

The Procedure of the International Criminal Court

إجراءات المحكمة الجنائية الدولية

ZOUINA Houda*, Faculty of Law ,University of Algiers 1

houda.zouina16@gmail.com

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Abstract:

The International Criminal Court is the first judicial body of a permanent nature. The Statute and its Supplement to the Rules of Procedure and Evidence are regarded as the codification of international criminal proceedings and the referral is made either by States parties or by the Security Council or the Prosecutor.

After the admissibility of the case by the International Criminal Court and the confirmation of the charges, the Prosecutor initiates an investigation, noting that the Pre-Trial Chamber has a supervisory role over its powers. It allows him to initiate the investigation or dismiss it. It also approves the charges and issues warrants of arrest, summons or pretrial detention.

Key words: The International Criminal Court, international criminal proceedings, the Rules of Procedure

Introduction:

On July 17, 1998, 120 countries adopted a statute in Rome - known as the Rome Statute of the International Criminal Court (the "Rome Statute") - that established the International Criminal Court. For the first time in human history, following the entry into force of the Rome Statute on 1 July, States decided to recognize the jurisdiction of a permanent International Criminal Court to try perpetrators of the most serious crimes committed on their territory or by their nationals. year 2002.

The International Criminal Court is not a substitute for national courts. Under the Rome Statute, every state is obliged to exercise criminal jurisdiction over those responsible for international crimes. The ICC can only intervene when a state is unable or unwilling to actually investigate and prosecute the perpetrators.

The International Criminal Court is a controversial and important body within the framework of international law and is significantly increasing in importance, particularly the challenges it faces, and its general contribution to international criminal law. It provides an unparalleled insight into the Court as an institution, its jurisprudence, the impact of its activities and its future development.¹

However, one aspect of the ICC that limits its international scope is the fact that, contrary to the ICTY and ICTR, it does not have primacy over national criminal jurisdictions but rather is complementary to the domestic prosecution. The ICC initiates proceedings only if the State in question is "unwilling or unable genuinely to carry out the prosecution or investigation" (Statute, Art. 17). This means that if a national legal entity is carrying out such proceedings, the ICC may not act unless it can prove that the proceedings are not being carried out in good faith (explained further in Section IV). The aim of this approach is to encourage States to carry out their own

* Corresponding Author

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prosecutions whenever possible. Another compromise that was reached in establishing the Court actually subordinates the exercise of the ICC's jurisdiction to the prior consent of States. Whether a case concerns genocide, war crimes, or crimes against humanity, the Court may only investigate the crimes if either the State of nationality of the person accused or the State on whose territory the crime was committed has accepted the ICC's jurisdiction (Statute, Art. 12). The absence of any reference to the State of nationality of the victim or of the State where the accused is located has doomed the most realistic scenarios under which investigations might have been triggered. Today, 90 percent of conflicts are internal; therefore, the State of nationality of the criminal and the State where the crime was committed are often the same. Finally, the Statute includes a provision allowing States to refuse the Court's jurisdiction over war crimes for seven years after the statute's entry into force for the State concerned (Statute, Art. 124).²

In July 1998, a United Nations Diplomatic Conference in Rome voted to adopt the Statute of the International Criminal Court. Rules of Procedure and Evidence are now required to effectuate proceedings and trials in the Court itself.³

Trial is the central and most visible phase of an international criminal prosecution. In all the international criminal tribunals examined in this series, it is the public forum in which the prosecution and defence question witnesses, present documentary and other evidence, and make legal arguments before a panel of judges who serve as finders of both fact and law. Since the majority of accused before international criminal tribunals choose to contest the charges against them rather than plead guilty, most cases to date have featured a trial, and the trial has usually been lengthy. Rarely has a trial chamber completed a trial in under a year, and trials lasting two or more years are common. While the extended length of these trials has been criticised for potentially violating the rights of accused, the reasons for delays are complex. Delay often occurs as a result of the unavoidable confluence of a challenging political context, complex substantive law, a heavy caseload, and persistent scarcity of resources.⁴

The Court is participating in a global fight to end impunity, and through international criminal justice, the Court aims to hold those responsible accountable for their crimes and to help prevent these crimes from happening again.

