

 **CHAPTER II**

INTRODUCTION TO THE ICC: STRUCTURE AND BASIC PRINCIPLES

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Unless otherwise specified:

“Article”: refers to the Rome Statute

“Rule”: refers to the Rules of Procedure and Evidence

“Regulation”: refers to the Regulations of the Court

“Regulation (RR)”: refers to the Regulations of the Registry

“Regulation (VTF)”: refers to the Regulations of the Trust Fund for Victims

I. BASIC PRINCIPLES OF THE ICC

1. Jurisdiction, admissibility, and referral

1.1. Crimes

The International Criminal Court has jurisdiction over four categories of crimes, often referred to as the “core crimes”: genocide, crimes against humanity, war crimes and – once a definition has been agreed¹ – the crime of aggression.

The **Elements of Crimes** were drafted by the ICC Preparatory Commission prior to June 2000 and finally adopted by the Assembly of States Parties in September 2002². According to Articles and 21(1)(a), the Elements of Crimes form a source of law for the Court (Article 21(1)(a)) and will guide judicial interpretation³.

1.1.1. Genocide (Article 6)

The crime of “genocide” has been referred to as “the crime of crimes”⁴. The definition of genocide in the Rome Statute is taken from the 1948 Convention on the Prevention and Punishment of the Crime of Genocide⁵.



DEFINITION OF GENOCIDE (ARTICLE 6)

Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group:

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

In order to fall within the definition of genocide the acts must have been committed with the **intent to destroy** all or part of the group.

The groups that are protected under the definition are required to be **permanent and stable**. While some national legislation also covers political and cultural groups, the Rome Statute does not extend to such groups.

The Court has jurisdiction over direct perpetrators, but also persons who ordered genocide; solicited or induced the commission of genocide; aided, abetted or assisted genocide; attempted genocide; or conspired to commit genocide⁶.

1. See Articles 5(2), 121, and 123.

2. See *Report of the First Session of the Assembly of States Parties*, ICC-ASP/1/3, 3-10 September 2002, at 108-155.

3. See Schabas, W., *An Introduction to the International Criminal Court* (Cambridge, 2004), at 36.

4. See, e.g. *The Prosecutor v Kambanda*, Case No ICTR-97-23-S, Judgement and Sentence, 4 September 1998, at 16, *The Prosecutor v Serashugo*, Case No ICTR-98-39-S, Sentence, 2 February 1999, at 15, and *The Prosecutor v Stakic*, Case No IT-97-29-T, Decision on Rule 98 bis motion for Judgement of Acquittal, 31 October 2002, at 22.

5. Adopted by Resolution 260 (III) A of the UN General Assembly on 9 December 1948.

6. Article 25(3)(b) - (f).

1.1.2. Crimes against humanity (Article 7)



DEFINITION OF CRIMES AGAINST HUMANITY (ARTICLE 7)

In the Rome Statute, crimes against humanity are defined as 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:

- **Murder.**
- **Extermination** (including the intentional infliction of conditions of life calculated to bring about the destruction of part of a population, for example through the deprivation of access to food and medicine).
- **Enslavement** (i.e. the exercise of powers attaching to the right of ownership over a person, especially in the course of trafficking in persons, in particular women and children).
- **Deportation or forcible transfer of population** (i.e. forcibly displacing persons by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law).
- **Imprisonment or other severe deprivation of physical liberty** in violation of fundamental Rules of international law.
- **Torture** (i.e. 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).
- **Rape, sexual slavery, enforced prostitution, forced pregnancy** (i.e. 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), **enforced sterilization**, or **any other form of sexual violence of comparable gravity.**
- **Persecution** against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender, or other grounds that are universally recognized as impermissible under international law (i.e. the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity).
- **Enforced disappearance of persons** (i.e. 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).
- **The crime of apartheid** (i.e. inhumane acts of a character similar to those referred to above, 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).

In order to fall within the definition of crimes against humanity under the Rome Statute, the acts must have been committed as part of a **'widespread or systematic attack'**. The International Criminal Tribunal for Rwanda (ICTR) defined 'widespread' as "massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims"; and 'systematic' as "thoroughly organised and following a regular pattern on the basis of a common policy involving substantial public or private resources"⁷.

7. The *Prosecutor v Akayesu*, Case No ICTR-96-4-T, Judgement, 2 September 1998, at 580.

The attack must be **directed against a civilian population**, meaning a course of conduct involving the multiple commission of acts referred to above against any civilian population, pursuant to or in furtherance of a state or organizational policy to commit such attack⁸.

In addition, the person charged with the crime must have had '**knowledge of the attack**'. According to the International Criminal Tribunal for Yugoslavia (ICTY), "it is the occurrence of the act within the context of a widespread or systematic attack on a civilian population that makes the act a crime against humanity as opposed to a war crime or crime against national penal legislation... and therefore in addition to the intent to commit the underlying offence the perpetrator must know of the broader context in which his act occurs". Secondly, "the act must not be taken for purely personal reasons unrelated to the armed conflict"⁹.

Crimes against humanity, as defined by the Rome Statute, can be committed in times of peace and war. There is no general requirement that crimes against humanity must be committed with a discriminatory intent, except the crime of persecution.

The definition of crimes against humanity adopted in the Rome Statute reflects some significant advances in international law: in particular, sexual slavery, enforced prostitution and forced pregnancy are, for the first time, specified as distinct crimes. However, in other aspects it represents a backward step from existing international law: for example, the definition of enforced disappearance of persons, in particular the reference to a "prolonged" period of time.

1.1.3. War crimes (Article 8)

The definition of war crimes covers acts committed during times of **internal and international conflict**. Unlike genocide and crimes against humanity, war crimes can be isolated acts. However the Statute specifies that, "[t]he 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"¹⁰.



DEFINITION OF WAR CRIMES (ARTICLE 8)

International law makes a distinction between war crimes committed in international and in internal armed conflicts (such as civil wars). This distinction is upheld in the Rome Statute, which has jurisdiction over war crimes:

in the context of international armed conflict:

- Grave breaches of the 1949 Geneva Conventions (followed by an exhaustive list of acts) (Article 8 (2) (a)).
- Other serious violations of the laws and customs applicable to the specific situation within the established framework of international law (followed by an exhaustive list of acts) (Article 8 (2) (b)).

in the context of internal armed conflict (not including internal disturbances and tensions):

- Serious violations of common Article 3 to the four 1949 Geneva Conventions (followed by an exhaustive list of acts) (Article 8 (2) (c)).
- Other serious violations of the laws and customs applicable to the specific situation within the established framework of international law (followed by an exhaustive list of acts) (Article 8 (2) (e)).

8. Article 7(2)(a).

9. *The Prosecutor v Tadic*, Case No ICTY-94-1-T, Judgement, 7 May 1997, at 656, and 657-660.

10. Emphasis added.

Most of the crimes listed in Article 8 are taken from established provisions of international law, in particular the 1949 Geneva Conventions and 1977 Additional Protocols and the Hague Conventions. The Rome Statute does not refer to all war crimes recognized under international humanitarian law, although it recognises some crimes which are not included in existing conventions, in particular the conscription and enlistment of children under 15 years and using them to participate actively in hostilities.

1.1.4. Crime of aggression (Article 5 (2))

The Statute also grants the Court jurisdiction over the crime of aggression. However, this is subject to a definition being agreed at a review conference of states parties and a corresponding amendment to the Statute. A first review conference at which agreement on such an amendment might be reached is due to be held 7 years after the entry into force of the Rome Statute, i.e. in 2009. Until then, Article 5 (2) amounts to an expression of intent to define the crime of aggression at some point in the future.



