An Introduction to the International Criminal Court

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Introduction

It has been 50 years since the United Nations first recognized the need to establish an international criminal court, to prosecute crimes such as genocide. In resolution 260 of 9 December 1948, the General Assembly, Recognizing that at all periods of history genocide has inflicted great losses on humanity; and adopted the Convention on the Prevention and Punishment of the Crime of Genocide.

Since that time, the question of the establishment of an international criminal court has been considered periodically. In December 1989, in response to a request by Trinidad and Tobago, the General Assembly asked the International Law Commission to resume work on an international criminal court with jurisdiction to include drug trafficking. The International Law Commission successfully completed its work on the draft statute for an international criminal court and submitted the draft statute to the General Assembly in 1994.

After the General Assembly had considered the Committee's report, it created the Preparatory Committee on the Establishment of an International Criminal Court to prepare a widely acceptable consolidated draft text for submission to a diplomatic conference.

In 1998, the General Assembly decided to convene the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, subsequently held in Rome, Italy, from 15 June to 17 July 1998, to finalize and adopt a convention on the establishment of an international criminal court.

The International Criminal Court (ICC) is an inter-governmental organization and international tribunal that sits in the Hague, Netherlands.

The ICC has jurisdiction to prosecute individuals for the international crimes of genocide, crimes against humanity, war crimes, and crimes of aggression. It is intended to complement existing national judicial systems and it may therefore exercise its jurisdiction only when certain conditions are met, such as when national courts are unwilling or unable to prosecute criminals or when the United Nations Security Council or individual states refer situations to the Court.

The ICC began functioning on 1 July 2002, the date that the Rome Statute entered into force. The Rome Statute is a multilateral treaty that serves as the ICC's foundational and governing document. States which become party to the Rome Statute become member states of the ICC. As of October 2019, there are 122 ICC member states.

This study touches upon the main subjects in the ICC system, with special emphasis on the history of the Court, Rome Statute of the International Criminal Court, and crimes within the Jurisdiction of the ICC.

CHAPTER 1

History of the International Criminal Court

1. Introduction

War criminals have been prosecuted at least since the time of the ancient Greeks, and probably well before that. The idea that there is some common denominator of behavior, even in the most extreme circumstances of brutal armed conflict, confirms beliefs drawn from philosophy and religion about some of the fundamental values of the human spirit.

The early laws and customs of war can be found in the writings of classical authors and historians. Those who breached them were subject to trial and punishment. Modern codifications of this law proscribed inhumane conduct and set out sanctions, including the death penalty, for pillage, raping civilians, abuse of prisoners and similar atrocities. Prosecution for war crimes, however, was only effected by national courts, and these were and remain ineffective when those responsible for the crimes are still in power and their victims remain subjugated. Historically, the prosecution of war crimes was generally restrained to the vanquished or to isolated cases of rogue combatants in the victor's army. National justice systems have often proven themselves to be incapable of being balanced and impartial in such cases ((1)).

The first genuinely international trial for the perpetration of atrocities was probably that of Peter von Hagenbach, who

(1) William A. Schabas, an Introduction to the International Criminal Court, Cambridge University Press, UK, 2001, p. 1.

was tried in 1474 for atrocities committed during the occupation of Breisach. When the town was retaken, von Hagenbach was charged with war crimes, convicted and beheaded ((1)). But what was surely no more than a curious experiment in medieval international justice was soon overtaken by the sanctity of State sovereignty resulting from the Peace of Westphalia of 1648.

2. Pre-World War II

The road to Rome was a long and often contentious one. While efforts to create a global criminal court can be traced back to the early 19th century, the story began in earnest in 1872 with Gustav Moynier one of the founders of the International Committee of the Red Cross who proposed a permanent court in response to the crimes of the Franco-Prussian War ((2)).

The next serious call for an internationalized system of justice came from the drafters of the Brussels Protocol of 1874 who drafted a code regulating the conduct of armies in the field. While it made no reference to enforcement or any potential consequences of violations of the agreement, it resulted in a group known as the Institute of International Law drafting the "Manual on the Laws of War on Land" in 1880. This document was to become the model for the conventions adopted at The Hague Peace Conferences of 1899 and 1907((3)). These conventions represented major advances in interna-tional law. Most importantly, the Hague Convention IV, adopted in 1907, for the first time referred to liability for breaches of international law. While the Convention

(1) Bassiouni, M. Cherif, From Versailles to Rwanda in 75 Years: The Need to Establish a Permanent International Court, Harvard Human Rights Journal, Vol. 10, 1997, p. 11.

(2) See: History of the ICC on the following Website:

- http://iccnow.org/?mod=icchistory

(3) Leslie Green, War Crimes, Crimes against Humanity, and Command Responsibility, Naval War College Review, Vol. L, No. 2, 1997, p. 68.

simply established state obligations, not personal criminal liability, it provided the first hint of the enforcement of these international norms.

During and following World War I, all combatant nations put members of enemy forces on trial for offences against the laws and customs of war. Of special note in the development of international criminal law was Article 227 of the Treaty of Versailles, which authorized the creation of a special tribunal to try Kaiser Wilhelm II. While no trial ever took place, this represented a significant departure from the traditional view, still held by many today, that a head of state should be immune from prosecution by any state other than his or her own. All that occurred following World War I were some token national prosecutions in Germany, with the consent of the Allies, suggesting that the political will of the world's major powers is essential for the enforcement of international humanitarian norms ((1)).

However, during the peace negotiations at Versailles, 901 accused war criminals were to be indicted. In Leipzig, the German Supreme Court found only sixteen cases in which there was sufficient evidence to bring defendants to trial. Articles 230-227 of the Treaty of Versailles outlined requirements and procedures for the trial and punishment of war criminals, but numerous exceptions to these provisions were sought by Baron von Lersner, the German representative. In May 1921, the Leipzig trials resulted in only thirteen convictions that were ultimately handed down. Considering the large number of cases referred to

(1) Bassiouni, M. Cherif, Historical Survey: 1919-1998, in the Statute of the International Criminal Court: A Documentary History, ed. Bassiouni M. Cherif, Transnational Publishers, Ardsley, N.Y., 1998, p. 7.

the German authorities, this was an untenable result, particularly in light of the finding of the Commission of Inquiry, which had been appointed by the Paris Peace Conference Delegates on January 1919 ,25. As part of the official report of that Commission to the Peace Conference, a list of thirty-two separate types of offenses were specified as violations of the “laws and customs of war ((1)).

In attempting to define the jurisdictional aspects of international criminal law and refine substantive aspects of customary international law, the Versailles Peace Conference set a foundation for future international legal action and raised the expectations of the international community to punish transgressors. Thus, as a result of the ineffective response to the outcome of the World War One war crimes prosecutions, a permanent International Criminal Court was proposed in 1926. While criminal offenses of a military character have been long recognized in common law courts, an effective and consistent means of applying jurisdiction in the international sphere really did not exist until the allied powers ((2)).

3. World War II

Germany began to rearm and nations of Europe, clinging to old traditions, formed new military alliances as the preferred means to maintain peace. When King Alexander of Yugoslavia and the French Foreign Minister were assassinated by a Croatian nationalist while the King was on a visit to Marseilles in 1934, the world was rocked by outrage. But, the League seemed unable to calm the nations involved, and memories of 1914 evoked

(1) Remigiusz Bierzanek, the Prosecution of War Crimes, in “International Criminal Law, Bassiouni M. Cherif & Ved P. Nanda eds.”, Illinois, 1973, pp. 599 et seq.

(2) Remigiusz Bierzanek, the Prosecution of War Crimes, op cit., pp. 571 et seq.

great fears. France quickly drafted legal conventions to prohibit such acts of terrorism and to establish an international criminal court to try offenders. The drafts were considered and revised by members of the League in preparation for a Diplomatic Conference expected in 1937, presumably to approve the convention and create the court. By that time, however, passions had cooled. The only state to ratify the revised terrorism convention was India. No state ratified the Convention for an International Criminal Court. Not one! Inaction was an invitation to pending disaster.

Japan, after invading Manchuria, in violation of the Covenant of the League and the Kellogg Pact, had shown its contempt by walking out of the League in 1934. Italy committed brazen aggression against Ethiopia in 1935. The limited economic sanctions finally applied by hesitant France and England were too little and too late. In March 1938, German troops invaded Austria and in 1939 began their march of conquest over Europe. The League was helpless. Behind the Blitzkreig of the German tanks, Nazi extermination squads killed without pity or remorse every Jew, Gypsy or perceived adversary they could lay their hands on. In defiance of the accepted rules of the Hague Conventions, millions of civilians were forced into slave labor, millions of prisoners-of-war were murdered or starved to death, while many millions more were simply annihilated in gas chambers and concentration camps.

In 1941, Japan attacked the United States in a sneak bombardment at Pearl Harbor. Japanese troops engaged in massive atrocities in all areas they occupied. It would require complete military defeat and unconditional surrender before

anything could be done to bring the German and Japanese war criminals to justice ((1)).