The Court cannot reach these goals alone. As a court of last resort, it seeks to complement, not replace, national Courts. Governed by an international treaty called the Rome Statute, the ICC is the world's first permanent international criminal court.⁵

1- Organization of the Court

The Statute contains a number of organizational choices that shape the Court's procedure. The organizational design of the Statute allows for the separation and allocation of distinct powers and functions and thus for the working of the Court according to the maxims of the Court's procedure."

1.1. The Court:

The ICC is an international organization. The Rome Conference has opted for a system that ensures that the 18 judges making up the Court are independent. The Statute itself specifies the qualifications that the judges must have, detailed provisions on the disqualification of judges (article 41 of the Statute), the removal of judges from the office (article 46) ,(and disciplinary measures (article 47). The RPE further specify the cases and guarantees under which a judge, the Prosecutor, a Deputy Prosecutor, the Registrar and a Deputy Registrar shall be removed from office or shall be subject to disciplinary measures in a case of serious misconduct.⁶

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The Court's internal organization is functional. The Court is composed of six organs - the Presidency, an Appeals Division, a Trial Division, a Pre-Trial Division, the Office of the Prosecutor, and the Registry (article 34). The Court's judicial function shall be carried out by Chambers (Pre-Trial Chamber, Trial Chamber and Appeals Chamber⁷s) ⁸The Trial Chamber renders both the decision on conviction or acquittal and, upon conviction, the sentence. The Assembly of States parties that the Statute provides for is not an organ of the Court but rather a separate institution that has important legislative and administrative but not judicial powers under the Statute.⁹

The competence of the Assembly of States parties to change both the substantive law (Elements of Crime) and the procedure (RPE) in fact renders the Court more autonomous. The autonomy of a judicial institution relates to the ability of the legislator to change the law it is to apply.¹⁰

1.2- The Office of the Prosecutor

Article 42 of the Statute provides for the Office of the Prosecutor as an organ of the Court¹¹ The Office is headed by a Prosecutor elected by the Assembly of States parties.¹²

The Prosecutor operates in personal and substantive independence of both the Court and the States parties¹³. It is well known that two tendencies clashed at the Rome Conference¹⁴. Some states¹⁵ wanted to grant the power to set investigations and prosecutions in motion to states and the Security Council only; the group of the so-called like-minded countries were advocating the institution of an independent prosecutor capable of initiating *proprio motu* investigations and prosecutions. The final result was a compromise. First of all, the right to carry out investigations and prosecutions was not left to the authorities of individual states or entrusted to a commission of inquiry or similar bodies. Instead, a prosecutor was envisaged. States had two options: the Nuremberg model, whereby the Prosecutor is an official of the state that has initiated the investigation and prosecution, and is therefore designated by that state and remains under its control, and the Yugoslavia and Rwanda model, whereby the prosecutor is a totally independent body. As an independent and impartial body, the Prosecutor was granted the power to investigate and prosecute *ex officio*.¹⁶

1.3. Parties and Participants of the ICC Procedure

This overview allows us to restate the point made earlier that the Statute models the positions not of the parties but of the participants. It needs to be stated clearly that this increases the impartiality of the procedure. The independence of the Court from the UN Security Council and the States parties, its commitment to the overall rule of law, and the substantive fairness of the Court's proceedings depend on the institution of the Prosecutor. The Statute and the RPE implement human rights standards, not just in standing for things like fair trial etc., but in actually devising new procedural mechanisms to flesh out the concept of human rights. The "participation" that is thus imputed to the accused is related to human dignity to human dignity.

2. Jurisdiction¹⁷

The Court may exercise jurisdiction in a situation where genocide, crimes against humanity or war crimes were committed on or after 1 July 2002 and:

- the crimes were committed by a State Party national, or in the territory of a State Party, or in a State that has accepted the jurisdiction of the Court; or

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- the crimes were referred to the ICC Prosecutor by the United Nations Security Council (UNSC) pursuant to a resolution adopted under chapter VII of the UN charter.

As of 17 July 2018, a situation in which an act of aggression would appear to have occurred could be referred to the Court by the Security Council, acting under Chapter VII of the United Nations Charter, irrespective as to whether it involves States Parties or non-States Parties.