IMPORTANT ASPECTS OF THE CORE CRIMES

	Genocide	Crime against Humanity	War Crime
Gravity Threshold:	Act committed with intent to destroy a group, in whole or in part	Act formed part of a widespread and systematic attack	War crimes can be isolated acts. However the Statute specifies: "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".
Acts Directed Against:	Groups: ethnic, national, religious, racial	Any civilian population	Persons protected under Geneva Conventions and other Geneva and Hague laws (depending on the crime in question: civilians; prisoners of war; hors de combat; humanitarian workers and peacekeepers; in certain circumstances, members of the hostile armed forces)
Mental element:	Intent to destroy	Knowledge of the attack	As listed in each separate provision of Article 8, e.g. willfull killing, wilfully causing great suffering, wanton destruction, killing treacherously, etc.
Nexus to war required?	No	No	Yes



SOME EXAMPLES OF ACTS THAT MIGHT CONSTITUTE CORE CRIMES

[This table sets out some common points of reference, but is in no way meant to be exclusive or comprehensive.]

Acts that might constitute crime	Genocide	Crime against Humanity	War Crime
Killings	<ul style="list-style-type: none"> - Killing members of an ethnic, national, religious, or racial group (Art 6) 	<ul style="list-style-type: none"> - Murder (Art 7 (1) (a)); - Extermination (Art 7 (1) (b)) 	<p>International Conflicts:</p> <ul style="list-style-type: none"> - Willful Killing (Art 8(2)(a)(i)); - Killing persons hors de combat (Art 8(2)(b)(vi)); - Killing treacherously individuals belonging to hostile nation or army (Art 8 (2)(b)(xi)); - Use of certain prohibited weapons (Art 8 (2)(b)(xvii), (xviii), (xix), (xx)) <p>Internal Conflicts:</p> <ul style="list-style-type: none"> - Murder of all kinds (Art 8 (2)(c)(i)); - Executions without previous judgement (Art 8(2)(c)(iv)); - Killing treacherously a combatant adversary (Art 8(2)(e)(ix))
Sexual violence	<ul style="list-style-type: none"> - Causing harm to members of an ethnic, national, religious, or racial group; - measures intended to prevent births within a group (Art 6; <i>Akayesu</i>, ICTR 1998). 	<ul style="list-style-type: none"> - Rape; - Sexual slavery; - Enforced prostitution; - Forced pregnancy; - Enforced sterilization; - Any other form of sexual violence of comparable gravity (Art 7 (1) (g)) - Torture 	<p>International Conflicts:</p> <ul style="list-style-type: none"> - Outrages upon personal dignity (Art 8 (2)(b)(xxi)); - Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, other forms of sexual violence (Art 8 (2)(b)(xxii)) <p>Internal Conflicts:</p> <ul style="list-style-type: none"> - Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, other forms of sexual violence (Art 8 (2)(e)(vi))
Other Serious Harm (mental or physical)	<ul style="list-style-type: none"> - Causing serious bodily or mental harm to members of an ethnic, national, religious, or racial group (Art 6) 	<ul style="list-style-type: none"> - Enslavement (Art 7 (1) (c)); - Torture (Art 7 (1) (f)); - Inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health (Art 7 (1) (k)) 	<p>International Conflicts:</p> <ul style="list-style-type: none"> - Torture or inhuman treatment (Art 8(2)(a)(ii)); - Great suffering or serious injury to body or health (Art 8(2)(a)(iii)); - Wounding a hors de combat combatant (Art 8(2)(b)(vi)) - Physical mutilation or experiments (Art 8(2)(b)(x)); - Use of certain prohibited weapons (Art 8 (2)(b)(xvii), (xviii), (xix), (xx)); - Outrages upon personal dignity (Art 8(2)(b)(xxi)); - Conscripting or enlisting children under the age of 15 (Art 8(2)(b)(xxvi)) <p>Internal Conflicts:</p> <ul style="list-style-type: none"> - Violence to person (Art 8 (2)(c)(i)); - Outrages upon personal dignity (Art 8 (2)(c)(ii)); - Conscripting or enlisting children under the age of 15 (Art 8(2)(e)(vii)); - Displacement of civilian population (Art 8(2)(e)(viii)); - Wounding treacherously a combatant adversary (Art 8(2)(e)(ix)); - Physical mutilation or experiments (Art 8(2)(e)(xi))

Acts that might constitute crime	Genocide	Crime against Humanity	War Crime
Destruction of Property	--	- Persecution (Art 7 (1) (h))	<p>International Conflicts:</p> <ul style="list-style-type: none"> - Extensive, non-justified destruction and appropriation of property (Art 8(2)(a)(iv)); - Attacks launched in knowledge that they will cause damage to civilian objects (Art 8(2)(a)(iii)); - Attacks against buildings dedicated to religion, education, art, etc (Art 8(2)(b)(ix)); - Unnecessary destruction or seizing of enemy's property (Art 8(2)(b)(xiii)); - Pillaging (Art 8(2)(b)(xvi)); <p>Internal Conflicts:</p> <ul style="list-style-type: none"> - Attacks against buildings dedicated to religion, education, art, etc (Art 8 (2)(e)(iv)); - Pillaging (Art 8 (2)(e)(v)); - Unnecessary destruction or seizing of enemy's property (Art 8(2)(e)(xii))

1.2. Scope of ICC jurisdiction

The ICC has jurisdiction when:

- The crimes have been committed *by a citizen* of a member state, i.e. of a state that has ratified the Statute¹¹; or
- The crimes have been committed *on the territory* of a member state¹² (which means that the Court may, under certain circumstances, be able to exercise jurisdiction over the nationals of a non-state party); or
- The *Security Council refers* a situation to the ICC (in such cases, the Court's jurisdiction is truly universal, meaning that it is not necessary for the alleged perpetrator of the crime to be citizen of a state party or for the crime to have been committed on the territory of a state party)¹³; or
- A state that is not party to the Statute (or was not party at the time the alleged crimes were committed) makes an *ad hoc* declaration for the Court to have jurisdiction "with respect to the crimes in question"¹⁴.

11. Article 12(2).
 12. Article 12(2).
 13. Article 13(b).
 14. Article 12(3).

1.2.1. Non-retroactive jurisdiction



TEMPORAL JURISDICTION

• No Criminal Responsibility for Crimes Committed before Entry into Force

The Court only has jurisdiction over crimes committed after the Rome Statute entered into force.

A further limitation applies in relation to the crime of enforced disappearances: during the negotiations of the Elements of Crimes, states decided that the ICC will not have jurisdiction over the crime of enforced disappearance where the elements of the crime were committed before 1 July 2002, despite the continuing nature of such crimes.

• General Entry into Force

The Rome Statute **entered into force on 1 July 2002**¹⁵. However, this date only applies to states that ratified the Statute prior to April 2002¹⁶.

• Individual Entry into Force

For all other member states, the Statute enters into force about two months after their respective date of ratification in accordance with Article 126 (2)¹⁷.

However, states can recognise the jurisdiction of the ICC before this date by making a declaration under Article 12(3).

For example, Uganda ratified the Statute on 14 June 2002, so the Statute entered into force on 1 September 2002. Uganda then made a declaration under Article 12(3) with the effect that the ICC has jurisdiction over crimes committed in Uganda since 1 July 2002.

1.2.2. Permanent jurisdiction

Unlike the *ad hoc* tribunals, which have jurisdiction over core crimes committed in the territory of the Former Yugoslavia since 1991 and in Rwanda in 1994, and the *hybrid or internationalised* tribunals (e.g. the Special Court for Sierra Leone or the Extraordinary Chambers of the Courts of Cambodia), the ICC is a **permanent court**.