The leaders of the United States and Great Britain, beginning in 1941, repeatedly issued public warnings that German violations of the rules of international law would be punished and that superior orders would be no defense. In London on January 1942 ,12, a public declaration by the "governments in exile" of nations overrun by the Nazis made clear that one of the principal aims of the war was "the punishment through the channel of organized justice, of those guilty or responsible for these crimes". Fact-finding Commissions were established and it was made abundantly clear to all who wanted to see that it was the Allied intent to bring to justice those who flouted established laws of humanity. The British government assumed that it was beyond question that Hitler and a number of other arch criminals, including Italy's Dictator Mussolini, would suffer the death penalty. Rather than try such leaders in a long judicial proceeding, the British (noted for "fair play") felt that "execution without trial is the preferable course." The United States (noted for its "wild-west approach") preferred the rule of law.

Secretary of War Henry Stimson, a former Wall Street lawyer, persuaded President Franklin D. Roosevelt that only those who had been found guilty beyond doubt in a court of law should be punished. The Soviet Government favored trials before special international criminal tribunals. Roosevelt and Britain's Prime Minister Winston Churchill spoke out clearly and eloquently, calling upon the German people to resist Hitler's crimes and

(1) Benjamin B. Ferencz, International Criminal Courts: The Legacy of Nuremberg, Pace International Law Review, Vol. 10, Issue 1, 1998, p. 209.

leaving no doubt of the Allies intent to place on trial those leaders who were responsible for the aggressions and atrocities being committed ((1)).

Allied radio and press condemned crimes by the Japanese, especially their slaughter and rape of the Chinese at Nanking and the brutal torture and murder of civilians and American soldiers and fliers. On March 1944 ,24, the German people were explicitly told that there would be an accounting for "the systematic murder of the Jews of Europe". Yet, the crimes continued unabated. It could not have come as a surprise to any of the German or Japanese defendants to find themselves in the dock after the war and to have to answer for their deeds in a court of law.

4. Nuremberg and Tokyo Tribunals

The next great impetus in the development of international criminal law was World War II. The Nazi government of Germany, in launching an offensive military campaign and committing startling atrocities, led the Allied powers to "place among their principal war aims the punishment, through the channel of organized justice, of those guilty for these crimes, whether they have ordered them, perpetrated them, or participated in them". In the aftermath of World War II, the International Military Tribunal sitting at Nuremberg and the International Military Tribunal for the Far East sitting at Tokyo were established.

At Nuremberg, each of the major Allied powers (the United States, the United Kingdom, the U.S.S.R. and France) appointed a judge and a chief prosecutor ((2)). As a team, the chief

(1) Benjamin B. Ferencz, International Criminal Courts, op. cit., p. 210.

(2) See: Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, 82 U.N.T.S. 280, entered into force 8 August 1945 (London Agreement), Article 14.

prosecutors were responsible for investigating and prosecuting major war criminals responsible for “crimes against peace,” “war crimes” and “crimes against humanity”. After a -10month trial, the Tribunal issued its final judgment in 1946, acquitting three defendants and sentencing 19 others to imprisonment or death. Three organizations were also acquitted, while another three were found to be criminal organizations.

Trials of Japanese ministers and military leaders began in Tokyo while the Nuremberg Court was still sitting. General Douglas MacArthur, as Supreme Commander in the Far East, appointed a tribunal of a similarly international character; that is, it was composed of representatives of nations that had been at war with Japan. The Tokyo Charter was almost identical to that of Nuremberg, with a few variations. The Tokyo Tribunal trials lasted more than two years and all accused were found guilty and sentenced to imprisonment or death.

Common to Nuremberg and Tokyo were the following: there was no code of conduct for the lawyers involved; there were no specific rules of evidence; and the prosecutors were directly appointed by the victorious powers, whose political goals were hardly obscure. While the defendants were usually treated fairly, the malleability of the rules left open the possibility of abuse ((1)).

Both the Nuremberg and Tokyo trials advanced the international rule of law and are commonly regarded as the archetypes of modern international criminal law. While they have established a “moral legacy”, one must recognize that, especially in respect of the

(1) See: The International Criminal Court: History and Role, Research Publications, Library of Parliament of Canada, on the following Website:
- https://lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublica-tions/200211E#a7

"international" facet, they are imperfect examples ((1)). Although the judges and prosecutors were drawn from more than one country and the tribunals invoked the notion of universal jurisdiction, they were in essence military courts created by the victors whose jurisdiction was founded on unconditional surrender.

The rules of procedure and evidence were even less representative of the diversity of the world's legal systems. They were essentially devised by Americans and based on American law. Despite the immense significance of the tribunals, many argue that they have stood the test of time as a fair articulation of evolving international law, they were not ideal representations of what one would expect from an indifferent or unbiased tribunal ((2)).

5. The Cold War Stall

In 1948, the Genocide Convention was adopted in response to Nazi atrocities and was among the first conventions of the United Nations to address humanitarian issues ((3)). Article 1 provides that "the Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and punish".

This significant achievement, unfortunately, did not foreshadow further advances over the next four decades. Following Nuremberg and Tokyo, the UN General Assembly had given the International Law Commission (ILC) the assignment of examining the possibility of establishing a permanent international criminal

(1) Robert J. Currie, International and Transnational Criminal Law, Irwin Law, Toronto, March 2010, p. 164.

(2) Benjamin B. Ferencz, International Criminal Courts, op. cit., p. 207.

(3) Marie-Claude Roberge, Jurisdiction of the ad hoc Tribunals for the Former Yugoslavia and Rwanda over Crimes Against Humanity and Genocide, International Review of the Red Cross, No. 321, 1997, p. 651.

court. Draft statutes were produced in the 1950s but the Cold War made any significant progress impossible ((1)). There were some trials by national courts in the post-World War II period, but a permanent international criminal court was considered a pipe dream by most.

The ILC's post-Nuremberg project was revived in 1989 via an unexpected route when Trinidad and Tobago approached the General Assembly with the suggestion of an international judicial forum for drug trafficking prosecutions. The Assembly held a special session on drugs in 1989, and in 1990 the ILC submitted a report that went beyond this limited issue. The report was well received and the ILC was encouraged, without a clear mandate, to continue its project. Thus, it was able to return to the task begun in the 1940s of preparing a draft statute for a comprehensive international criminal court ((2)).

There appeared to be little hope for an ICC between 1989 and 1992, but Security Council Resolution 780, establishing a Commission of Experts to investigate international humanitarian law violations in the former Yugoslavia, changed all this. The breakdown of the bipolar world and the increased expectations of peace with the end of the Cold War sparked a strong international response to the humanitarian crisis in the Balkans, and allowed the major powers to find common ground ((3)). The creation of the ad hoc tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) followed the Commission's work and garnered worldwide

(1) Bassiouni, M. Cherif, Historical Survey, op. cit., pp. 10- 15.

(2) Benjamin R. Dolin, the International Criminal Court: American Concerns about an International Prosecutor, Law and Government Division, 14 May 2002, on the following Website:

e.htm-http://publications.gc.ca/Collection-R/LoPBdP/BP/prb٠٢١١ -

(3) James O'Brien, the International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia, A.J.I.L., Vol. 87, 1993, pp. 639 et seq.

recognition and credibility that gave support to the process for establishing the ICC.

6. The International Criminal Tribunals for Yugoslavia and Rwanda

It has been suggested that the International Criminal Tribunals for Yugoslavia (ICTY) was born of the frustration of having exhausted all other measures to stop a brutal war, except the measures that took too much courage, and that the International Criminal Tribunals for Rwanda (ICTR) was born of the guilt of having stood by while half a million were slaughtered in one hundred days ((1)). The cynicism surrounding the establishment of the ad hoc tribunals was exacerbated by the fact that Rwanda voted against Resolution 955 which created the ICTR, although it has agreed to co-operate with tribunal prosecutions.

The ICTY was granted jurisdiction over grave breaches of the Geneva Conventions of 1949, violations of the law or customs of war, genocide and crimes against humanity. As the Rwandan crisis involved an internal conflict, although there were certainly international pressures and involvement, the ICTR's jurisdiction was established as including genocide, crimes against humanity and violations of Article 3 common to the 1949 Geneva Conventions and Additional Protocol II.

Despite some initial cynicism and, with respect to the ICTY, significant difficulties in arresting those indicted, both tribunals have made historic progress in international humanitarian law. At the ICTY, for example, rape and enslavement have been

(1) Louise Arbour, the Prosecution of International Crimes: Prospects and Pitfalls, Washington University Journal of Law and Policy, Vol. 1, 1999, pp. 13 et seq.

recognized as crimes against humanity and we have seen the indictment of a head of state while still in office. Recently, indictees have voluntarily surrendered to the Court, something that has shocked many observers. In Rwanda, the former prime minister pleaded guilty to genocide and admitted his role in the murder of more than half a million people. The 1998 Akayesu decision of the ICTR was the first conviction by an international tribunal, including the Nuremberg Tribunal, for the crime of genocide.

There was no precedent at the United Nations for establishing and administering an international prosecutor's office ((1)). Unlike the prosecution team at Nuremberg, the prosecutors at the ICTY and the ICTR are not separate national teams of organized military lawyers with shared assumptions about legal and procedural matters. The prosecution teams came, and continue to come, from diverse legal backgrounds and justice systems.

