa. Two States Parties, the Republic of Uganda and the Democratic Republic of Congo, have referred situations to the Chief Prosecutor Mr. Luis Moreno-Ocampo. After rigorous analysis, the Prosecutor has decided to open investigations into both situations.

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2. Jurisdiction of the Court

Once a State becomes a party to the Statute, it accepts the Court's jurisdiction with respect to crimes under the Statute. For the Court to exercise its jurisdiction, the territorial State (the State on whose territory the situation which is being investigated has taken or is taking place), or the State of nationality (the State whose nationality is possessed by the person who is being investigated) must be a party to the Statute.

2.1. Subject Matter

Based in the Hague, The Netherlands, the ICC has jurisdiction to prosecute individuals responsible for the most serious crimes of international concern. It can therefore carry out trial of the following offences:

- Crimes of genocide,
- Crimes against humanity and
- War crimes
- Aggression (subject to agreements)

Even though the Court has jurisdiction over aggression, it will not exercise such jurisdiction until the crime has been further defined and conditions under which the Court will exercise its jurisdiction have been agreed upon. The First Session of the Assembly of States Parties created a subcommittee of its Bureau to continue work on the crime of aggression. A review conference will be held in 2009, seven years from the date that the Rome Statute entered into force, during which the matter will be discussed.

2.2. National Court

The ICC will not replace national courts, but will be complementary to national criminal jurisdictions. The Court will only act when :

- countries themselves are unable: A country may be determined to be "unwilling" if it is clearly shielding someone from responsibility for ICC crimes.

and/or

- unwilling to investigate or prosecute: A country may be "unable" when its legal system has collapsed.

The inability and unwillingness would be determined at the pre-trial chamber of the ICC.

2.3. Personnel

The Court only has jurisdiction over natural persons aged 18 and above. Natural persons include Head of State or Government:

- A member of a Government or parliament,
- An elected representative or a government official
- Commanders and superiors, both civil and military

3. Organs of the Court

The Court is composed of the following organs: the Presidency; the Chambers; the Office of the Prosecutor; the Registry.

3.1. The Presidency

The Presidency is responsible for the proper administration of the Court, with the exception of the Office of the Prosecutor. However, the Presidency shall coordinate with and seek the concurrence of the Prosecutor on all matters of mutual concern. On 11 March 2003, according to article 38 of the Rome Statute, the 18 judges of the Court elected the Presidency . It is composed of Judge Philippe Kirsch (Canada) as President, Judge Akua Kuenyehia (Ghana) as First Vice-President, and Judge Elizabeth Odio Benito (Costa Rica) as Second Vice-President of the Court.

3.2. Chambers

The judicial functions of the Court are carried out by the following Chambers :

- The Appeals Chamber
- The Trial Chamber
- The Pre-Trial Chamber

During its first resumed session held in New York from 3 to 7 February 2003, the Assembly of States Parties elected the eighteen judges of the Court for a term of office of three, six, and nine years. The judges constitute a forum of international experts that represents the world's principal legal systems.

3.3. The Office of the Prosecutor

The Office of the Prosecutor shall act independently as a separate organ of the Court. It shall be responsible for receiving referrals and any substantiated information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the Court. On 21 April 2003, the Assembly of States Parties to the Rome Statute of the International Criminal Court, meeting in its second resumed first session, unanimously elected Mr. Luis Moreno-Ocampo (Argentina) as the first Chief Prosecutor of the Court.

3.4. The Registry

The Registry shall be responsible for the non-judicial aspects of the administration and servicing of the Court, without prejudice to the functions and powers of the Prosecutor.

On 24 June 2003, Mr. Bruno Cathala (France) was elected Registrar of the International Criminal Court by an absolute majority of the judges meeting in plenary session. He will hold office for a term of five years.

4. Procedural mechanism

Initiation of a case: States Parties as well as the United Nation Security Council can refer situations to the Office of the Prosecutor for investigations. Keeping in mind the principle of complementarity, the Prosecutor also has power to initiate investigations on his/her own on the basis of information received from reliable sources (NGOs or Individuals) if, after examining the information, he/she determines that there is a reasonable basis to proceed with an investigation.