1.3. Trigger mechanisms: how to refer a situation to the Court?

Situations can be referred to the Court in four ways:

- States parties can refer a situation to the Prosecutor (this was the case for the situations in Uganda, Democratic Republic of the Congo, and the Central African Republic)¹⁸.
- The United Nations Security Council can refer a situation under Chapter VII of the United Nations Charter (this is what happened in the case of Darfur/Sudan)¹⁹;
- The Prosecutor can initiate an investigation on his own motion (*proprio motu*), on the basis of information received from any sources, individuals or organisations. In such circumstances, the Prosecutor must seek the authorization of the Pre-Trial Chamber before proceeding with the investigation²⁰.

¹⁵. Article 24. Cf. Article 126(1), which holds that the Statute entered into force on the first day of the month after the 60th day following the date of the deposit of the 60th date of ratification. Since the 60th ratification took place on 11 April 2002, the Statute entered into force on 1 July 2002.

¹⁶. On 11 April 2002, 10 states simultaneously deposited their instrument of ratification, bringing the total number of ratifications from 56 to 66, past the 60 signatures required for the entry into force of the Rome Statute.

Thus, the Rome Statute is binding on all of those 66 states as of 1 July 2002. A full and up-to-date list of ratifications, with dates of ratifications, can be found on the website of the Coalition for an International Criminal Court at www.iccnw.org/?mod=romesignatures.

¹⁷. Article 11 in combination with Article 126(2) sets out that the Rome Statute becomes binding on each member state that accedes to the Statute on the first day of the month after the 60th day following the accession. For a full list of dates of accession, please see www.iccnw.org/?mod=romesignatures.

¹⁸. Article 13(a).

¹⁹. Article 13(b).

²⁰. Article 15.

- Additionally, States that are not parties to the Rome Statute can refer a situation if they make an *ad hoc* declaration accepting the jurisdiction of the Court (this was the case for the situation in the Ivory Coast, which made a declaration in 2003 accepting the jurisdiction of the Court from 19 September 2002)²¹.

It should be noted that Article 16 authorises the UN Security Council to postpone the initiation of an investigation or prosecution by adopting a resolution deferring any action by the Court for a twelve-month period.



SOME CASES BEFORE THE ICC BY TYPE OF REFERRAL

• Uganda

Uganda ratified the Rome Statute on 14 June 2002 (i.e. the Rome Statute, for Uganda, **entered into force on 1 September 2002**). In December 2003, Uganda **referred** the situation concerning the Lord's Resistance Army to the ICC **under Article 14 of the Rome Statute** (announced publicly on 29 January 2004). In addition, the government of Uganda made a **declaration under Article 12(3)** to accept jurisdiction of the Court as of **1 July 2002** (the entry into force of the Rome Statute in general).

On 29 July 2004, the ICC Prosecutor determined that there was a reasonable basis to open an investigation into crimes committed in Northern Uganda, underlining that the jurisdiction of the Court cannot be limited to crimes committed by specific groups.

• Democratic Republic of the Congo (DRC)

DRC ratified the Rome Statute on 11 April 2002 (i.e. the Rome Statute, for DRC, **entered into force on 1 July 2002**). In March 2004, the DRC government **referred** the situation to the ICC **under Article 14**, for **crimes committed on the territory of DRC since 1 July 2002** (publicly announced on 19 April 2004). On 23 June 2004, the Prosecutor announced his decision to open the first investigation of the ICC.

• Sudan/Darfur

Sudan has not ratified the Rome Statute and has not made an *ad hoc* declaration under Article 12 (3). On 31 March 2005, the United Nations **Security Council adopted Resolution 1593**, referring the situation in Darfur, Sudan since **1 July 2002** to the Prosecutor of the ICC **under Article 13(b)**. On 6 June 2005, the Prosecutor decided that there was a reasonable basis to initiate an investigation.

• Central African Republic (CAR)

CAR ratified the Rome Statute on 3 October 2001 (i.e. the Rome Statute, for CAR, **entered into force on 1 July 2002**). On 21 December 2004, the government of CAR **referred crimes committed anywhere on the territory of CAR since 1 July 2002 under Article 14**. At the time of writing, the Prosecutor had not yet opened an investigation in CAR.

1.4. Complementarity and admissibility

One of the key features of the International Criminal Court is that it is **complementary** to national courts²². This means that the Court will only investigate and prosecute cases when national authorities are **unable or unwilling** to do so, in accordance with Article 17.

²¹. Article 12(3).

²². Cf. paragraph 10 of the preamble and Articles 1, 15, 17, 18, 19.

Challenges to admissibility can be brought by the accused and certain states. Victims can submit observations to the Court in any such proceedings²³.



**THE COMPLEMENTARITY TEST
ARTICLE 17 (2) AND (3)**

The criteria for determining the **unwillingness** of a State to investigate or prosecute are:

Article 17 (2)

- “(a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court...;
- (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
- (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.”

In order to determine the **inability** of a State to investigate or prosecute:

Article 17 (3)

“... the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.”

2. Applicable law

Article 21 of the Rome Statute creates a hierarchy of applicable sources of law before the Court:

- The primary sources of law for the ICC are the **Rome Statute** together with the **Elements of Crimes** and the **Rules of Procedure and Evidence**.
- Secondly, “**applicable treaties** and the **principles and Rules of international law**” will be applied, “where appropriate”²⁴.
- Finally, judges may also take into account “**general principles of law** derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with [the] Statute and with international law and internationally recognized norms and standards”²⁵.

²³. Article 19. Any cases arising out of the investigation into the situation in Darfur, for example, are likely to bring about admissibility challenges. The government of Sudan has contested the exercise of jurisdiction by the ICC and has submitted information to the Prosecutor which “purports to demonstrate their own efforts to investigate and prosecute crimes which potentially fall within the jurisdiction of the Court”, see, e.g. *Prosecutor’s Response to Cassese’s Observation on Issues concerning the Protection of Victims and the Preservation of Evidence in the Proceedings on Darfur Pending before the ICC*, ICC-02/05, 11 September 2006, para. 21. It is possible that the ICC will have to determine whether the efforts of the government of Sudan in establishing a Special Criminal Court designed to prosecute crimes that have taken place in Darfur will be sufficient to satisfy the requirement of complementarity. Concerning the possibility for victims to participate in such proceedings, see Chapter IV, *Participation*.

²⁴. Article 21(1)(b).

²⁵. Article 21(1)(c).



ADDITIONAL DOCUMENTS TO THE ROME STATUTE

Following the adoption of the Rome Statute on 17 July 1998, states met between 1998 and 2002 during sessions of the Preparatory Commission for the ICC at the United Nations Headquarters in New York to negotiate additional instruments that would be necessary for the future court to be effective. These include:

- The Rules of Procedure and Evidence, adopted by the Assembly of States Parties on 9 September 2002
- The Elements of Crimes, adopted by the Assembly of States Parties on 9 September 2002
- Rules of Procedure of the Assembly of States Parties, adopted on 3 September 2002
- The Agreement on Privileges and Immunities, adopted on 3 September 2002

Other instruments have been adopted by the Court:

- Regulations of the Court, adopted on 26 May 2004
- Regulations of the Registrar, adopted on 6 March 2006
- Relationship Agreement between the ICC and the UN, adopted on 4 October 2004

The Assembly of States Parties has adopted the following instruments:

- Code of Professional Conduct for Counsel, adopted on 3 December 2005
- Regulations of the Trust Fund for Victims, adopted on 3 December 2005

3. General principles of criminal law

3.1. Individual criminal responsibility

The ICC's jurisdiction is limited to natural persons. It therefore does not have jurisdiction over states or legal entities, such as multinationals or corporations²⁶.

3.2. Minimum age for ICC jurisdiction

The Court can only try persons of **18 years** of age or older at the time of commission of the alleged crime²⁷.

3.3. Command responsibility

Military commanders, those "effectively acting" as such, or those with "effective authority and control" over subordinates can be tried for crimes committed by their subordinates when:

- they knew or should have known that their subordinates were committing crimes within the jurisdiction of the ICC; and
- they failed to take all necessary and reasonable measures within their power to prevent or repress their commission²⁸.