The ICTY and ICTR Statutes set out in much greater detail than any previous similar body the functions and duties of the prosecutor. The prosecutor of the ICTY was established as an independent entity and cannot seek or receive directions from national governments. The chief prosecutor is appointed by the UN Security Council for a term of four years. The prosecutor's office is distinct from the tribunal itself, but any proposed indictment must be submitted for approval by a judge of the ICTY. Thus, the prosecutor's discretion as to whom the tribunal prosecutes is tempered by judicial oversight. The ICTR prosecutor is similarly an independent organ that does not "seek or receive instructions from government or from any other source". The difference

(1) Minna Schrag, the Yugoslav Crimes Tribunal: A Prosecutor's View, Duke Journal of Comparative and International Law, Vol. 6, 1995, pp. 187 et seq.

between the two tribunals relates to subject matter jurisdiction, as Rwanda was essentially an internal conflict. The role of the prosecutor, however, is the same, and a chief prosecutor is responsible for both tribunals ((1)).

The ad hoc tribunals are significantly different from Nuremberg, which was a multilateral, not truly international, military court. It was composed of victorious allies as part of a political settlement, whereas the ICTY started functioning as conflict in the Balkans continued to rage. In Nuremberg, most defendants were in custody, and trial in absentia was permitted for those who were not. The Allies had a staff of prosecutors one hundred strong and only eleven simple rules of evidence. And there was no right of appeal at the IMT. The situation for prosecutors also differs in respect of disclosure obligations, which are immense for the ICTY and ICTR.

The creation of these tribunals demonstrates an evolution of the concept of an independent prosecutor. Although having greater political autonomy than their Nuremberg counterparts, the tribunals are still a creation of the Security Council and are beholden to it for funding and enforcement assistance. As valuable a precedent as they are, they took two years of negotiation and preparation to establish thereby confirming the necessity of a permanent ICC. Not only would a permanent Court avoid the time-consuming establishment process, but also it could address smaller-scale incidents that might not garner the political will to establish another ad hoc tribunal ((2)).

(1) Payam Akhavan, the International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment, A.J.I.L., Vol. 90, 1996, p. 501.

(2) Melissa K. Marler, the International Criminal Court: Assessing the Jurisdictional Loopholes in the Rome Statute, Duke Law Journal, Vol. 49, No. 3, 1999, pp. 825 et seq.

In 1994, a draft statute for an international criminal court was submitted to the General Assembly; and in 1996, the Preparatory Committee on the establishment of an Interna-tional Criminal Court was established. An amended draft statute was submitted in April 1998, setting the stage for the five-week conference in Rome in June of the same year.

7. Relationship of the ICC with the United Nations

The UN has been involved with several tribunals established to bring justice to victims of international crimes. The Security Council established two ad hoc criminal tribunals, the International Criminal Tribunals for Yugoslavia (ICTY) and the International Criminal Tribunals for Rwanda (ICTR). The UN has also been involved in various ways with the Special Court for Sierra Leone (SCSL), the Extraordinary Chambers in the Courts of Cambodia (ECCC), and others. Though the UN continues to be actively engaged in transitional justice and rule of law matters, the ICC is mandated to be a permanent international criminal court, fulfilling the role of these ad hoc criminal tribunals.

The ICC is not part of the United Nations. The Court was established by the Rome Statute which was the outcome of a long process of consideration of the question of international criminal law within the United Nations.

The ICC is an independent body whose mission is to try individuals for crimes within its jurisdiction without the need for a special mandate from the United Nations. On 4 October 2004, the ICC and the United Nations signed an agreement governing their

institutional relationship ((1)).

8. Why do We Need an International Criminal Court?

In fact, we do need an International Criminal Court for the following reasons ((2)):

(a) To Achieve Justice for All

An international criminal court has been called the missing link in the international legal system. The International Court of Justice at The Hague handles only cases between States, not individuals. Without an international criminal court for dealing with individual responsibility as an enforcement mechanism, acts of genocide and egregious violations of human rights often go unpunished. In the last 50 years, there have been many instances of crimes against humanity and war crimes for which no individuals have been held accountable. In Cambodia in the 1970s, an estimated two million people were killed by the Khmer Rouge. In armed conflicts in Mozambique, Liberia, El Salvador and other countries, there has been tremendous loss of civilian life, including horrifying numbers of unarmed women and children. Massacres of civilians continue in Algeria and the Great Lakes region of Africa.

(b) To End Impunity

The Judgment of the Nuremberg Tribunal stated that “crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such

(1) Article 2 of the Rome Statute of the International Criminal Court provides that:
“The Court shall be brought into relationship with the United Nations through an agreement to be approved by the Assembly of States Parties to this Statute and thereafter concluded by the President of the Court on its behalf”.

(2) International Criminal Court (Overview) on the following Website:
- http://legal.un.org/icc/general/overview.htm

crimes can the provisions of international law be enforced" -- establishing the principle of individual criminal accountability for all who commit such acts as a cornerstone of international criminal law. According to the Draft Code of Crimes against the Peace and Security of Mankind, completed in 1996 by the International Law Commission at the request of the General Assembly, this principle applies equally and without exception to any individual throughout the governmental hierarchy or military chain of command. And the Convention on the Prevention and Punishment of the Crime of Genocide adopted by the United Nations in 1948 recognizes that the crime of genocide may be committed by constitution-ally responsible rulers, public officials or private individuals.

(c) To Help End Conflicts

In situations such as those involving ethnic conflict, violence begets further violence; one slaughter is the parent of the next. The guarantee that at least some perpetrators of war crimes or genocide may be brought to justice acts as a deterrent and enhances the possibility of bringing a conflict to an end. Two ad hoc international criminal tribunals, one for the former Yugoslavia and another for Rwanda, were created in this decade with the hope of hastening the end of the violence and preventing its recurrence.

(d) To Remedy the Deficiencies of Ad Hoc Tribunals

The establishment of an ad hoc tribunal immediately raises the question of "selective justice". Why has there been no war crimes tribunal for the "killing fields" in Cambodia? A permanent court could operate in a more consistent way.

Reference has been made to “tribunal fatigue”. The delays inherent in setting up an ad hoc tribunal can have several consequences: crucial evidence can deteriorate or be destroyed; perpetrators can escape or disappear; and witnesses can relocate or be intimidated. Investigation becomes increasingly expensive, and the tremendous expense of ad hoc tribunals may soften the political will required to mandate them.

Ad hoc tribunals are subject to limits of time or place. In the last year, thousands of refugees from the ethnic conflict in Rwanda have been murdered, but the mandate of that Tribunal is limited to events that occurred in 1994. Crimes committed since that time are not covered.

(e) To Take over when National Criminal Justice Institutions are Unwilling or Unable to Act

Nations agree that criminals should normally be brought to justice by national institutions. But in times of conflict, whether internal or international, such national institutions are often either unwilling or unable to act, usually for one of two reasons. Governments often lack the political will to prosecute their own citizens, or even high-level officials, as was the case in the former Yugoslavia, or national institutions may have collapsed, as in the case of Rwanda.

(f) To Deter Future War Criminals

Most perpetrators of war crimes and crimes against humanity throughout history have gone unpunished. In spite of the military tribunals following the Second World War and the two recent ad hoc international criminal tribunals for the former Yugoslavia and for

Rwanda, the same holds true for the twentieth century. That being said, it is reasonable to conclude that most perpetrators of such atrocities have believed that their crimes would go unpunished. Effective deterrence is a primary objective of those working to establish the international criminal court. Once it is clear that the international community will no longer tolerate such monstrous acts without assigning responsibility and meting out appropriate punishment -- to heads of State and commanding officers as well as to the lowliest soldiers in the field or militia recruits -- it is hoped that those who would incite a genocide; embark on a campaign of ethnic cleansing; murder, rape and brutalize civilians caught in an armed conflict; or use children for barbarous medical experiments will no longer find willing helpers ((1)).

(1) International Criminal Court (Overview), op. cit., pp. 3- 5.

CHAPTER 2

Rome Statute of the International Criminal Court

1. Introduction:

In 1994, the United Nations General Assembly decided to pursue work towards the establishment of an international criminal court, taking the International Law Commission's draft statute as a basis. It convened an Ad Hoc Committee, which met twice in 1995. Debates within the Ad Hoc Committee revealed rather profound differences among States about the complexion of the future court, and some delegations continued to contest the overall feasibility of the project, although their voices became more and more subdued as the negotiations pursued.

The International Law Commission draft envisaged a court with 'primacy', much like the ad hoc tribunals that had been set up by the Security Council for the former Yugoslavia and Rwanda. If the court's prosecutor chose to proceed with a case, domestic courts could not pre-empt this by offering to do the job themselves ((1)). In meetings of the Ad Hoc Committee, a new concept reared its head, that of 'complementarity', by which the court could only exercise jurisdiction if domestic courts were unwilling or unable to prosecute. Another departure of the Ad Hoc Committee from the International Law Commission draft was its insistence that the crimes within the court's jurisdiction be defined in some detail and not simply enumerated.

(1) William A. Schabas, an Introduction to the International Criminal Court, op. cit., p. 16.