Issue of Warrant: In the case of proprio motu investigations, authorization of the Pre-Trial Chamber is required for the Prosecutor to proceed. Once they are completed, a warrant for the arrest of a person can only be issued by the Pre-Trial Chamber if the Prosecutor satisfies the Chamber that there are reasonable grounds to believe that the person has committed one of the crimes under the Statute.

Trial: All persons arrested pursuant to an arrest warrant issued by the Pre-Trial Chamber are entitled to be promptly brought before competent judicial authorities to determine the lawfulness of their arrest. At this time, they can also apply for release. Once a person is in the custody of the Court he/she is entitled to appear before the Trial Chamber within a reasonable time for confirmation of the charges.

The Trial Chamber bears the responsibility of ensuring that trials are fair and expeditious and that they are conducted with full respect for the rights of the accused and due regard for the protection of witnesses.

Sentence: The maximum specified term of imprisonment that can be imposed by the Court is 30 years. Imprisonment for life can be imposed if circumstances justify it. Sentences will be served in the States which have indicated their willingness to accept sentenced persons.

Obligation of cooperation: States Parties are obliged to fully cooperate with the Court in its investigations and prosecution of crimes under the Statute. To this end, States Parties should designate appropriate channels of communication with the Court, ensure that there are procedures available under their national law for all forms of cooperation and consultation with the Court whenever there are problems which could impede or prevent the execution of the Court's request for cooperation.

Assembly of the States Parties: Oversight management of the Court is provided by the Assembly of States Parties, a body composed of all parties to the Statute. To be assisted in the discharge of its responsibilities, the Assembly elected a Bureau, consisting of a President, two Vice-Presidents and eighteen members. All regions and principal legal systems of the world are represented on the Bureau.

5. Preconditions to the exercise of jurisdiction

The Court may exercise its jurisdiction with respect to the crime of genocide, crimes against humanity and war crimes either when the situation is referred to the Prosecutor by a State Party or by the Security Council,

or when the Prosecutor decides to initiate an investigation his or her own decision and on the basis of information received. However, in this last case, the Prosecutor must seek the authorization of the Pre-Trial Chamber before proceeding with the investigation.

When the situation is referred to the Prosecutor by the Security Council, the Court may exercise its jurisdiction in all cases and no preconditions are applicable.

However, in the two other cases, when the Prosecutor decides to initiate an investigation on his or her own decision with the authorization of the Pre-Trial Chamber, or when the situation is referred to the Prosecutor by a State Party, strict preconditions shall be met before the Court can exercise its jurisdiction. In those two cases:

- The Court may exercise its jurisdiction only if either the State on the territory of which the suspected crime occurred (State of territoriality), or the State of which the person suspected of having committed the crime is a national (State of nationality of the suspected person), is a State Party to the Statute.
- If neither of these two States is a State Party to the Statute, the Court will not be in a position to investigate the suspected crimes, except if either the State of territoriality or the State of nationality of the suspected person accepts the exercise of jurisdiction of the Court by declaration lodged with the Registrar. Such a declaration may be made for all suspected crimes committed after 1 July 2002.

Thus, if nationals of States Parties to the Statute are victims of suspected crimes within the jurisdiction of the Court in the territory of a State which is not a Party to the Statute committed by persons who are not nationals of a State Party, the Court wouldn't be in a position to investigate except if either the State of territoriality or the State of nationality of the suspected person accepts the jurisdiction of the Court, or if the situation is referred to the Court by the Security Council.

6. Relationship with United Nations

The International Criminal Court is an independent international organisation. In accordance with article 2 of the Rome Statute, the relationship with the United Nations system is governed by an agreement that has been approved by the Assembly of States Parties during its first Session held in New York from 3 to 10 September 2002. On 4 October 2004, this Negotiated Relationship Agreement between the International Criminal Court and the United Nations has been concluded by the President of the Court on its behalf. This agreement defines the institutional relation and form of cooperation between ICC and the UN. According to Article 13 of the agreement The United Nations and the Court agree that the conditions under which any funds may be provided to the Court by a decision of the General Assembly of the United Nations shall be subject to separate arrangements.