In the absence of a UNSC referral of an act of aggression, the Prosecutor may initiate an investigation on her own initiative or upon request from a State Party. The Prosecutor shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned. Where no such determination has been made within six months after the date of notification to the UNSC by the Prosecutor of the situation, the Prosecutor may nonetheless proceed with the investigation, provided that the Pre-Trial Division has authorized the commencement of the investigation. Also, under these circumstances, the Court shall not exercise its jurisdiction regarding a crime of aggression when committed by a national or on the territory of a State Party that has not ratified or accepted these amendments.

2.1. Status of Cases and Investigations¹⁸

As of January 2022, the Office of the Prosecutor has brought 30 cases before the Court. So far, the ICC has issued 10 convictions and 4 acquittals. Each case or pending investigation is summarized below.

Dominic Ongwen, an alleged commander of the Lord's Resistance Army (LRA) in **Uganda** was found guilty of 61 counts of crimes against humanity and war crimes, and sentenced to 25 years' imprisonment, in 2021. The defense intends to appeal the judgment and may also appeal the sentence. At least two other suspects remain at large with regard to the situation in Uganda, in the separate case of *Kony et al.*

Trials have concluded in the six cases related to the situation of the **Democratic Republic of the Congo**. In 2012, the Court convicted Thomas Lubanga Dyilo of enlisting and conscripting children under the age of 15 into the Patriotic Forces for the Liberation of the Congo (FPLC), and acquitted Mathieu Ngudjolo Chui. In 2014, the ICC convicted Germain Katanga of war crimes and crimes against humanity, including murder, rape, and sex slavery. In 2019, Bosco Ntaganda was convicted of 18 counts of war crimes and crimes against humanity, and sentenced to 30 years in prison. An additional DRC defendant, Callixte Mbarushimana, was released from ICC custody after the pre-trial chamber declined to confirm the charges against him. The final DRC defendant, Sylvestre Mudacumura, remains at large.

The six cases in the situation of **Darfur, Sudan** are in various stages. Bahr Idriss Abu Garda was released after the pre-trial chamber declined to confirm the charges against him in 2010. Although Abdallah Banda Abakaer Nourain appeared voluntarily during the pre-trial stage, he is currently at large. His trial will not begin until he appears in court as the ICC does not try people unless they are present. The Trial Chamber I has scheduled trial to begin for Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb") in April 2022. Three suspects – Muhammad Harun ("Ahmad Harun"), former Sudanese President Omar Hassan Ahmad Al Bashir, and Abdel Raheem Muhammad Hussein – remain at large.

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in the situation in the **Central African Republic**, the Trial Chamber found Jean-Pierre Bemba Gombo guilty of two counts of crimes against humanity and three counts of war crimes. However, the Appeals Chamber reversed the Trial Chamber's decision, acquitting Bemba on all charges of crimes against humanity and war crimes in 2018. In separate proceedings, Bemba and several members of his legal team were convicted of offenses against the administration of justice for witness tampering and presenting false evidence. On appeal, the Appeals Chamber confirmed the conviction against Bemba with respect to the witness tampering but reversed the charge for presenting false evidence.

The ICC has heard four cases with regard to **Kenya**. In 2016, the Trial Chamber decided to terminate the case against William Samoei Ruto and Joshua Arap Sang. The charges against President Uhuru Muigai Kenyatta have been dropped due to insufficient evidence. The charges against Francis Kirimi Muthaura, initially confirmed, were later withdrawn and the charges against Henry Kipromo Kosgey and Mohammed Hussein Ali were not confirmed. Additionally, Walter Osapiri Barasa and Philip Kipkoech Bett are wanted by the ICC in connection with witness tampering. The trial of Paul Gicheru, also wanted for corruptly influencing witnesses, is scheduled for February 2022.

With regard to the **Côte d'Ivoire** cases, the joint trial against former President Laurent Gbagbo and Charles Blé Goudé led to their acquittal on all charges of crimes against humanity in 2019. The arrest warrant for Simone Gbagbo, wanted on similar charges, was vacated in 2021.