The International Law Commission had contented itself with listing the crimes subject to the court's jurisdiction – war crimes, aggression, crimes against humanity and genocide – presumably because the draft code of crimes, on which it was also working, would provide the more comprehensive definitional aspects. Beginning with the Ad Hoc Committee, the nearly fifty-year-old distinction between the 'statute' and the 'code' disappeared. Henceforth, the statute would include detailed definitions of crimes as well as elaborate provisions dealing with general principles of law and other substantive matters. The Ad Hoc Committee concluded that the new court was to conform to principles and rules that would ensure the highest standards of justice, and that these should be incorporated in the statute itself rather than being left to the uncertainty of judicial discretion ((1)).

It had been hoped that the Ad Hoc Committee's work would set the stage for a diplomatic conference where the statute could be adopted. But it became evident that this was premature. At its 1995 session, the General Assembly decided to convene a 'Preparatory Committee', inviting participation by Member States, non-governmental organizations and interna- tional organizations of various sorts. The 'PrepCom', as it became known, held two three-week sessions in 1996, presenting the General Assembly with a voluminous report comprising a hefty list of proposed amendments to the International Law Commission draft. It met again in 1997, this time holding three sessions. These were punctuated by informal intersessional meetings, of which the most important was surely that held in Zutphen, in the Netherlands,

(1) Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, UN Doc. A/50/22.

in January 1998. The 'Zutphen draft' consolidated the various proposals into a more or less coherent text. The 'Zutphen draft' was reworked somewhat at the final session of the Preparatory Committee, and then submitted for consideration by the Diplomatic Conference. Few provisions of the original International Law Commission proposal had survived intact.

Most of the Articles in the final draft were accompanied with an assortment of options and alternatives, surrounded by square brackets to indicate a lack of consensus, fore- boding difficult negotiations at the Diplomatic Conference ((1)). Some important issues such as 'complementarity' – recognition that cases would only be admissible before the new court when national justice systems were unwilling or unable to try them – were largely resolved during the PrepCom process. The challenge to the negotiators at the Diplomatic Conference was to ensure that these issues were not reopened. Other matters, such as the issue of capital punishment, had been studiously avoided during the sessions of the PrepCom, and were to emerge suddenly as impasses in the final negotiations.

2. The Rome Conference

Pursuant to General Assembly resolutions adopted in 1996 and 1997, the Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court convened on 15 June 1998 in Rome, at the headquarters of the Food and Agriculture Organization. More than 160 States sent delegates to the Conference, in addition to a range of inter- national organizations and literally hundreds of non-governmental

(1) Bassiouni, M. Cherif, Observations Concerning the 1997–98 Preparatory Committee's Work, Denver Journal of International Law and Policy, Vol. 25, 1997, p. 397.

organizations. Three basic groupings of states emerged. Led by Canada and Norway, the “like-minded group” advocated a potent and robust international criminal court. This group consisted mostly of the middle powers and developing countries, which generally supported a proprio motu prosecutorial model (a prosecutor who has the power to initiate proceedings himself or herself).

The second group consisted of the permanent members of the UN Security Council, or the “P5-”, with the exception of Britain, which had joined the like-minded states just before the conference began. Not surprisingly, this group sought a more important role for the Security Council in the establishment and operation of the Court. The United States, in particular, expressed grave concerns about the possibility of a proprio motu prosecutor and argued for the limiting of the ICC’s jurisdiction to Security Council referrals ((1)).

A third, non-aligned group was formed in opposition to

the P5-’s insistence on the exclusion of nuclear weapons from the statute. This group included such states as India, Mexico and Egypt. However, this group’s position in respect of the independence and powers of the ICC was similar to that of the P5-.

Jurisdictional issues were the most complex and most sensitive, but the proprio motu prosecutor model did receive significant, although not general, support. As the conference was nearing its conclusion and no agreement was evident, the Bureau of the Committee of the Whole decided to prepare a final package for

(1) Philippe Kirsch and John T. Holmes, the Rome Conference on an International Criminal Court: The Negotiating Process, A.J.I.L., Vol. 93, No. 2, 1999, pp. 3 et seq.

possible adoption. The alternative of reporting that an agreement could not be reached and scheduling another conference was not attractive. Many feared that a second conference stood no better chance of success and would likely result in either a weakened ICC or no court at all for years to come. By a final vote of 120 in favor, 21 abstaining and 7 against, the Bureau's package was adopted ((1)).

The United States voted against the Rome Statute - along with China, Iraq, Israel, Libya, Qatar and Yemen - then signed on 31 December 2000, the last day the treaty was open for signature. The United States then "unsigned" in May 2002, when John Bolton, Under Secretary of State for Arms Control and International Security, sent a letter to the UN stating that the U.S. did not intend to become a party to the Rome Statute and formally renounced any obligations under the treaty. The expressed concerns of the U.S. related to jurisdictional issues and, in particular, to what the American delegation saw as a lack of accountability in granting proprio motu power to an independent prosecutor who could potentially decide to pursue American personnel. As the U.S. is one of the most influential actors in the international community and a key member of the P5-, its government's rejection of the statute was a blow to the nascent court.

However, the International Criminal Court is perhaps the most innovative and exciting development in international law since the creation of the United Nations. The Statute is one of the most complex international instruments ever negotiated, a sophisticated web of highly technical provisions drawn from

(1) See: The International Criminal Court: History and Role, op. cit., p. 8.

comparative criminal law combined with a series of more political propositions that touch the very heart of State concerns with their own sovereignty. Without any doubt its creation is the result of the human rights agenda that has steadily taken centre stage within the United Nations since Article 1 of its Charter proclaimed the promotion of human rights to be one of its purposes. From a hesitant commitment in 1945, to an ambitious Universal Declaration of Human Rights in 1948, we have now reached a point where individual criminal liability is established for those responsible for serious violations of human rights, and where an institution is created to see that this is more than just some pious wish ((1)).

3. Seat and Legal status of the ICC

An International Criminal Court (the Court) is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute ((2)).

The seat of the International Criminal Court is in The Hague in the Netherlands. The Rome Statute provides that the Court may sit elsewhere whenever the judges consider it desirable. The Court has also set up offices in the areas where it is conducting investigations ((3)).

(1) William A. Schabas, an Introduction to the International Criminal Court, op. cit., p. 23.

(2) Article 1 of the Rome Statute of the International Criminal Court.

(3) Article 3 of the Rome Statute of the International Criminal Court provides that:

1. The seat of the Court shall be established at The Hague in the Netherlands (the host State).

2. The Court shall enter into a headquarters agreement with the host State, to be approved by the Assembly of States Parties and thereafter concluded by the President of the Court on its behalf.

3. The Court may sit elsewhere, whenever it considers it desirable, as provided in this Statute.

The Court shall have international legal personality. It shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes. The Court may exercise its functions and powers, as provided in this Statute, on the territory of any State Party and, by special agreement, on the territory of any other State ((1)).

4. Jurisdiction of the ICC

The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court may exercise jurisdiction in a situation where genocide, crimes against humanity or war crimes ((2)) were committed on or after 1 July 2002 ((3)) 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

The crimes were referred to the ICC Prosecutor by the United Nations Security Council pursuant to a resolution adopted under chapter VII of the UN Charter ((4)).

(1) Article 4 of the Rome Statute of the International Criminal Court.

(2) Article 5 of the Rome Statute of the International Criminal Court provides that:

1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

(a) The crime of genocide;

(b) Crimes against humanity;

(c) War crimes;

(d) The crime of aggression.

2. The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.

(3) Article 11 of the Rome Statute of the International Criminal Court provides that:

1. The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute.

2. If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under article 12, paragraph 3.

(4) Article 13 of the Rome Statute of the International Criminal Court.

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 ((1)).

The ICC is intended to complement, not to replace, national criminal systems; it prosecutes cases only when States do not are unwilling or unable to do so genuinely ((2)).

As a judicial institution, the ICC does not have its own police force or enforcement body; thus, it relies on cooperation with countries worldwide for support, particularly for making arrests,

(1) See: Jurisdiction of the ICC on the following Website:
- https://www.icc-cpi.int/about/how-the-court-works/Pages/default.aspx #legalProcess
(2) Article 1 of the Rome Statute of the International Criminal Court.

transferring arrested persons to the ICC detention centre in The Hague, freezing suspects' assets, and enforcing sentences.

While not a United Nations organization, the Court has a cooperation agreement with the United Nations. When a situation is not within the Court's jurisdiction, the United Nations Security Council can refer the situation to the ICC granting it jurisdiction. This has been done in the situations in Darfur (Sudan) and Libya.

The ICC actively works to build understanding and cooperation in all regions, for example, through seminars and conferences worldwide. The Court cooperates with both States Parties and non-States Parties.

The Court works in particularly close cooperation with its host state, the Netherlands, regarding practical matters such as constructing the Court's new permanent buildings, transferring suspects to the ICC Detention Centre, facilitating their appearances before the Court, and many other matters.

Countries and other entities, including civil society groups such as NGOs, also cooperate with the Court in numerous ways, such as raising awareness of and building support for the Court and its mandate. The Court seeks to increase this ongoing cooperation through such means as seminars and conferences ((1)).

5. Structure of the ICC

The International Criminal Court (ICC) is an international judicial body that was formed by a multilateral treaty called the Rome Statute. The ICC is composed of four primary organs: the Presidency, the Judicial Divisions, the Office of the Prosecutor, and the Registry ((2)).