Article 17 of the agreement deals with Cooperation between the Security Council of the United Nations and the Court. According to this Article:

- When the Security Council, decides to refer to the Prosecutor a situation, the Secretary-General shall immediately transmit the written decision of the Security Council to the Prosecutor together with documents and other relevant materials. The Court undertakes to keep the Security Council informed in this regard.
- When the Security Council adopts a resolution requesting the Court, pursuant to article 16 of the Statute, not to commence or proceed with an investigation or prosecution, this request shall immediately be transmitted to the President of the Court and the Prosecutor. The Court shall inform the Security Council of its receipt of the above request and, as appropriate, inform the Council of actions, if any, taken by the Court in this regard.
- Where a matter has been referred to the Court by the Security Council and the Court makes a finding of a failure by a State to cooperate with the Court, the Court shall inform the Security Council or refer the matter to it, as the case may be. The Security Council shall inform the Court of action, if any, taken by it under the circumstances.

Supporting agreements

Agreement on Privileges and Immunities of the International Criminal Court (APIC), designed to provide officials and staff of the ICC with certain privileges and immunities necessary for them to perform their duties in an independent and unconditional manner, came into effect on 22 July 2004 for those countries that have ratified the Agreement.

7. ICC and US

Shortly before the entry into force of the Rome Statute in July 2002, the United States launched a full-scale multi-pronged campaign against the International Criminal Court, claiming that the ICC may initiate politically-motivated prosecutions against US nationals. This campaign is reflected, among other things, on the text of the following documents.

- Bilateral Immunity Agreements (BIAs)
- the American Servicemembers' Protection Act (ASPA); and
- ICC immunity resolutions in the Security Council

a) Bilateral Immunity Agreements (BIAs)

As part of its efforts, the Bush administration has been approaching countries around the world seeking to conclude Bilateral Immunity Agreements, purportedly based on Article 98 of the Rome Statute, excluding its citizens and military personnel from the jurisdiction of the Court. These agreements prohibit the surrender to the ICC of a broad scope of persons including current or former government officials, military personnel, and US employees (including contractors) and nationals. These agreements, which in some cases are reciprocal, do not include an obligation by the US to subject those persons to investigation and/or

prosecution. These agreements are alternately referred to as so-called "Article 98" agreements, bilateral immunity agreements, impunity agreements or bilateral non-surrender agreements.

Many governmental, legal and non-governmental experts have concluded that the bilateral agreements being sought by the U.S. government are contrary to international law and the Rome Statute.

b) American Service member's Protection Act (ASPA)

Another facet of this crusade against the Court is the adoption of US legislation known as the American Service members' Protection Act (ASPA). This law, passed by Congress in August 2002, contains provisions restricting US cooperation with the ICC; making US support of peacekeeping missions largely contingent on achieving impunity for all US personnel; and even granting the President permission to use "any means necessary" to free US citizens and allies from ICC custody (prompting the nickname "The Hague Invasion Act"). The legislation also contains waivers that make all of these provisions non-binding, however, the Bush administration has been using these waivers as bargaining chips to pressure countries around the world into concluding bilateral immunity agreements – or otherwise lose essential US military assistance.

c) ICC immunity resolutions in the Security Council

Security Council Resolution 1422 (first passed in July 2002 and renewed as Resolution 1487 in June 2003) grants immunity to personnel from ICC non-States Parties involved in United Nations established or authorized missions for a renewable twelve-month period. CICC members support the conclusions of legal experts from many nations that Security Council Resolution 1422 is incompatible with the Rome Statute, demonstrates the improper use of the Security Council, and contradicts the UN Charter and other international law. In respond to these criticisms, this resolution was later withdrawn by another SC resolution.

8. Conclusion

The birth of ICC is widely acclaimed in view of its immense importance in contributing to the establishment of a just, fair and equitable world. ICC is needed to achieve justice for all, to end impunity, to help end conflicts, to remedy the deficiencies of ad hoc tribunals and to deter future war criminals

The necessity of ICC has been reaffirmed by the very fast entry into force of the Rome Statute and by the level of enthusiasm the world community has expressed in regard to the ICC. Failure or unwillingness of any State to ratify the Statute is being viewed as sponsoring the culture of impunity to be enjoyed by the perpetrators of concerned states and their allies.

**This article draws heavily from the materials available at the ICC official websites.*