²⁶. Article 25(1).

²⁷. Article 26.

²⁸. Article 28.

3.4. *Ne Bis In Idem*

The principle of *ne bis in idem* applies meaning that:

- No person can be tried by another court for a crime for which that person has already been convicted or acquitted by the ICC.
- No person who has been tried by another court for conduct proscribed under the Rome Statute can be tried by the ICC with respect to the same conduct, unless the proceedings in the other court were for the purpose of shielding the person concerned from criminal responsibility or were not conducted independently or impartially in accordance with the norms of due process recognized by international law²⁹.

3.5. *Irrelevance of official capacity*

The Rome Statute applies without any distinction based on the official capacity of individuals. **Immunities are not applicable** before the ICC³⁰.

3.6. *Sentences*

The ICC **does not recognize the death penalty**. It can impose a maximum penalty of 30 years of imprisonment, or a term of life imprisonment when justified by the extreme gravity of the crime. In addition to sentences of imprisonment, the ICC can order fines and forfeiture of property and assets³¹.

3.7. *Superior orders defence*

The general principle is that superior orders is not a defence in respect of crimes within the jurisdiction of the ICC. However, contrary to existing international law, the Rome Statute contains an exception in the case of war crimes: where a person has committed a war crime pursuant to an order by a superior, he or she may be relieved of criminal responsibility only if it can be shown that he or she was under a legal obligation to obey such orders, that he or she did not know that the order was unlawful, and that the order was not “manifestly” unlawful³².

29. Article 20.

30. Article 27.

31. Article 77.

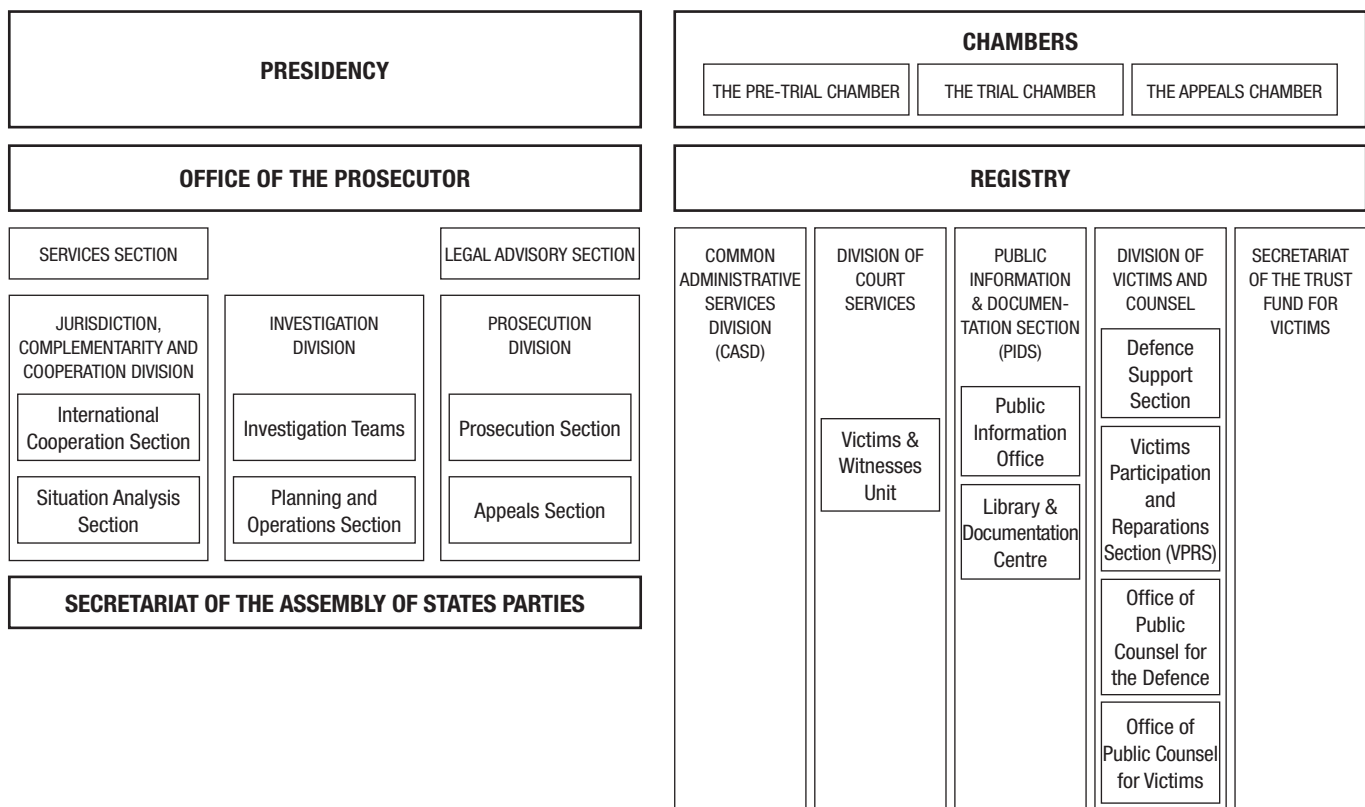
32. Article 33.

II - ORGANS OF THE ICC

The Court is composed of four organs: the Presidency; the Chambers; the Office of the Prosecutor; and the Registry³³.

ORGANIGRAMME OF THE COURT WITH THOSE DEPARTMENTS MOST RELEVANT TO VICTIMS AND THEIR COUNSEL

Source: Compiled from ICC Proposed Programme Budget 2007³⁴



1. The Presidency

The Presidency is composed of the President, and the First and Second Vice-Presidents, elected by an absolute majority of the 18 judges of the Court for a renewable three year term (or until their term of office as judges expires)³⁵. These three judges serve on a full-time basis.



COMPOSITION OF THE PRESIDENCY

On 11 March 2003, the 18 judges of the ICC elected the Presidency in accordance with the Rome Statute, choosing:

- **Philippe Kirsch** of Canada as President (re-elected in 2006);
- **Akua Kuenyehia** of Ghana as first Vice President (re-elected in 2006); and
- **Elizabeth Odio Benito** of Costa Rica as second Vice President, replaced at the second election on 11 March 2006 by **René Blattmann** of Bolivia.

³³. Article 34.

³⁴. ICC Proposed Programme Budget 2007, ICC-ASP/5/9, 22 August 2006, available from www.icc-cpi.int/library/asp/ICC-ASP-5-9_English.pdf#search=%22ICC%20Proposed%20Programme%20Budget%20for%2007%20ASP-06-0227%22 (note that this organigramme does not include all sections and units of the Court).

³⁵. Article 38.