(1) Articles 86- 93 of the Rome Statute of the International Criminal Court.
(2) Article 34 of the Rome Statute of the International Criminal Court.

(a) The Presidency

The Presidency is one of the four Organs of the ICC. It is composed of the President and First and Second Vice-Presidents, all of whom are elected by an absolute majority of the Judges of the Court for a three year renewable term. The judges composing the Presidency serve on a full-time basis.

The Presidency has three main areas of responsibility: judicial/ legal functions, administration and external relations. In the exercise of its judicial/legal functions, the Presidency constitutes and assigns cases to Chambers, conducts judicial review of certain decisions of the Registrar and concludes Court-wide cooperation agreements with States. With the exception of the Office of the Prosecutor, the Presidency is responsible for the proper administration of the Court and oversees the work of the Registry ((1)).

The Presidency will coordinate and seek the concurrence of the Prosecutor on all matters of mutual concern. Among the Presidency's responsibilities in the area of external relations is to maintain relations with States and other entities and to promote public awareness and understanding of the Court.

(1) Article 38 of the Rome Statute of the International Criminal Court provides that:

1. The President and the First and Second Vice-Presidents shall be elected by an absolute majority of the judges. They shall each serve for a term of three years or until the end of their respective terms of office as judges, whichever expires earlier. They shall be eligible for re-election once.

2. The First Vice-President shall act in place of the President in the =

= event that the President is unavailable or disqualified. The Second Vice-President shall act in place of the President in the event that both the President and the First Vice-President are unavailable or disqualified.

3. The President, together with the First and Second Vice-Presidents, shall constitute the Presidency, which shall be responsible for:

(a) The proper administration of the Court, with the exception of the Office of the Prosecutor; and

(b) The other functions conferred upon it in accordance with this Statute.

4. In discharging its responsibility under paragraph 3 (a), the Presidency shall coordinate with and seek the concurrence of the Prosecutor on all matters of mutual concern.

(b) The Judicial Divisions

The ICC's 18 judges are elected by the Assembly of States Parties for their qualifications, impartiality and integrity, and serve -9year, non-renewable terms. They ensure fair trials and render decisions, but also issue arrest warrants or summonses to appear, authorize victims to participate, order witness protection measures, and more. They also elect, from among themselves, the ICC President and two Vice-Presidents, who head the Court.

The Court has three Judicial Divisions, which hear matters as different stages of the proceedings: Pre-Trial, Trial and Appeals.

(i) Pre-Trial Judges

Generally 3 judges per case.

Decide if there is enough evidence for a case to go to trial, and if so, confirm the charges and commit the case to trial.

Issue arrest warrants or summonses to appeal.

Preserve evidence, protect suspects, and safeguard information affecting national security.

Guarantee the rights of all persons during the investigation phase, including suspects, victims and witnesses.

Grant protection measures for victims and witnesses.

Appointing counsel or other support for the defense.

Ensure that a person is not detained for an unreasonable period prior to trial due to inexcusable delay by the Prosecutor, and decide on requests for interim release pending trial.

Authorize the Prosecutor to open investigation proprio motu, or

to continue an investigation when a State requests that the Court defer to national investigations, or to take steps in an investigation without State cooperation.

Review the Prosecutor's decision not to investigate where there is a referral.

Decide on a challenge to jurisdiction or the admissibility of a case.

Documents and decisions related to Regulation 3)46) of the Regulations of the Court ((1)).

(ii) Trial Judges

Generally 3 judges per case.

Conduct fair trials.

Decide if there is enough evidence to prove beyond a reasonable doubt that the accused is guilty as charged.

Sentence those found guilty, and pronounce the sentence in public.

Order reparation to victims, including restitution, compensation and rehabilitation.

(iii) Appeals Judges

Five judges.

Handle appeals filed by Parties.

Confirm, reverse or amend a decision on guilt or innocence or on the sentence and, if necessary, order a new trial before a different Trial Chamber.

(1) See: Judicial Divisions of the ICC on the following Website:
- https://www.icc-cpi.int/about/judicial-divisions

Ensure that the conviction was not materially affected by errors or by unfairness of proceedings.

Ensure the sentence is proportionate to the crimes.

Confirm, reverse or amend an order for reparations.

Revise the final judgment of conviction or the sentence, for example, if new evidence is later found.

Hear appeals on a decision on jurisdiction or admissi-bility, interim release decisions and interlocutory matters ((1)).

(c) The Office of the Prosecutor

The Office of the Prosecutor (OTP) is an independent organ of the Court. It is responsible for examining situations under the jurisdiction of the Court where genocide, crimes against humanity, war crimes and aggression appear to have been committed, and carrying out investigations and prosecutions against the individuals who are allegedly most responsible for those crimes. It is for the first time in history that an international Prosecutor has been given the mandate, by an ever-growing number of States, to independently and impartiality select situations for investigation where atrocity crimes are or have been committed on their territories or by their nationals. Like the judges of the Court, the Prosecutor and Deputy Prosecutor are elected by the ASP for a non-renewable mandate of nine years ((2)).

(i) How does the OTP work?

The OTP benefits from the services of approximately 380 dedicated staff members from over 80 different nationalities,

(1) See: https://www.icc-cpi.int/about/judicial-divisions
(2) See: Office of the Prosecutor on the following Website:
- https://www.icc-cpi.int/about/otp/Pages/default.aspx

including members of the legal profession, investigators and analysts, psycho-social experts, individuals with experience in diplomacy and international relations, public information and communication, and more. The OTP is composed of three main Divisions:

The Jurisdiction, Complementarity and Cooperation Division conducts preliminary examinations, provides advice on issues of jurisdiction, admissibility and cooperation, and coordinates judicial cooperation and external relations for the OTP;

The Investigation Division is in charge of providing investigative expertise and support, coordinating field deployment of staff and security plans and protection policies, and providing crime analysis and analysis of information and evidence;

The Prosecution Division prepares the litigation strategies and conducts prosecutions, including through written and oral submissions to the judges ((1)).

(ii) How does the OTP start its operations?

Under article 13 of the Rome Statute, there are three ways the exercise of the Court's jurisdiction can be triggered where crimes under the Court's jurisdiction appear to have been committed:

Any State Party of the Rome Statute may request the Prosecutor to carry out an investigation. This was the case for the Democratic Republic of the Congo, Uganda, Central African Republic on two occasions, and Mali ((2)).

(1) Article 15 of the Rome Statute of the International Criminal Court.
(2) Article 14 of the Rome Statute of the International Criminal Court.

The United Nations Security Council may also refer a situation to the Prosecutor ((1)). To date, this possibility has materialized with respect to the situations of Darfur and Libya. UNSC referrals may also give the Court jurisdiction over States not Party to the Rome Statute.

Finally, the Prosecutor may open an investigation on her own initiative after the authorization of the judges; this was the case for Kenya, Côte d'Ivoire, Georgia and Bangladesh/Myanmar. The Prosecutor cannot, on her own motion, initiate investigations with respect to States not Party to the Rome Statute unless the matter involves nationals of States Parties allegedly involved in committing Rome Statute crimes on the territory of the non-State Party in question ((2)).

Exceptionally, States may accept the jurisdiction on an ad hoc basis, by submitting a declaration pursuant to article 3)12) of the Rome Statute.

(iii) Preliminary Examinations

Any individual, group or State can send information to the OTP regarding alleged crimes falling under the jurisdiction of the Court. To date, the OTP has received more than 12,000 of such communications, which can form the initial basis of the Office's preliminary examinations.

The OTP conducts a preliminary examination to decide whether there is a reasonable basis to initiate an investigation.

In doing so, the OTP is required to assess and verify a number of legal criteria. These include, among others: if the crimes were

(1) Article 13/2 of the Rome Statute of the International Criminal Court.
(2) Article 13 of the Rome Statute of the International Criminal Court.

committed after 1 July 2002, the date of the entry into force of the Rome Statute, the Court's founding treaty; if the crimes took place in the territory of a State Party or were committed by a national of a State Party (unless the situation was referred by the UN Security Council); if they amount to war crimes, crimes against humanity or genocide; the gravity of these crimes; if there are no genuine investigations or prosecutions for the same crimes at the national level; and if opening an investigation would not serve the interests of justice and of the victims.

National authorities bear the primary responsibility, in the first instance, to investigate and prosecute those most responsible for the commission of mass crimes. The Court will initiate investigations, in accordance with the legal criteria set by the Rome Statute, only when the national authorities have failed to uphold this primary responsibility and in the absence of genuine national proceedings.

There are no timelines provided in the Rome Statute for bringing a preliminary examination to a close. Depending on the facts and circumstances of each situation, the Prosecutor may decide either to: (i) decline to initiate an investigation; (ii) continue to collect information on crimes and relevant national proceedings in order to make a determination; or (iii) initiate the investigation, subject to judicial authorization as appropriate ((1)).

Preliminary examinations also provide an opportunity to the OTP to encourage national authorities to fulfil their primary responsibility to carry out national investigations and prosecutions themselves. In applying the Rome Statute criteria, should the OTP

(1) See: Office of the Prosecutor on the following Website:
- https://www.icc-cpi.int/about/otp/Pages/default.aspx

determine it needs to open an investigation, it will do so without hesitation. Political considerations never form part of the Office's decision making.

