



The ICC: Mission and Present Developments

CHAPTER 3

This chapter addresses the mandate, mission and structure of the ICC.

Before the ICC there was no permanent system to hold individuals responsible for genocide, war crimes and crimes against humanity

3.1 Origin of the International Criminal Court

During the 20th century, we witnessed the worst violence in the history of humankind. Over the past fifty years alone, over 86 million civilians, mostly women and children, have died during violent conflicts. Following war, many governments desire to move on and not look back, thus lacking the political will to prosecute war criminals. As a result, the grievances of most victims have been simply forgotten and few perpetrators have been brought to justice.

World War II brought about an initial change towards prosecuting war crimes. The suffering and loss of life had been so massive that at the international level it was decided that several persons must be punished for their role in the war. These trials were held in Nuremberg (Germany) and in Tokyo (Japan).

In 1948, the General Assembly of the newly constituted UN adopted the Universal Declaration of Human Rights. Inspired

by this declaration, governments subsequently drafted and ratified a number of legally binding international human rights treaties despite the hostilities of the Cold War. These treaties codified the various rights of both individuals and (sometimes) of groups. At the same time, having learned from the tribunals after WW II, discussion started on the possibilities of establishing a permanent institution that would prosecute individual war criminals and mass murderers. Since then several international treaties and protocols have defined and outlawed



The ICC is a product of a long struggle by human rights and civil society organisations to stop impunity

genocide, war crimes, and crimes against humanity. However, no international court system was accepted to enforce these norms by holding individuals criminally responsible for these crimes.

In the 1980s, organisations of victims and their relatives, as well as several human rights organisations and legal experts persuaded interested countries to campaign for the establishment of an international criminal court. In 1989, Trinidad and Tobago tabled the issue again at the UN General Assembly. By then, almost all countries of the world had become a member of the UN.

Thereafter, the UN established two temporary international criminal tribunals:

- i. The wars in the former Yugoslavia (where genocide, crimes against humanity and war crimes took place) led the UN to establish the International Criminal Tribunal for the former Yugoslavia (ICTY) in 1993.
- ii. The genocide in Rwanda led to the establishment in 1994 of the International Criminal Tribunal for Rwanda (ICTR), based in Arusha, Tanzania.

The establishment of these two international criminal tribunals provided the basis for a permanent court. In 1995, the “NGO Coalition for the ICC” (CICC) was established, with several major human rights organisations on board. Since then the CICC has grown to include over 2,000 member NGOs worldwide, including many from Africa and the faith-based NGOs responsible for this Manual. The CICC thus became a major impetus for the process. From 1995 until 1998, 160 states participated in the official preparatory process for the ICC. On 17 July 1998, at the diplomatic conference in Rome (Italy) an overwhelming number of 140 states voted in favour of the so-called *Rome Statute of the ICC*, the Treaty that established the first permanent international court capable of trying individuals accused of genocide, war crimes and crimes against humanity.

“The ICC is a gift of hope for the future”

“The establishment of the Court is still a gift of hope to future generations, and a giant step forward in the march towards universal human rights and the rule of law.”

(Kofi Annan, UN Secretary-General, 18 July 1998 at the signing of the Rome Statute of the ICC in Rome).



3.2 Mandate

Which crimes does the ICC prosecute?

The jurisdiction of the ICC is not retroactive: it applies only to *crimes committed after 1 July 2002*, the date that the Rome Statute entered into force. Criminal responsibility is applied equally to all persons without distinction whether he/she is e.g. a former or present head of state or government. A president, warlord, general or mercenary, a victor or a defeated person: all can be prosecuted. As we will see below, the Prosecutor will focus his work on those who bear the greatest responsibility for the crimes. It remains the task of national systems of justice to prosecute low ranking perpetrators.