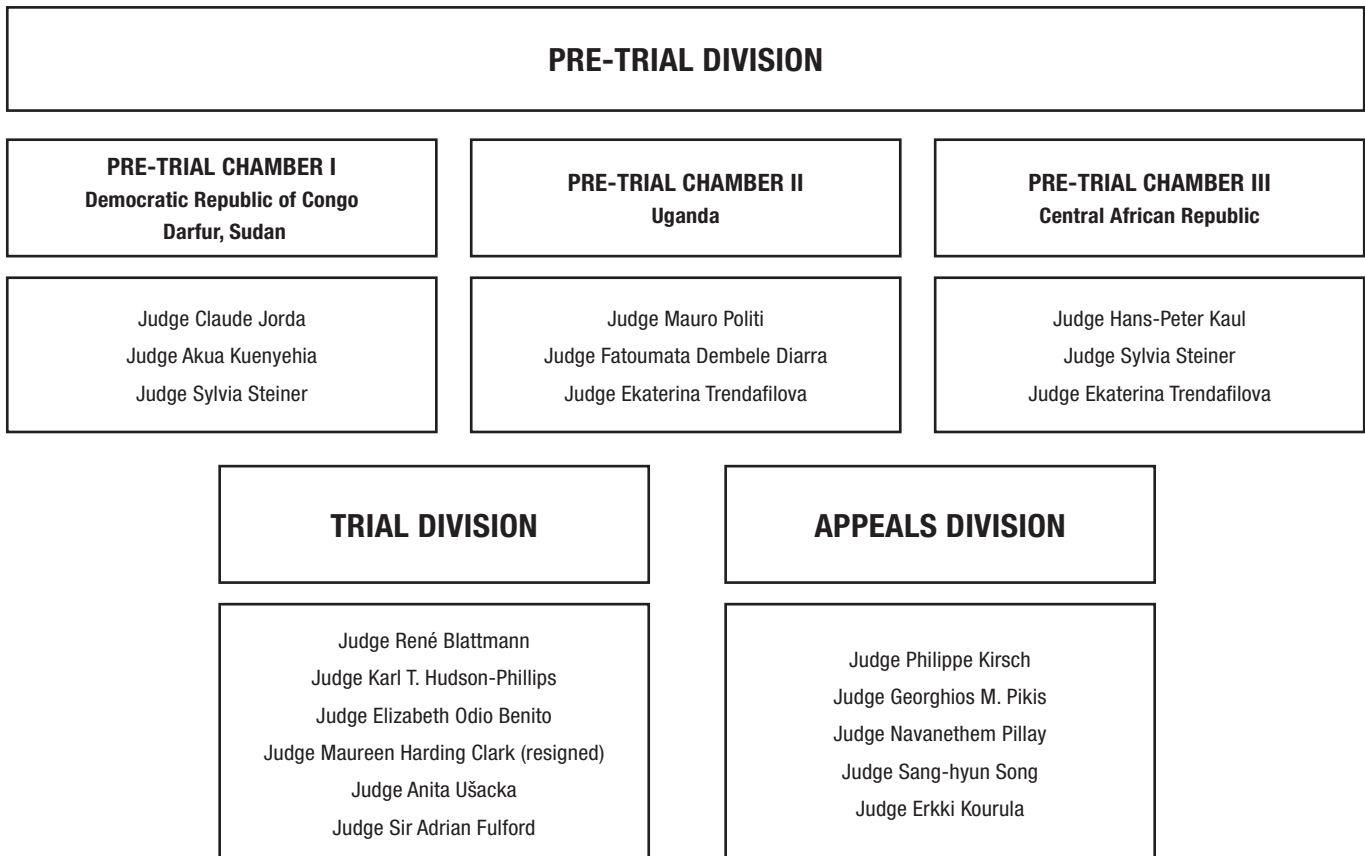
Under Article 38 (3), the Presidency is responsible for the “proper administration of the Court”. The Presidency must ensure that all the necessary structures and judicial support systems are established, in order to allow the Court to work efficiently. It is also responsible for the coordination between the Presidency, the Prosecutor and the Registrar and represents the Court on the international and diplomatic scene.

Specific duties of the Presidency include:

- Enforcement of fines, forfeiture orders and reparations orders, with the assistance of the Registry (Regulation 116);
- Reviewing the decisions of the Registrar on the payment of legal assistance (Regulation 85(3));
- Receiving all complaints concerning serious misconduct and serious breaches of duties against a judge, the Prosecutor, a Deputy Prosecutor, the Registrar or the Deputy Registrar (Regulation 119) and may also initiate proceedings on its own motion (Regulation 125).

2. The Chambers

Source: ICC, September 2006³⁶



³⁶ See www.icc-cpi.int/organs/chambers.html.

2.1. Election of judges

The first 18 judges of the ICC were elected during the first resumed session (3-7 February 2003) of the Assembly of States Parties, according to the procedure laid out in Article 36 of the Rome Statute, to serve terms of three, six, or nine years. The second elections were held three years later, on 26-27 January 2006.



THE JUDGES OF THE ICC

President, Judge Philippe KIRSCH (Canada)
 First Vice-President, Judge Akua KUENYEHIA (Ghana)
 Second Vice-President, Judge René BLATTMANN (Bolivia)
 Judge Karl T. HUDSON-PHILLIPS (Trinidad and Tobago)
 Judge Claude JORDA (France)
 Judge Georghios M. PIKIS (Cyprus)
 Judge Elizabeth ODIO Benito (Costa Rica)
 Judge Navanethem PILLAY (South Africa)
 Judge Sang-Hyun SONG (Republic of Korea)
 Judge Hans-Peter KAUL (Germany)
 Judge Mauro POLITI (Italy)
 Judge Maureen Harding CLARK (Ireland) (resigned)
 Judge Erkki KOURULA (Finland)
 Judge Fatoumata Dembele DIARRA (Mali)
 Judge Anita USACKA (Latvia)
 Judge Sir Adrian FULFORD (United Kingdom)
 Judge Sylvia STEINER (Brazil)
 Judge Ekaterina TRENDAFILOVA (Bulgaria)

Source: www.icc-cpi.int (September 2006)

2.1.1. Nominations

Under Article 36, the nomination process starts at the national level. Each state party can nominate one candidate, who must be national of a state party, although not necessarily of the same nationality as the nominating state. Nominations must follow either “the procedure for the nomination of candidates for appointment to the highest judicial offices in the State in question”, or the “procedure provided for the nomination of candidates for the International Court of Justice in the Statute of that Court”. These requirements prevent states from making discretionary nominations, unless they are part of the usual national procedure.

It is important to note that the body of judges may not include two nationals of the same state³⁷. This provision facilitates fair geographical representation among judges, as well as representation of the principal legal systems of the world. States parties must also take into account a fair representation of female and male judges. Women have generally been underrepresented at the international level; the ICTY and ICTR have had very few female judges. Those women did, however, play an important role in developing interpretations of the statutes of the ad hoc international criminal tribunals and in finding definitions of crimes within the jurisdiction of the ICC that are gender-sensitive, taking into account women’s experience of armed conflicts³⁸.

³⁷. Article 36(7).

³⁸. Fair representation: *A Short Guide to Monitoring and Influencing the Nomination and Election of Judges at the International Criminal Court*, Women’s Caucus for Gender Justice, available from www.iccnw.org/documents/WomensCaucusBrochure.pdf.

2.1.2. Qualifications

Candidates nominated by states parties to the Statute must be “of high moral character, impartiality and integrity [and] possess the qualifications required in their respective States for appointment to the highest judicial offices”³⁹. They must have established competence in criminal law and procedure, or relevant areas of international law such as international humanitarian law and the law of human rights. Candidates must also have “an excellent knowledge of and be fluent in at least one of the working languages of the Court”⁴⁰, i.e. English or French.

2.1.3. Selection process

Once the national selection process has been carried out, the nominated candidates are divided into two lists: list A contains the names of candidates who have established competence in criminal law and procedure, while list B contains the names of candidates who have established competence in relevant areas of international law. At least nine candidates are elected from list A, at least five from list B.

The 18 candidates who obtain “the highest number of votes and a two-third majority of the States Parties present and voting at the Assembly of States Parties during which the ballot takes place will be elected. According to the workload of the Court, the Presidency can propose an increase in the number of judges”⁴¹.

Judges usually serve a non-renewable term of nine years. However, for the first election, one third was elected for a renewable term of three years, one third for a six-year term, and the remaining judges for a term of nine years, in order to stagger future elections⁴².

Judges do not have to serve on a full time basis. Pursuant to Article 35(3), this is to be decided by the Presidency, according to the workload of the Court.

2.2. Assignment of judges to Divisions and Chambers

The judges are organised into divisions, assigned according to their qualifications and experience, “in such a way that each division shall contain an appropriate combination of expertise in criminal law procedure and in international law”⁴³.

There are three divisions, which correspond to the three Chambers: the Pre-Trial Division, the Trial Division, and the Appeals Division.