(iv) Investigations

To conduct its investigations, generally, the OTP sends missions – usually composed of investigators, cooperation advisers, and if necessary, prosecutors – to concerned countries, collects and examines different forms of evidence, and questions a range of persons, from those being investigated to victims and witnesses. To undertake these activities, the OTP relies on the assistance and cooperation of States Parties, international and regional organizations, as well as civil society.

In the process of gathering evidence, the OTP identifies the gravest incidents and those most responsible for these crimes. The OTP has an obligation to gather both incriminating and exonerating evidence, in order to establish the truth about a given situation. The exonerating information will be disclosed to the Defense teams as part of the proceedings.

Once the OTP considers that it has sufficient evidence to prove before the judges that an individual is responsible for a crime in the Court's jurisdiction, the Office will request the judges to issue a warrant of arrest or a summons to appear ((1)).

(v) Applying for an Arrest Warrant or Summons to Appear

Based on the evidence it gathers during an investigation, the OTP can submit a request to the ICC judges, asking them to

issue arrest warrants or summonses to appear.

(1) Article 54 of the Rome Statute of the International Criminal Court.

Once the judges determine that there are reasonable grounds to believe that a person has committed a crime within the Court's jurisdiction, the judges will only issue an arrest warrant to ensure the person's appearance at trial, to ensure the person does not obstruct or endanger the investigation or Court proceedings, or to prevent the person from continuing to commit the crime in question.

Once issued, even in cases where arrests are delayed, arrest warrants are valid for life. Once arrested, suspects are held in custody at the Court's detention centre.

Alternatively, judges can issue summonses to appear, when there are reasonable grounds to believe that a summons is sufficient to ensure the person's appearance. Defendants subject to summonses to appear come before the Court voluntarily and are neither arrested nor held in the Court's custody ((1)).

(vi) Prosecutions

Once the person for whom an arrest warrant or a summons to appear has been issued is in the Court's custody or decides to come voluntarily to the Court, the OTP will first have to convince the judges, at the Pre-Trial phase, that it has sufficient evidence to commit the case to trial. At this stage, the judges will have to decide whether to confirm, decline, or review the charges presented by the Office of the Prosecutor against the defendant.

If the judges confirm the charges, the case goes to trial. Once at trial, the OTP is first to present its case, and bears the burden of proof that the accused person is guilty beyond reasonable doubt.

(1) Article 58 of the Rome Statute of the International Criminal Court.

The OTP can present evidence in the form of documents, other tangible objects, or witness statements; the OTP's witnesses are also questioned by the Defense, and vice versa.

As part of the proceedings, the OTP discloses both incriminating and exonerating information to the Defense. The OTP is obligated to gather both during its investigations, in order to establish the truth about a given situation.

Once the OTP has presented all its evidence, it is the turn of the accused, with the assistance of his or her counsel, to present his or her Defense ((1)).

(d) The Registry

The Registry is a neutral organ of the Court that provides services to all other organs so the ICC can function and conduct fair and effective public proceedings. The Registry is responsible for three main categories of services:

Judicial support, including general court management and court records, translation and interpretation, counsel support (including lists of counsel and assistants to counsel, experts, investigators and offices to support the Defense and victims), the detention centre, legal aid, support for victims to participate in proceedings and apply for reparations, for witnesses to receive support and protection;

External affairs, including external relations, public information and Outreach, field office support, and victims and witness support; and Management, including security, budget, finance, human resources and general services ((2)).

(1) See: Office of the Prosecutor on the following Website:
- https://www.icc-cpi.int/about/otp/Pages/default.aspx
(2) Article 43 of the Rome Statute of the International Criminal Court.

6. The rights of suspects

Suspects are presumed innocent. They are present in the courtroom during the trial, and they have a right to a public, fair and impartial hearing of their case. To this end, a series of guarantees are set out in the Court's legal documents, including the following rights, to mention but a few ((1)):

to be defended by the counsel (lawyer) of their choice, present evidence and witnesses of their own and to use a language which they fully understand and speak;

to be informed in detail of the charges in a language which they fully understand and speak;

to have adequate time and facilities for the preparation of the defense and to communicate freely and in confidence with counsel;

to be tried without undue delay;

not to be compelled to testify or to confess guilt and to remain silent, without such silence being a conside-

ration in the determination of guilt or innocence;

to have the Prosecution disclose to the defense evidence in its possession or control which it believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of the Prosecution's evidence ((2)).

7. The Rights of Victims before the ICC

Victims before the ICC have rights that have never before been

(1) Understanding the International Criminal Court on the following Website: https://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf

(2) Article 67 of the Rome Statute of the International Criminal Court.

granted before an international criminal court. Victims may be involved in the proceedings before the ICC in various ways:

victims can send information to the Office of the Prosecutor and ask the Office to initiate an investigation;

at a trial, a victim may voluntarily testify before the Court, if called as a witness for the Defense or the Prosecution or other victims participating in the proceedings;

victims are also entitled to participate in proceedings through a legal representative; during proceedings, victims may participate by presenting their views and concerns to the judges; such participation is voluntary and enables victims to express an opinion independently of the Prosecution or the Defense and offers them the opportunity to present their own concerns and interests;

victims participating in proceedings may also, in some circumstances, lead evidence pertaining to the guilt or

innocence of the accused; they may also challenge the admissibility or the relevance of evidence presented by the parties;

Lastly, victims can seek reparation for the harm that they have suffered ((1)).

8. Witnesses Protection

The Court has a number of protective measures that can be granted to witnesses who appear before the Court and other persons at risk on account of testimony given by a witness. The foundation of the Court's protection system is good practices which are aimed at concealing a witness' interaction with the Court from their community and from the general public. These are employed by all people coming into contact with witnesses.

(1) Understanding the International Criminal Court on the following Website: https://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf

Operational protective measures can be implemented where witnesses reside; for example the Initial Response System is a 7/24 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. The Court can also apply procedural protective measures. Such measures may consist of face/voice distortion or the use of a pseudonym. Separate special measures can be ordered by the Court for traumatized witnesses, a child, an elderly person or a victim of sexual violence. These can include facilitating the testimony of witnesses by allowing a psychologist or family member to be present while the witness gives testimony or the use of a curtain to shield the witness from direct eye contact with the accused.

A last resort protective measure is entry into the Court's Protection Programme (ICCPP) through which the witness and his or her close relatives are relocated away from the source of the threat. This is an effective method of protection, but due to the immense burden on the relocated persons, relocation remains a measure of last resort and absolute necessity.

Protective measures do not affect the fairness of a trial. They are used to make witnesses safe and comfortable. They apply for both referring parties, the Prosecution and the Defence equally. All parties are bound by confidentiality and respect to protective measure, yet even when protective measures are applied, witness can still be questioned ((1)).

(1) See: https://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf

9. Assembly of States Parties

The Assembly of States Parties (the Assembly) is the Court's management oversight and legislative body and is composed of representatives of the States which have ratified or acceded to the Rome Statute. In accordance with article 112 of the Rome Statute, the Assembly of States Parties meets at the seat of Court in The Hague or at the United Nations Headquarters in New York once a year and, when circumstan-ces so require, may hold special sessions.

Each State Party has one representative in the Assembly who may be accompanied by alternatives and advisers. The Rome Statute further provides that each State Party has one vote, although every effort shall be made to reach decisions by consensus. States that are not party to the Rome Statute may take part in the work of the Assembly as observers, without the right to vote. The President, the Prosecutor and the Registrar or their representatives may also participate, as appropriate, in the meetings of the Assembly.

In accordance with article 112 of the Rome Statute, the Assembly is tasked with providing management oversight to the Presidency, the Prosecutor and the Registrar regarding administration of the Court. In addition, the Assembly adopts the Rules of Procedure and Evidence and the Elements of Crime. At its annual sessions, the Assembly considers a number of issues, including the budget of the Court, the status of contributions and the audit reports. In addition, the Assembly considers the reports on the activities of the Bureau, the Court and the Board of Directors of the Trust Fund for Victims ((1)).

(1) See: Assembly of States Parties on the following Website:
- https://www.icc-cpi.int/asp

The Assembly is further tasked with election of, inter alia, the Judges, the Prosecutor and Deputy Prosecutors. The Assembly may also decide, by secret ballot, on the removal from office of a Judge, the Prosecutor or Deputy Prosecutors((1)).

(1) *Article 112/2 of the Rome Statute of the International Criminal Court.*

CHAPTER 3

Crimes within the Jurisdiction

Of the International Criminal Court

1. Introduction:

The Court's founding treaty, called the Rome Statute, grants the ICC jurisdiction over four main crimes. First, the crime of genocide is characterized by the specific intent to destroy in whole or in part a national, ethnic, racial or religious group by killing its members or by other means: 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; or forcibly transferring children of the group to another group.

Second, the ICC can prosecute crimes against humanity, which are serious violations committed as part of a large-scale attack against any civilian population. The 15 forms of crimes against humanity listed in the Rome Statute include offences such as murder, rape, imprisonment, enforced disappearances, enslavement – particularly of women and children, sexual slavery, torture, apartheid and deportation.