All three pending cases connected to the situation of **Libya** are in the pre-trial phase. Saif Al Islam Gaddafi, Al-Tuhamy Mohamed Khaled, and Mahmoud Mustafa Busayf Al-Werfalli are not yet in ICC custody. In 2013, the ICC pre-trial chamber determined the case against Abdullah Al-Senussi to be inadmissible because his liability was being determined by appropriate domestic proceedings. The proceedings against former Libyan ruler Muammar Gaddafi were terminated upon his death.

In the situation of **Mali**, one defendant has been convicted and a second is on trial. In 2016, Ahmad Al Faqi Al Mahdi was convicted and sentenced to nine years' imprisonment for the war crime of intentionally attacking historic and religious sites. An ICC pre-trial chamber charged Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud with war crimes and crimes against humanity in September 2019, and his trial began in 2020.

In 2021, the ICC authorized an investigation into the situation in **Palestine** with regard to crimes committed in the occupied Palestinian territory since June 2014. Palestinian armed groups are accused of indiscriminately firing rockets and mortars, which resulted in the deaths, injuries, and displacement of civilians. Israeli armed groups are accused of directing attacks toward civilian buildings and indiscriminately attacking civilian areas, causing hundreds of deaths. The crimes being investigated include killings, arrests, detentions, and other ill-treatment.

2.2. What cases has the ICC opened?¹⁹

The ICC has indicted more than forty individuals, all from African countries. Seventeen people have been detained at The Hague, ten have been convicted of crimes, and four have been acquitted.

- International Criminal Court Cases

There have been thirty-one cases before the ICC. Eight have resulted in acquittals or no charges, while five have resulted in reparations or imprisonment.

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Case start	Country	Person charged
2019	CAR	Said
2018	Mali	Al-Hassan
	CAR	Yekatom and Ngaissona
	CAR	Mokom
2017	Libya	Al-Werfalli
2015	Mali	Al-Mahdi
	Kenya	Gicheru
	Kenya	Bett
2013	Kenya	Barasa
	CAR	Bemba et al.
	Libya	Khaled
2012	Ivory Coast	S. Gbagbo
	Sudan	Hussein
	DRC	Mudacumura
2011	Ivory Coast	L. Gbagbo and Ble Goude
	Kenya	Kenyatta
	Libya	Qaddafi
	Kenya	Ruto and Sang
2010	DRC	Mbarushimana
2009	Sudan	Abu Garda
	Sudan	Al-Bashir
	Sudan	Banda

Sources: International Criminal Court; CNN

Cases have been referred by the governments of Uganda, the Central African Republic, the Democratic Republic of Congo, and Mali relating to the civil wars and other conflicts that have raged in those countries. In 2021, the court opened an investigation into alleged crimes against humanity in Venezuela based on a referral from half a dozen member countries, mostly in South America.²⁰

In addition, the prosecutor's office opened investigations proprio motu in Kenya in 2010, the Ivory Coast in 2011, Georgia in 2016, Burundi in 2017, Bangladesh and Myanmar in 2019, Afghanistan in 2020, and the Palestinian territories and the Philippines in 2021.

Most recently, in 2022, the court launched an investigation into Russia's invasion of Ukraine after receiving a referral from more than forty member states. Though Ukraine is not an ICC member, it accepted the court's jurisdiction for alleged crimes on its territory going back to 2013.

The International Criminal Court is working to create a safer and more just world, by investigating serious crimes and trying the perpetrators. And hopefully by deterring such crimes. What's more, creating a more just world will also make the Netherlands safer.

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As a State Party to the Rome Statute and as the ICC's host country, the Netherlands supports the work of the ICC and other international organisations in the Netherlands by helping to strengthen the international legal order. The Netherlands also promotes the rule of law worldwide, under which not only citizens but also governments are bound by laws. In other words, no country or person is above the law.

Conclusion:

The history and record of the investigative bodies and the international criminal tribunals since the promulgation of the Treaty of Versailles until the establishment of the International Criminal Tribunal for Rwanda are the most striking evidence of the international community's need for a permanent international criminal court. In the absence of this Court, many perpetrators of brutal attacks have escaped with impunity. All those who participated in the investigations and trials specifically prepared for this purpose were affected by political considerations and their volatility in accordance with the changing international situation.