***Criminal
responsibility
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The ICC investigates and prosecutes “the most serious crimes of concern to the international community” (quote from the Preamble and Article 1 of the Rome Statute). These are the crimes of *genocide*, *crimes against humanity* and *war crimes*. (The Rome Statute also mentions the “crime of aggression”. Once the ICC States Parties agree on its content, then that crime will also fall within the Court’s jurisdiction.) The aforementioned crimes are defined in the Rome Statute and further elaborated in the so-called “Elements of Crimes” list. It is important to note that the Rome Statute does not identify new categories of crimes, but rather reflects existing international law. Two aspects need to be proved: the facts of occurrence of the crime and the attribution to the individual perpetrator (his/her intent).

The procedural provisions of the Rome Statute have been drafted to create an optimal balance between the following priorities:

- i. the need for an independent, apolitical, representative international court, which can function efficiently and effectively;
- ii. the right of states to take primary responsibility for prosecuting such crimes if they are genuinely willing and able;



- iii. the need to give victims of such crimes adequate redress and compensation;
- iv. the need to protect the rights of accused persons; and
- v. the role of the UN Security Council in maintaining international peace and security.

Genocide (Article 6)	Crimes against humanity (Article 7)	War crimes (Article 8)
<p>Acts committed with:</p> <ul style="list-style-type: none"> - <i>intent</i> to destroy - in whole or in part - a national, ethnic, racial or religious group. <p>These acts can be one of the following:</p> <ul style="list-style-type: none"> - killing members of the group - causing serious bodily or mental harm to members of the group - imposing conditions on the group calculated to destroy it - preventing births within the group - forcibly transferring children from one group to another. 	<p>Acts committed:</p> <ul style="list-style-type: none"> - as part of a widespread or systematic attack - against a civilian population - with knowledge of the attack. <p>These acts include amongst others:-</p> <ul style="list-style-type: none"> - murder - extermination - enslavement - deportation, forcible transfer of population - torture - rape, sexual slavery, enforced prostitution, forced pregnancy (..) - enforced disappearance of persons - the crime of apartheid. 	<p>Acts committed:</p> <ul style="list-style-type: none"> - in situations of armed conflicts, - either internal (e.g. civil war) - or international. <p>These acts include amongst others:</p> <ul style="list-style-type: none"> - wilful killing - torture or inhuman treatment - wilfully causing great suffering or serious injury to body or health - extensive destruction and appropriation of property not justified by military necessity - taking hostages - mutilation, cruel treatment, torture - intentional attacks against civilians or civilian objects, e.g. dedicated to religion, education, hospitals etc. - recruiting children under the age of 15 to fight in army or guerrilla.

These considerations are all reflected in the functions and powers of the Court, and its relationship with other entities.

Who can bring cases: the trigger mechanism

The Prosecutor analyses *every* item of information that is sent to him. The information can be on atrocities committed in any country and can be sent by anyone (NGOs, victim





groups, governments, media, etc.). Then, on the basis of the information received an investigation may start. There are three ways in which the Court can initiate investigations.

1. Through a referral of a State Party to the ICC
 - if a crime has been committed on the *territory* of a State Party (or on board of a boat or aircraft registered in a State Party)
 - if a crime has been committed by a *national* of a State Party

The governments of the DRC (March 2004), Uganda (December 2003) and Central African Republic (January 2005) have referred cases to the ICC.

2. Through a referral of the Security Council of the UN
 - on crimes that may have taken place anywhere in the world, regardless of whether the state concerned is a party to the ICC Treaty, as long as those crimes formed so-called “breaches of international peace and security” (as last remedy, when the conflict is so violent and deadly and nothing else helps to stop it).

The Security Council has referred one situation to the ICC, namely the conflict in Darfur (Sudan) in March 2005.

3. By the Prosecutor himself (“*proprio motu*”)
 - on the basis of credible information that he receives from states, NGOs, victims, or any other source. After a thorough preliminary examination, the Prosecutor asks the Judges’ Pre-Trial Chamber for authorisation of a formal investigation.

The ICC began to work on the DRC on 16 July 2003, when the Prosecutor announced that he would begin a preliminary examination of the information that he had received on crimes committed in Ituri, DRC. Later, in March 2004, the government of DRC referred the situation in the country to the Court.



The ICC has the power to prosecute if the State is unable or unwilling to carry out a genuine investigation or prosecution

When is a case admissible?