Third, war crimes which are grave breaches of the Geneva conventions in the context of armed conflict and include, for instance, the use of child soldiers; the killing or torture of persons such as civilians or prisoners of war; intentionally directing attacks against hospitals, historic monuments, or buildings dedicated to religion, education, art, science or charitable purposes.

Finally, the fourth crime falling within the ICC's jurisdiction is the crime of aggression. It is the use of armed force by a State against the sovereignty, integrity or independence of another State. The definition of this crime was adopted through amending the Rome Statute at the first Review Conference of the Statute in Kampala, Uganda, in 2010((1)).

On 15 December 2017, the Assembly of States Parties adopted by consensus a resolution on the activation of the jurisdiction of the Court over the crime of aggression as of 17 July 2018.

2. The Crime of Genocide

For the purpose of this Statute, "genocide" means any of the following acts committed with intent to destroy, in whole in or part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;

(b) Causing serious bodily or mental harm to members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group;

(1) Article 5 of the Rome Statute of the International Criminal Court provides that:
The jurisdiction of the International Criminal Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:
(a) The crime of genocide;
(b) Crimes against humanity;
(c) War crimes;
(d) The crime of aggression.
The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.

(e) Forcibly transferring children of the group to another group[((1))].

3. Crimes against Humanity

1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

(a) Murder;

(b) Extermination;

(c) Enslavement;

(d) Deportation or forcible transfer of population;

(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;

(f) Torture;

(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;

(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;

(i) Enforced disappearance of persons;

(j) The crime of apartheid;

(1) Article 6 of the Rome Statute of the International Criminal Court.

(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

2. For the purpose of paragraph 1:

(a) “Attack directed against any civilian population” means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;

(b) “Extermination” includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;

(c) “Enslavement” means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;

(d) “Deportation or forcible transfer of population” means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;

(e) “Torture” means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;

(f) “Forced pregnancy” means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the

ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;

(g) "Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;

(h) "The crime of apartheid" means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;

(i) "Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

3. For the purpose of this Statute, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above ((1)).

4. War Crimes

1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.

(1) Article 7 of the Rome Statute of the International Criminal Court.

2. For the purpose of this Statute, "war crimes" means:

(a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

(i) Willful killing;

(ii) Torture or inhuman treatment, including biological experiments;

(iii) Willfully causing great suffering, or serious injury to body or health;

(iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

(v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;

(vi) Willfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;

(vii) Unlawful deportation or transfer or unlawful confinement;

(viii) Taking of hostages.

(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;

(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;

(v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;

(vi) Killing or wounding a combatant who, having laid down his arms or having no longer means of defense, has surrendered at discretion;

(vii) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;

(viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;

(ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(x) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

(xi) Killing or wounding treacherously individuals belonging to the hostile nation or army;

(xii) Declaring that no quarter will be given;

(xiii) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;

(xiv) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;

(xv) Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;

(xvi) Pillaging a town or place, even when taken by assault;

(xvii) Employing poison or poisoned weapons;

(xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;

(xix) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;

(xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123;

(xxi) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;

(xxiii) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;

(xxiv) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

(xxv) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including willfully impeding relief supplies as provided for under the Geneva Conventions;

(xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

(c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:

(i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(iii) Taking of hostages;

(iv) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

(d) Paragraph 2 (c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.

(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(v) Pillaging a town or place, even when taken by assault;

(vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;

(vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;

(viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;

(ix) Killing or wounding treacherously a combatant adversary;

(x) Declaring that no quarter will be given;

(xi) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

(xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;

(f) Paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.

3. Nothing in paragraph 2 (c) and (e) shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means ((1)).

(1) Article 8 of the Rome Statute of the International Criminal Court.

5. The Crime of Aggression ((1))

As adopted by the Assembly of States Parties during the Review Conference of the Rome Statute, held in Kampala (Uganda) between 31 May and 11 June 2010, a "crime of aggression" is defined as follows:

1. For the purpose of this Statute, "crime of aggression" means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.

2. For the purpose of paragraph 1, "act of aggression" means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression:

(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

(1) Article 5/2 of the Rome Statute of the International Criminal Court provides that: "The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations".

(b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

(c) The blockade of the ports or coasts of a State by the armed forces of another State;

(d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

(e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

(f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein ((1)).

The Court may exercise jurisdiction over the crime of aggression, subject to a decision to be taken after 1 January 2017 by a two-thirds majority of States Parties and subject to the ratification of the amendment concerning this crime by at least 30 States Parties.

The Court will be able to exercise jurisdiction over a crime of aggression, arising from an act of aggression committed by a

(1) Article 8 bis of the Rome Statute of the International Criminal Court.

State Party, unless that State Party has previously declared that it does not accept such jurisdiction. Except when the situation is referred to the Court by the United Nations Security Council, the Court has no jurisdiction over crimes of aggression committed in the territory of a State which is not party to the Rome Statute or by its citizens.

The Court will have jurisdiction only over crimes of aggression committed one year after 30 States Parties ratify or accept the amendments of the Rome Statute in relation with the crime of aggression, which were adopted by the Assembly of States Parties in June 2010.

If the United Nations 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. Otherwise, the Prosecution may examine the situation and, based on its assessment, may notify the United Nations Secretary General of the situation.

If, within six months of being notified by the Prosecution, the United Nations Security Council does not make a determination 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 authoriz-ation by the ICC's Pre-Trial Division ((1)).

Elements of the Crime of Aggression

The perpetrator planned, prepared, initiated or executed an act of aggression.

(1) Understanding the International Criminal Court on the following Website: https://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf

The perpetrator was a person in a position effectively to exercise control over or to direct the political or military action of the State which committed the act of aggression.

The act of aggression – the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations – was committed.

The perpetrator was aware of the factual circumstances that established that such a use of armed force was inconsistent with the Charter of the United Nations.

The act of aggression, by its character, gravity and scale, constituted a manifest violation of the Charter of the United Nations.

The perpetrator was aware of the factual circumstances that established such a manifest violation of the Charter of the United Nations ((1)).

6. The ICC Situations under Investigation

Upon referrals by States Parties or by the UNSC, or on its own initiative and with the judges' authorization, the Office of the Prosecutor (OTP) conducts investigations by gathering and examining evidence, questioning persons under investigation and questioning victims and witnesses, for the purpose of finding evidence of a suspect's innocence or guilt. OTP must investigate incriminating and exonerating circumstances equally.

(1) See: Elements of Crimes, p. 43, on the following Website:
- https://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF 9DE73D56/0/ElementsOfCrimesEng.pdf

OTP requests cooperation and assistance from States and international organizations, and also sends investigators to areas where the alleged crimes occurred to gather evidence. Investigators must be careful not to create any risk to the victims and witnesses.

As of October 2019, there are 12 Situations under investigation ((1)):

Democratic Republic of the Congo: Alleged crimes against humanity committed in the context of post-election violence in Kenya in 2008/2007.

Uganda: Alleged war crimes and crimes against humanity committed in the context of a conflict between the Lord's Resistance Army (LRA) and the national authorities in Uganda since 1 July 2002 (when the Rome Statute entered into force).

Darfur, Sudan: Alleged genocide, war crimes and crimes against humanity committed in in Darfur, Sudan, since 1 July 2002 (when the Rome Statute entered into force).

Central African Republic: Alleged war crimes and crimes against humanity committed in the context of a conflict in CAR since 1 July 2002, with the peak of violence in 2002 and 2003.

Kenya: Alleged crimes against humanity committed in the context of post-election violence in Kenya in 2008/2007.

Libya: Alleged crimes against humanity and war crimes committed in the context of the situation in Libya since 15 February 2011.

(1) See: Situations under investigation on the following Website:
https://www.icc-cpi.int/pages/situation.aspx -

Côte d'Ivoire: Alleged crimes within the jurisdiction of the Court committed in the context of post-election violence in Côte d'Ivoire in 2011/2010, but also since 19 September 2002 to the present.

Mali: Alleged war crimes committed in Mali since January 2012.

Central African Republic II: Alleged war crimes and crimes against humanity committed in the context of renewed violence starting in 2012 in CAR.

Georgia: Alleged crimes against humanity and war crimes committed in the context of an international armed conflict between 1 July and 10 October 2008.

Burundi: Alleged crimes against humanity committed in Burundi or by nationals of Burundi outside Burundi since 26 April 2015 until 26 October 2017.

Bangladesh/Myanmar: Alleged crimes of deportation, persecution, and any other crime within the ICC jurisdiction committed, against the Rohingya people or others, violence which occurred in Rakhine State, Myanmar, and any other crimes under the ICC's jurisdiction sufficiently linked to these events.

7. The ICC Situations under Preliminary Examinations

The Office of the Prosecutor of the International Criminal Court is responsible for determining whether a situation meets the legal criteria established by the Rome Statute to warrant investigation by the Office. For this purpose, the OTP conducts a preliminary examination of all communications and situations that come to its attention based on the statutory criteria and the information available.

The preliminary examination of a situation by the Office may be initiated on the basis of: (a) information sent by individuals or groups, States, intergovernmental or non-governmental organizations; (b) a referral from a State Party or the United Nations Security Council; or (c) a declaration lodged by a State accepting the exercise of jurisdiction by the Court pursuant to article 3)12) of the Statute.