The establishment of the Permanent International Criminal Court at the end of the twentieth century and its entry into force at the beginning of the twenty-first century was therefore an important event for the international community in recent years.

We conclude from the foregoing:

The International Criminal Court is an independent judicial body under the jurisdiction of persons accused of genocide, crimes against humanity and war crimes.

The International Criminal Court is not part of the United Nations

The Court was established by treaty. The Treaty was negotiated at the United Nations.

The Treaty established an independent judicial body.

The Rome Statute is the result of a long process of considering the issue of international criminal law within the United Nations. See the International Law Commission's Analytical Guide, section on international criminal law, for an introduction to part of the work of the United Nations on the topic.

The United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court adopted the Statute of the Court

Relationship with the United Nations:

Article 2 of the Statute provides for the International Criminal Court's relationship with the United Nations Agreement on the relationship between the United Nations and the International Criminal Court regulates cooperation between the two organizations

In its resolution 58/318, the General Assembly endorsed the Agreement on the Relationship between the United Nations and the International Criminal Court, contained in document A/58/874 and Add.1.

In accordance with article 13 (b) of the Rome Statute, the Security Council may refer certain cases to the Prosecutor of the International Criminal Court.

References:

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² Albert Camus. *The Practical Guide to Humanitarian Law, International Criminal Court (ICC)*.

³ Vladimir Tochilovsky, Rules of Procedure for the International Criminal Court: Problems to Address in Light of the Experience of the Ad Hoc Tribunals, Published online by Cambridge University Press: 21 May 2009

⁴ Gideon Boas , James L. Bischoff , Natalie L. Reid and B. Don Taylor III, published online by Cambridge University Press: 05 August 2011

⁵ <https://www.icc-cpi.int/about/the-court>

⁶ See Rule 24.

⁷ Article 39

⁸ Although the office of the prosecutor is an organ of the Court, it exercises executive rather than judicial functions . Cf. Morrison v. Olson, 487 U.S. 654.

⁹ D.A. Mundis, "The Assembly of States Parties and the Institutional Framework of the International Criminal Court", *AJIL* 97 (2003), 132 et seq.

¹⁰ N. Luhmann, *Legitimation durch Verfahren*, 1983. In entrusting the collectivity of the States parties with legislative powers, the Rome Statute follows institutional developments pioneered, i.e., in modern international environmental law. See V. Raben, "Institutional Developments under Modern International Environmental Agreements", *Max Planck UNYB* 4,(2000) 363 et seq.

¹¹ See article 42 entitled "The Office of the Prosecutor".

¹² Following months of lengthy consultations, the States parties to the Rome Statute elected at the resumed session of the Assembly of States parties, 21-24 April 2003, Mr. Luis Moreno Ocampo of Argentina as prosecutor of the ICC. See Statement for the Press by the President of the Assembly of States Parties to the Rome Statute of the International Criminal Court, HRH Prince Zeid Raad Al Hussein.

¹³ A. Klip, "State Security and Obtaining Evidence Independently by the Defence", in: H. Roggemannl P. Sarcevic (eds), *National Security and International Criminal Justice*, 2003, 127 et seq. (131).

¹⁴ A. Cassese, "The Statute of the International Criminal Court: Some Preliminary Reflections ", *EJIL* 10 (1999), 144 et seq. (161)

¹⁵ Including the United States, China and others.

¹⁶ Rule 11 RPE secures the independence in detail. According to this Rule, the Prosecutor may delegate his or her functions exclusively to full staff members of his office but not to so-called gratis personnel within the meaning of article 44 (4) offered by States parties, inter-governmental or non-governmental organizations to the Prosecutor's office.

¹⁷ How the Court works : <https://www.icc-cpi.int/about/how-the-court-works>

¹⁸ International Criminal Court : <https://ijrcenter.org/international-criminal-law/international-criminal-court/>

¹⁹ Claire Klobucista, **The Role of the International Criminal Court**, Updated Last updated March 28, 2022 2:00 pm (EST)

²⁰ Claire Klobucista, **The Role of the International Criminal Court**, Updated Last updated March 28, 2022 2:00 pm (EST)