THE PRE-TRIAL DIVISION

The Pre-Trial Division is composed of the First Vice President and six other judges⁴⁴:

Judge Akua Kuenyehia, First Vice-President of the ICC
 Judge Claude Jorda
 Judge Hans-Peter Kaul
 Judge Mauro Politi
 Judge Fatoumata Diarra
 Judge Sylvia Steiner
 Judge Ekaterina Trendafilova

39. Article 36(3)(a).

40. Article 36(3)(c).

41. Article 36(6)(a).

42. Article 36.

43. Article 39(1).

44. See www.icc-cpi.int/chambers/pretrial.htm.

THE TRIAL DIVISION

The Trial Division is composed of the Second Vice-President and five other judges:

Judge René Blattman, Vice-President of the ICC
 Judge Karl Hudson-Phillips
 Judge Elizabeth Odio-Benito
 Judge Maureen Harding Clark
 Judge Anita Usacka
 Judge Sir Adrian Fulford

THE APPEALS DIVISION

The Appeals Division is composed of the President and four other judges:

Judge Philippe Kirsch, President of the ICC,
 Judge Georgios M. Pikis
 Judge Navanethem Pillay
 Judge Sang-hyun Song
 Judge Erkki Kourula

2.3. Functions of the different Chambers

2.3.1. The Pre-Trial Chamber

The Pre-Trial Chamber is composed of either one or three judges of the Pre-Trial Division⁴⁵. It deals with questions arising prior to trial. Its principal functions and powers are set out in Article 53 of the Rome Statute.

The Pre-Trial Chamber has an important role in the decision whether or not to initiate an investigation or prosecution. If the Prosecutor seeks to open an investigation on his own initiative, (or, in the language of the Court, *proprio motu*), the authorisation of the Pre-Trial Chamber is required⁴⁶. The Pre-Trial Chamber can also, in certain circumstances, request the Prosecutor to review a decision *not* to investigate or prosecute⁴⁷. Victims can participate in such proceedings⁴⁸.

Other functions of the Pre-Trial Chamber include: issuing warrants of arrests and summons to appear before the Court (at the request of the Prosecutor)⁴⁹, ensuring the rights of the accused are respected⁵⁰, and providing for the protection and privacy of victims and witnesses, the preservation of evidence, the protection of persons who have been arrested or appeared in response to a summons, and the protection of national security information⁵¹. The Pre-Trial Chamber can authorise certain measures to be taken in the territory of a states party⁵².

After a person's surrender or voluntary appearance before the Court, the Pre-Trial Chamber is required to hold a 'confirmation hearing', in the presence of the Prosecutor, the person charged and his/her counsel, to confirm or reject the charges brought by the Prosecutor⁵³. At this hearing, the Prosecutor is required to support the charges with sufficient documentary and/or summary evidence to establish substantial grounds that the person committed the crime charged. The accused has the right to object

⁴⁵. Article 39(2)(b)(iii).

⁴⁶. Article 15(3).

⁴⁷. Article 53(3).

⁴⁸. See further Chapter IV, *Participation*.

⁴⁹. Article 57(3)(a).

⁵⁰. Article 57(3)(b).

⁵¹. Article 57(3)(c).

⁵². Rule 115.

⁵³. Article 61(1).

to the charges, challenge the evidence presented by the Prosecutor and present evidence⁵⁴. Victims can participate in such hearings⁵⁵.

2.3.2. The Trial Chamber

The Trial Chamber is composed of three judges of the Trial Division⁵⁶. The Trial Chamber determines the innocence or guilt of an accused.

Upon the preliminary decision on the admissibility of a case and after the confirmation of charges by the Pre-Trial Chamber, the Presidency constitutes a Trial Chamber responsible for the conduct of subsequent proceedings⁵⁷.

The Presidency can decide to attach temporarily to the Trial Division a judge assigned to the Pre-Trial Division if the efficient management of the Court's workload so requires. However, a judge who has participated in the pre-trial phase of a case cannot, under any circumstances, sit on the Trial Chamber hearing of that same case⁵⁸.

The major role of the Trial Chamber, under Article 64 of the Rome Statute, is to ensure that trials are fair and expeditious and are conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

If a Trial Chamber reaches a guilty verdict, it can impose the following penalties:

- Imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or
- A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person; as well as
- Fines; and
- Forfeiture of proceeds, property and assets derived from the crime⁵⁹.

The Trial Chamber can also make an order against a convicted person for reparations, including compensation, restitution or rehabilitation for victims⁶⁰.

Trials must be held in public, unless special circumstances require that certain proceedings be in closed session to protect confidential or sensitive information to be given in evidence or to protect victims and witnesses⁶¹.

2.3.3. The Appeals Chamber

The Appeals Chamber is composed of all the judges of the Appeals Division⁶².

The Prosecutor or the convicted person can appeal to the Appeals Chamber against decisions of the Pre-Trial and of the Trial Chambers⁶³. In addition, decisions of the Court can be appealed in specific circumstances by states parties, other states that claim jurisdiction, victims, *bona fide* property owners who are adversely affected by such a decision, or relatives or other authorized persons after the death of a convicted person⁶⁴.

54. Article 61(5).

55. See further Chapter IV, *Participation*.

56. Article 39(2)(b)(ii).

57. Article 61(11).

58. Article 39(4).

59. Article 77.

60. Article 75(2). See Chapter VII, *Reparations and the Trust Fund for Victims*.

61. Article 68.

62. Article 39(2)(b)(i).

63. Articles 81 and 82.

64. Cf. Article 82(2) and (4), Article 18(4), Article 84(1).

A sentence may be appealed on the ground of procedural error, error of fact, error of law, or any other ground that affects the fairness or reliability of the proceedings or decision, such as disproportion between the crime and the sentence issued by the lower chambers⁶⁵.

The Appeals Chamber may decide to reverse or amend the decision, judgment, or sentence or order a new trial before a different Trial Chamber⁶⁶.

The revision of the sentence can be requested if new evidence has been discovered that was not available at the time of the trial and that is sufficiently important or decisive for the Appeals Chamber to revise or amend the sentence⁶⁷.

3. The Office of the Prosecutor (OTP)

The OTP is responsible for conducting investigations and prosecutions of crimes that fall within the jurisdiction of the Court. As an independent, separate organ of the Court, it is specifically charged with “receiving referrals and any substantiated information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the Court”⁶⁸.

The principle of complementarity requires the OTP to analyse information relating to crimes within the jurisdiction of the Court and to determine whether states with jurisdiction over the crimes are willing or able to investigate and prosecute.

Three main divisions carry out the operative work of the Office: the Jurisdiction, Complementarity and Cooperation Division (JCCD); the Investigation Division; and the Prosecution Division. The Immediate Office of the Prosecutor is in charge of coordinating the work of the Office. It is supported by the Services and Legal Advisory Sections (the Services Section provides administrative, linguistic and technical infrastructure and services)⁶⁹.