The ICC was created to complement national courts (**complementarity principle**). The Court will not begin investigating a crime if the state concerned is already investigating or prosecuting it, or even if the state has investigated it and then decided not to prosecute the persons concerned. However, under the Rome Statute, the ICC has the power to prosecute cases if the state concerned is *unwilling* or *unable* to carry out a genuine investigation or prosecution. This part of the Statute is meant to make it less likely for perpetrators to escape punishment for crimes because their own state is not willing or is unable to investigate and prosecute them.

- In order to determine if a state is “*unwilling*” to genuinely investigate and prosecute a case, the Court considers whether it has taken measures to shield the suspect from criminal responsibility, whether it has unduly delayed the proceedings and whether it conducted the proceedings in an independent and impartial way.
- In order to determine if a state is “*unable*” to genuinely investigate and prosecute a case, the Court considers whether it is unable to arrest the accused, to obtain the necessary evidence, and to otherwise carry out judicial proceedings. This can be the case if the national justice system has collapsed, totally or substantially.

3.3 Structure and procedures of the ICC

Structure

The figure shows the four organs of the ICC, summarises their roles and provides names of those currently in key positions (as at December 2005).



Presidency

Mr. Philippe Kirsch (Canada) is Head of all Judges and President of the Court

Role:

- Promote unity of the Court, the 'One Court Principle'
- Administration of the Court
- Advance acceptance of international justice and promote ratification

One Court, Different Roles, Common Strategies

Registry

Mr. Bruno Cathala, (France) is Registrar

Role:

- Non-judicial administration and servicing of the Court
- To provide general information on the Court; general outreach; to make the proceedings public and accessible
- Support to victims & witnesses:
 - Victims and Witnesses Unit
 - Victims Participation and Reparation Section
 - Office of Public Counsel for Victims

18 Judges

18 legal experts, both women and men, from all over the world (3 from Africa)

Divided into:

- Pre-Trial Chambers
- Trial Chambers
- Appeals Chamber

Independent in performance of their functions

Role:

Decide on

- guilt and punishment of an individual brought before the Court
- reparation to victims
- various other legal issues (e.g. pre-trial and in appeal)

Office of the Prosecutor

Mr. Luis Moreno Ocampo (Argentina) is Prosecutor.

Deputy Prosecutors:

Ms Fatou Bensouda (the Gambia) and **Mr Serge Brammertz (Belgium)**

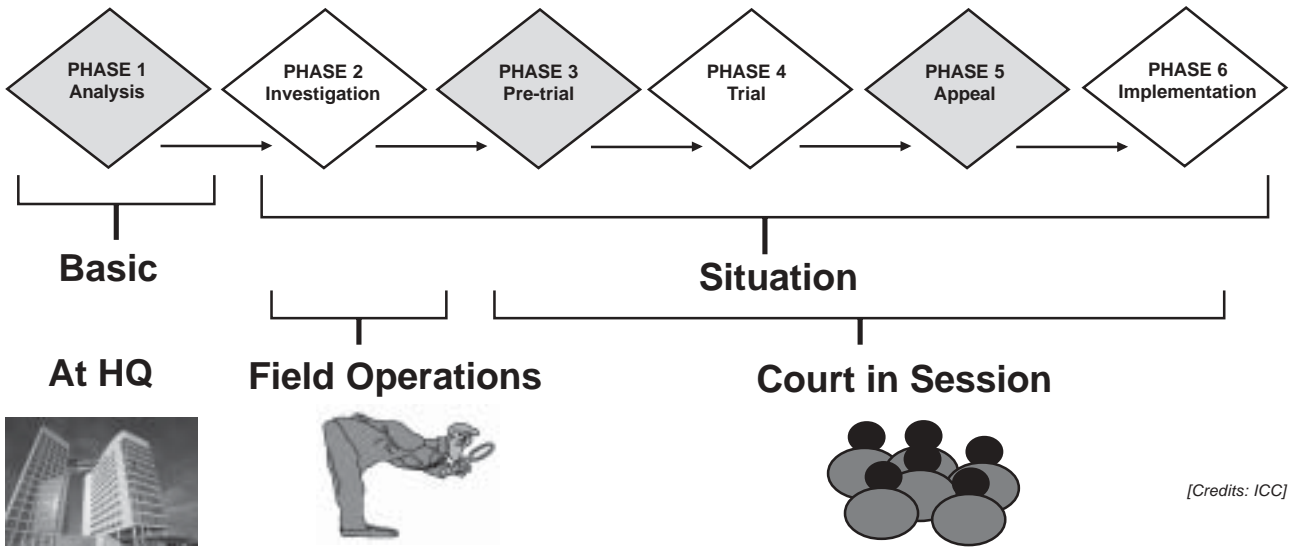
Role:

Responsible for Investigation and Prosecutions

Independent from rest of Court

➡ See Appendix for contact details of the ICC

Operational Procedures of the ICC



[Credits: ICC]

Decisive elements in each phase

PHASE 0: Trigger mechanism, beginning of a case:

Referral by State Party, UN Security Council or by the Prosecutor himself

 See Manual part 3

PHASE 1: Analysis —→ PHASE 1: Investigation

The Prosecutor considers:

Is the case admissible? (Art. 17 Rome Statute)

Is there a 'reasonable basis to proceed'? (Art. 53 par.1 and 2 Rome Statute), taking into account:

- the gravity of the crime
- the interest of the victims
- the interest of justice

This can be challenged by the referring party (State Party or Security Council); it can be reviewed by the Pre-Trial Chamber (Art. 53 par.3).

Victims may participate in the proceedings from now on.

PHASE 2: Investigation —→ PHASE 3: Pre-Trial

The Pre-Trial phase starts when the Judges decide to establish a Pre-Trial Chamber to deal with a situation under investigation. The Pre-Trial Chamber decides on various legal issues, such as:

- protection of evidence
- convening of a status conference
- participation and reparation of victims
- appointment of counsel
- issuance of arrest warrants.

PHASE 3: Pre-Trial —→ PHASE 4: Trial —→ PHASE 5: Appeal

After the Pre-Trial Chamber has confirmed the charges against the alleged perpetrator the case will be committed to the Trial Chamber. The Trial and Appeal Chambers shall ensure that a trial is:-

- fair and expeditious;
- conducted with full respect for the rights of the accused; and has
- due regard for the protection of victims and witnesses.

Appeal against decisions of the Trial Chamber will be dealt with by the Appeal Chamber

PHASE 6: Implementation of the verdict of the Judges

In case of conviction of the accused: implementation of the sentence:

- imprisonment (no death penalty), and possibly
- a fine and/or
- forfeiture of the proceeds derived directly or indirectly from the crime.

Reparations to victims as determined by the Judges, often referred to the ICC Victims Trust Fund.

 See chapter 4

3.4 Protection of witnesses and victims

What about the security of victims and witnesses when they are involved with the ICC? That is usually one of the first questions that people ask when hearing about the ICC. The Rome Statute obliges the ICC to take appropriate measures to protect the safety, the physical and psycho-social well-being, the dignity and privacy of victims and witnesses (article 68 RS). In doing so the Court regards all relevant factors (including age, gender, health and the nature of the crime), in particular when the crimes involves sexual or gender violence, or violence against children.

Because of the need for security, the ICC guidelines are not public. But they are well-drafted and implemented both with regard to witnesses and with regard to victims participating before the Court.

Safety procedures for witnesses

- All investigators are well trained on protection issues;
- A security assessment takes place before going into the field with regard to e.g. transportation of witnesses, the use of intermediaries to locate witnesses;
- Another security assessment takes place during each interview of witnesses;

The Victims and Witnesses Unit (VWU)

As a part of the Registry, this Unit provides for counselling and other appropriate assistance:

- i. for witnesses,
- ii. for victims who appear before the Court,
- iii. for others who are at risk on account of testimony given by such witnesses.

In addition, the VWU plans protective measures and security arrangements for these persons. The Unit includes protection officers and staff with expertise in trauma, including trauma related to crimes of sexual violence.