Once a situation is thus identified, the factors set out in article 1)53) (a)-(c) of the Statute establish the legal framework for a preliminary examination. This article provides that, in order to determine whether there is a reasonable basis to proceed with an investigation into the situation, the Prosecutor shall consider: jurisdiction (temporal, either territorial or personal, and material); admissibility (compl-ementarity and gravity); and the interests of justice.

As of October 2019, situations of Afghanistan, Colombia, Nigeria, Gabon, Guinea, Honduras, Iraq/UK, Palestine, “Registered Vessels of Comoros, Greece and Cambodia”, Republic of Korea, The Philippines, Ukraine and Venezuela are under preliminary examinations ((1)).

8. Criticisms of the ICC

When the International Criminal Court was established in 2002, there was real optimism about holding those most responsible for genocide, crimes against humanity, war crimes and the crime of aggression to account. Today, the Court is being criticized for:

(1) See: Preliminary examinations on the following Website:
https://www.icc-cpi.int/pages/pe.aspx -

(a) The Politically Motivated Prosecutor

Clearly, what many ICC opponents fear most is a prosecutor who initiates proceedings proprio motu for purely political reasons. However, safeguards have been built into the Rome Statute precisely to guard against politically motivated prosecutions. International crime is inherently political.

Anyone who assumes the prosecutorial role at the ICC will, of course, come with his or her political perspective on the world and its conflicts, and external political pressure may be exerted in an effort to bring a complaint when it might not be justified or helpful in a particular political context. However, several factors - notably, a process of vigorous internal indictment review, the requirement of confirmation by a judge, and the inevitable acquittal that would result from an unfounded prosecution - act as safeguards to prevent any abuse of power by a politically driven prosecutor ((1)). The fact that only two prosecutions have moved forward proprio motu is perhaps an indication that these safeguards are working.

In fact, one of the ICC's goals is to alleviate political pressures in the realm of international justice. States have historically been reluctant to exercise universal jurisdiction in respect of grave crimes, due to political pressures from other states. The ICC serves to shift some of this risk from individual states and thereby overcome political obstacles to prosecution.

(b) A Barrier to Peace and Reconciliation

Many commentators have expressed their concern that the ICC may stand as an obstacle to reconciliation and the resolution

(1) Louise Arbour, the Need for an Independent and Effective Prosecutor in the Permanent International Criminal Court, Windsor Yearbook of Access to Justice, Vol. 17, 1999, p. 212.

of conflicts. In the past, many countries have granted amnesties in order to end conflicts. The fear is that as the ICC becomes involved in ongoing or recent conflicts, wars will be fought longer, peace processes will be disrupted and leaders will be reluctant to relinquish power if facing indictment. The argument is that removing the possibility for amnesty removes incentives for settlement, and may even encourage leaders to remain in power.

Conversely, others suggest that amnesty is not the reason that dictators relinquish power. They argue that instead, dictators leave only when they are weak and vulnerable and desperate to get whatever they can, not whatever they want ((1)). In this context, attempting to draw lines between the pursuit of justice as an obstacle to peace is often tenuous. In some cases a move towards peace may be best served by effective justice. In other cases, peace processes may remain shallow and incomplete if not accompanied by promises of responsible justice.

During the ICC preparatory phase and in Rome in 1998, the issue of how to address amnesties was never discussed, in part due to pressure from human rights groups. Significantly, Article 53 of the Statute does allow for the prosecutor to refuse to proceed with an investigation or prosecution if it would not serve the interests of justice. As discussed earlier, this decision is subject to review by the Pre-Trial Chamber.

Whether or not there is a clear-cut answer to this dilemma, the amnesty versus prosecution debate is an important one for the ICC and certainly lies at the heart of the situation in Uganda,

(1) Vesselin Popovski, International Criminal Court: Necessary Steps Towards Global Justice, Security Dialogue, Vol. 31, No. 4, 2000, p. 405.

where ICC arrest warrants were initially critical in bringing Joseph Kony and others to the negotiating table. The Lord's Resistance Army leaders now demand to be shielded from prosecution in exchange for their further participation in the peace process. A similar debate swirls over the effect of the indictment of President Al Bashir on the peace process in Sudan, as well as President Kenyatta's indictment on recent elections in Kenya. While the ICC prosecutor hopes that "the shadow of the ICC" may have contributed to peaceful 2013 elections in Kenya, others suggest that the ICC charges against Kenyatta helped him to win votes by appearing to be "victim of a mostly Western-funded court" ((1)).

(c) Cost and Delay

As the ICC matures, critical voices are mounting with respect to the expense and delay involved in ICC proceedings. By early 2012, the ICC had cost the international community over 900$ million but had only handed down one conviction and one acquittal - more than 10 years after the Court's establishment. Even proponents of the ICC have begun to ask whether the ICC is losing credibility ((2)).

However, although major prosecutions are proceeding slowly, things are not at a standstill. Procedural issues at the pre-trial and trial stage are handled and decided regularly. The problem is that success at the procedural level inevitably slows progress in the actual trials; bogging down the larger issues at play. The main question is whether the ICC can retain its preventative power in

(1) David Bosco, Why is the International Criminal Court Picking only on Africa? Washington Post, 29 March 2013.

(2) Jon Silverman, Ten years, $900m, one verdict: Does the ICC cost too much? BBC News Magazine, 14 March 2012.

the face of such delays. The ICC will remain credible only as long as it can remain a powerful symbol for deterrence.

(d) The Focus on Africa

Finally, one concern of some significance is the ICC prosecutor's apparent exclusive focus on Africa. A number of critics have expressed serious reservations about this reality, and voice fear about bias and the perception that the ICC is yet another instrument of foreign intervention in a long history of Western/ Northern interference in African affairs. Although African nations were early supporters of the Court, at a May 2013 meeting of the African Union, the Chairman went so far as to say that some African leaders now believe that the ICC prosecutions "have degenerated into some kind of race hunt". Some commentators point out that even if various geopolitical pressures have simply made it easier for the prosecutor to begin investigations in Africa rather than elsewhere, this sends a negative signal about how the ICC works. They insist that the ICC cannot investigate African crises alone.

Proponents of the ICC raise a number of explanations for the Court's concentration on Africa. First, almost all of the situations under investigation have been initiated upon referral by African governments themselves or the UN Security Council. Commentators also note that Africa is home to some of the world's weakest states that are plagued with conflict. The Court's prosecutor has noted that it is in Africa that the breaches of international criminal law are particularly severe. Sexual assault, forced displacement and massacre are issues that are present on a massive scale in the countries under investigation. He said

that it was only natural that they should come under investigation first. National legal systems are also weak in Africa, so the complementarity principle has led to ICC jurisdiction faster than in some other states. Geopolitical pressures are clearly also at play. African nations were initially very supportive of the ICC and some important players in the international community can effectively block controversial prosecutions in more politically sensitive regions. Finally, it is important to note that although the prosecutor has initiated official investigations in Africa only thus far, the Office of the Prosecutor is also monitoring the situation in other countries around the world, including Afghanistan, Georgia and Colombia ((1)).

9. Conclusion

Although criticism of the ICC, it is important to remember that the Court is still a “baby” institution - essentially the first of its kind. Building upon the history of Nuremberg and the ICTY and ICTR, the ICC is dealing with complex international criminal law issues in a way that could not even have been contemplated 50 years ago. International criminal law has grown in leaps and bounds in the last years. New hybrid tribunals implementing a mix of domestic and international law are popping up around the world to deal with domestic and historical instances of crimes against humanity.

ICC trials may be slow and costly, but the mere fact that they are occurring is nevertheless a milestone and an inspiration for the international community. The ICC is a body that is slowly but

(1) See: The International Criminal Court: History and Role, Research Publications, Library of Parliament of Canada, on the following Website:
- https://lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/200211E#a7

surely showing that it can work, together with national and regional courts, truth and reconciliation commissions and other peace and justice processes, to create a powerful role for international criminal law.

In order to effectively perform its mandate, the ICC needs the support and cooperation of States. The international community has, on multiple occasions, declared its determination to end impunity for the gravest crimes, and cooperation with the ICC is a concrete way to give effect to that objective. As the ICC has no police force of its own, it requires States' cooperation for the enforcement of its orders and is entirely reliant upon them for the execution of its arrest warrants. Unfortunately, several suspects subject to ICC arrest warrants have successfully evaded arrest for many years, defying the international community's attempts to establish the rule of law at the international level. Political will to bring these persons to justice is crucial.

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An Introduction to the International Criminal Court

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Abstract

The International Criminal Court (ICC) is an inter-governmental organization and international tribunal that has jurisdiction to prosecute individuals for the international crimes of genocide, crimes against humanity, war crimes, and crimes of aggression.

The ICC began functioning on 1 July 2002, the date that the Rome Statute entered into force. It has four principal organs: the Presidency, the Judicial Divisions, the Office of the Prosecutor, and the Registry.

The ICC has faced a number of criticisms from states and civil society. In order to effectively perform its mandate, the ICC needs the support and cooperation of States.

Key words

International Criminal Court, Rome Statute of the ICC, Genocide, Crimes against Humanity, War crimes, crime of aggression.