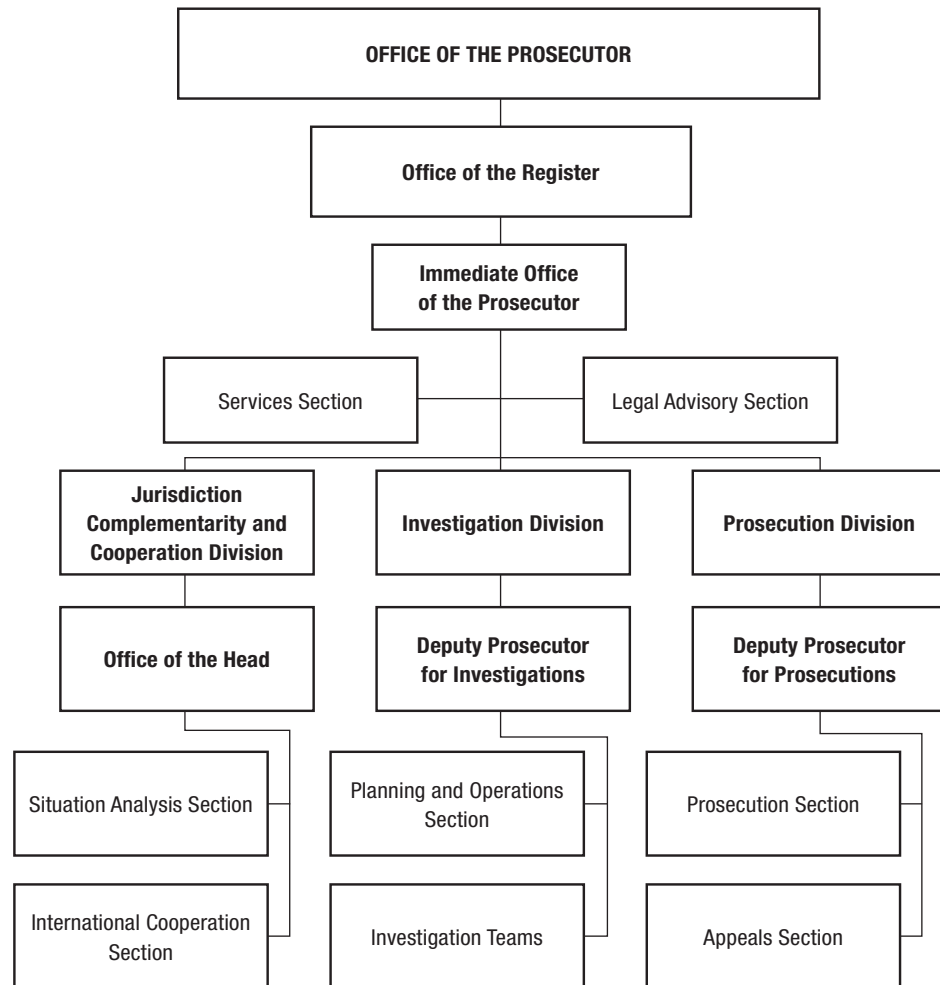
⁶⁵. Article 81(1) and (2).

⁶⁶. Article 83(2).

⁶⁷. Article 84.

⁶⁸. Article 42(1).

⁶⁹. *Proposed Programme Budget for 2007 of the International Criminal Court*, Assembly of States Parties, 22 August 2006, ICC-ASP/5/9, p. 24, paras. 64 and 67.



Source: Proposed Programme Budget 2007⁷⁰

3.1. The Prosecutor and Deputy Prosecutors

The OTP is headed by the Prosecutor, who serves on a full-time basis for a nine-year, non-renewable term. The Prosecutor is responsible for “the management and administration of the Office, including the staff, facilities and other resources thereof”⁷¹.

Under Article 42(3), the Prosecutor shall be a person of high moral character and “be highly competent in and have extensive practical experience in the prosecution or trial of criminal cases”. The Prosecutor must moreover be fluent in and have an excellent knowledge of one of the working languages of the Court.

The Prosecutor is elected by secret ballot, by an absolute majority of the members of the Assembly of States Parties.

⁷⁰. ICC-ASP/5/9, 22 August 2006, at page 20, available at www.icc-cpi.int/library/asp/ICC-ASP-5-9_English.pdf.

⁷¹. Article 42(2).



THE PROSECUTOR OF THE ICC

On 21 April 2003, **Mr. Luis Moreno Ocampo** of Argentina⁷² was elected to serve as the ICC Prosecutor by a unanimous vote of the 78 states parties present and voting. He was sworn in on 16 June 2003.

The Prosecutor can be assisted by one or more Deputy Prosecutors. The Deputy Prosecutors must be persons of high moral character and be highly competent in the prosecution or trial of criminal cases, in which they must also have extensive practical experience. As all the staff of the Court, they must be fluent in, and have an excellent knowledge of, French or English, or both.

The Deputy Prosecutors are elected by secret ballot by an absolute majority of the members of the Assembly of States Parties, from a list of three candidates nominated by the Prosecutor for each vacant position. The Deputy Prosecutors are elected for a non-renewable nine year term, unless “a shorter term is decided upon at the time of their election”⁷³.

The Deputy Prosecutor elected on 9 September 2003 to be in charge of investigations is Mr. Serge Brammertz⁷⁴, a Belgian citizen, who was elected for a term of six years. Mr. Brammertz has temporarily left the ICC on accepting to head the International Independent Investigation Commission on the assassination of former Lebanese Prime Minister Rafik Hariri in January 2006⁷⁵.

The Deputy Prosecutor in charge of Prosecutions is Ms. Fatou Bensouda⁷⁶, who was elected for a period of nine years by the Assembly of States Parties on 8 September 2004.

3.2. Functions of the OTP

As mentioned above, the OTP’s operative tasks are carried out by three main divisions: the Jurisdiction Complementary and Cooperation Division (JCCD); the Investigations Division and the Prosecution Division.

3.2.1. The Jurisdiction, Complementarity and Cooperation Division (JCCD)

The JCCD’s function is to analyse the information on crimes received by the OTP in order to decide on the opening of an investigation and to seek the necessary support and cooperation of states in the fulfilment of the OTP’s mandate.

The creation of the JCCD was partially based on the recognition that the successful implementation of the Prosecutorial Strategy in reducing the impunity gap and contributing to the prevention of crime, would require the OTP to “galvanize support and cooperation for arrest and surrender and to promote coordination among national/international partners with a view to securing arrests”⁷⁷.

72. See www.icc-cpi.int/otp/otp_bio.html.

73. Article 42(4).

74. See www.icc-cpi.int/otp/otp_bioInvest&l=fr.html.

75. See “Secretary-General Appoints Serge Brammertz of Belgium to Head Investigation into Assassination of Serge Brammertz,” 17 January 2006, available at www.un.org/News/Press/docs/2006/sga973.doc.htm and “Secretary-General Extends Term of Head of UN Probe into Hariri Assassination,” 24 July 2006, available at www.un.org/apps/news/story.asp?NewsID=19287&Cr=leban&Cr1=.

76. See www.icc-cpi.int/otp/otp_bioProsec&l=fr.html.

77. *Proposed Programme Budget for 2007 of the International Criminal Court*, Assembly of States Parties, 22 August 2006, ICC-ASP/5/9, p. 35, para. 97.



THE JURISDICTION, COMPLEMENTARITY AND COOPERATION DIVISION

The JCDD is responsible for providing analysis of, and legal advice on, any issues pertaining to jurisdiction, complementarity and cooperation that are considered necessary for the effective and efficient conduct of investigations and prosecutions. While the specific objectives of the Division are likely to change from year to year, some general tasks include:

- Analysis of communications and referrals (Article 15 and 53)
- Seeking additional information pertaining to situations of interest to the Court
- Preparation of recommendations and legal advice for the Prosecutor
- Dedicated situation analysis (admissibility, interests of justice) for each situation during the investigation and at other stages
- Negotiation and conclusion of cooperation agreements needed to support the investigations and activities of the OTP
- Efficient channeling of requests for assistance
- Building contacts and networks for the provision of information and cooperation
- Verification of conformity with procedures and standards and tracking compliance
- Building and strengthening relationships of support and cooperation in specific situations and in the general enabling environment⁷⁸.

3.2.2. The Investigation Division



THE INVESTIGATION DIVISION

The Investigation Division, headed by a Deputy Prosecutor, is responsible for conducting investigations, collecting evidence, interviewing witnesses, identifying the perpetrators, and selecting cases for prosecution.