- Provision of financial means and relevant telephone numbers for witnesses to contact ICC staff in case of emergencies;
- A response system is in place in case witnesses are threatened after an interview; this has been successfully used.

The VWU cooperates closely with the Office of the Prosecutor (OTP) so that witnesses are not endangered when interviewed by an OTP investigator. In fact, the OTP spends half of its time



on protection issues. Many potential witnesses have been set aside out of fear for their security. Within the OTP there is a special Gender and Children Unit that is involved with drafting and evaluating guidelines, security assessments and training. Fortunately, up to now, there have been no incidents related to security.



See also Chapter 5

Safety procedures for victims who appear before the Court

The Victims Participation and Reparation Section manages its contacts with victims in a manner aimed at limiting any risk to victims or others, and handles the information received from victims with strict confidentiality. According to the procedures of the Court, applications for participation must be disclosed to the Prosecutor and the Defence. However, if applicants are concerned about the implications for their safety or the safety of others, they can request that this will not be done. The Judge will decide what steps to take in response to such requests.



Those victims that are granted the right to participate before the Court will benefit from the security arrangements of the Court. Other victims do not receive such protection!



Different from witnesses or victims, NGOs as such should not expect to be protected by the Court! The Court will conduct its activities and engage in its work in a manner that attempts to avoid risk to those assisting it, but will not be able to protect everyone who provides information. Human rights defenders should therefore develop their own strategies for protection and not wait for the Court's help. Nevertheless it is important to inform the Court of any attacks on human rights defenders resulting from their contribution of information to the Court or other role (e.g. assisting victims).

3.5 Present developments of the ICC

Establishing a new, independent and permanent international criminal court is an unprecedented and challenging undertaking. Since the Rome Statute entered into force in 2002, the ICC has made important advances. The Court has moved from its establishment phase into the operational and

judicial phase. Investigations are underway in three countries: in the DRC, Uganda and Sudan. Eight other situations are being analysed, among others in the Central African Republic and Côte d'Ivoire. The situation in Darfur (Sudan) was referred to the Court by the UN Security Council, thereby affirming the Court's legitimacy. The ICC's first arrest warrants, for five Ugandan rebel group members, were issued on 8 July 2005 and unsealed on 13 October 2005. The Pre-Trial Chambers have begun to issue important case law on substantial matters.

ICC field offices have been established in Kinshasa (DRC) and Kampala (Uganda) with an operational presence in Bunia (Eastern DRC). Another field office will probably be opened in Chad, near Darfur(Sudan) in early 2006.

At the same time many internal regulations of the Court have been adopted (Regulations of the Court, of the Registrar, of the Office of the Prosecutor etc.). Furthermore, a number of coordinating bodies with representatives from the different Court organs have been created. In December 2005 the Regulations of the Victims Trust Fund were adopted.

A serious shortcoming of the ICC at present is the lack of substantial outreach and communication in those countries where it is conducting investigations and indictments. However, the Court is preparing to have a more consolidated outreach programme. Unlike a national court the ICC has no deep-rooted legitimacy in the communities where it is working. It conducts proceedings in languages not always mastered by the local population and its legal procedures are mostly unfamiliar.

Outreach is not meant to create a consensus about the Court, but rather to provide the necessary information for local communities to have a correct understanding of the Court's role. Only then can the Court be relevant to the people in need of justice.

The International Criminal Court holds the promise of an end to impunity and a start to accountability. It is the hope of countless victims. Therefore, it is important for faith-based leaders and groups to understand the work of the Court and engage with its activities.

Outreach is not supposed to create a consensus about the Court, but rather to provide the necessary tool for local communities to have a correct understanding of the Court's role





See also Chapter 8.



3.6 Key questions

1. Through which law did the ICC gain the mandate to prosecute in a particular situation? Which governments were involved?
2. What crimes does the ICC prosecute and what not?
3. When should a crime be tried by a national court and when can it be tried by the ICC?
4. What role can religious leaders and groups play in providing information to the Court?
5. What are the limitations to the legal mandate of the ICC?