During the investigation stage, as at all stages of proceedings, the OTP is required to take measures to ensure the protection of victims and witnesses. In order to limit the risks posed to potential witnesses, the OTP has stated its intention to limit the number of witnesses contacted. The OTP has indicated that, where possible, investigators will attempt to work with witnesses “outside areas of conflict, whether in other countries or more secure parts of the same country” and that interviews will be conducted “only following a clear assessment of protection issues and through means and in locations where exposure is minimized”⁷⁹.

⁷⁸. *Proposed Programme Budget for 2006 of the International Criminal Court*, 24 August 2005, ICC-ASP/4/5, p. 28, para. 100, p. 29, para. 104, p. 31, para. 114, p. 44, para. 123.

⁷⁹. *Report to the Assembly of States Parties on the Activities of the Court*, 16 September 2005, ICC-ASP/4/16, para. 52.

The Role of the Gender and Children Unit

Article 54 (3) (f) requires the Prosecutor to “take necessary measures, or request that measures be taken, to ensure [...] the protection of any person”. To this end, the **Gender and Children Unit** was established within the Investigation Division of the OTP. Its function is to “provide specialist advice and support in relation to victims/witness issues (e.g. pre-interview psychological assessment of potential witnesses; assistance to interviews of highly traumatized witnesses; the development and implementation of policies on the analysis and investigation methodologies regarding gender and sexual violence and violence against children)”⁸⁰.

The objectives of the Gender and Children Unit of the OTP for 2006 were “to develop a network of experts for the psychological assessment of all witnesses; to implement specialized interviewing techniques for children; and to implement a policy guaranteeing an adequate approach by the OTP on sexual and gender violence”⁸¹.

As of June 2006, there were four staff members at the Gender and Children Unit: one psycho-social expert at headquarter level, one person in the field responsible for the psycho-social assessments of victims the ICC would like to interview, one headquarter level capacity building officer, and one administrative assistant. In addition, they have a roster of nine outside psycho-social experts, of which five or six are being used actively⁸².

3.2.3. Prosecution

The Prosecution Division, headed by a Deputy Prosecutor, carries primary responsibility for the litigation of cases before the different Chambers of the Court, which includes the preparation of written submissions and the supervision of investigative and case-preparatory work. In everything it does, the Division is tasked with carrying out “fair, effective and expeditious public proceedings” as required by the Rome Statute⁸³.



THE PROSECUTION DIVISION

The Prosecution Division is responsible for the prosecution of cases that fall within the jurisdiction of the ICC at all three stages: pre-trial, trial, and appeals. While the specific objectives of the Division are likely to change from year to year, some general tasks include:

- Execution of all elements of pre-trial, trial and appeal work undertaken by the OTP
- Interacting with the Investigation Division, national and international authorities, intergovernmental and other relevant bodies and organizations on issues relevant to the conduct of trials and issues of cooperation
- Interacting with other divisions within OTP and other organs of the Court as required
- Provision of timely legal advice to investigative teams (and trial teams in case of potential appeals) / to ensure more focused investigations by determining a case focus and reviewing investigative steps from the point of view of trial necessities
- Ensuring timely and adequate presentation of applications for arrest warrants or summons to appear
- Efficient litigation before all three Court Divisions⁸⁴.

⁸⁰. *Proposed Programme Budget for 2006 of the International Criminal Court*, 24 August 2005, ICC-ASP/4/5, p.37, para. 137.

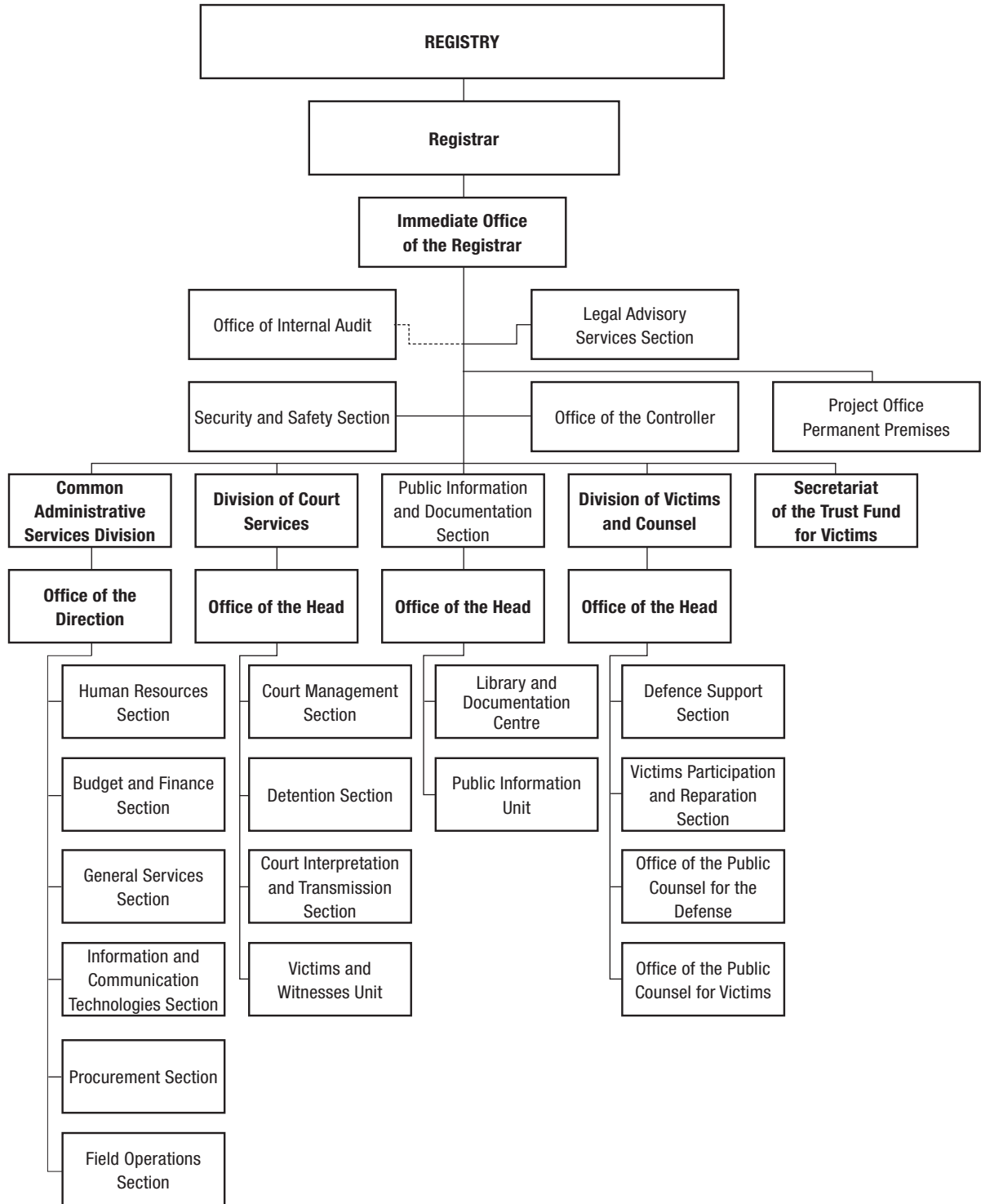
⁸¹. *Proposed Programme Budget for 2006 of the International Criminal Court*, 24 August 2005, ICC-ASP/4/5, p. 38, para. 140.

⁸². Presentation by a representative of the Gender and Children Unit during an NGO Capacity Building Seminar organized by FIDH in The Hague, 20 June 2006.

⁸³. *Proposed Programme Budget for 2007 of the International Criminal Court*, Assembly of States Parties, 22 August 2006, ICC-ASP/5/9, p. 60, para. 145.

⁸⁴. *Proposed Programme Budget for 2006 of the International Criminal Court*, 24 August 2005, ICC-ASP/4/5, p. 45, paras. 175, 178-180, p. 48, para. 190, p. 50, para. 199.

4. The Registry



Source: Proposed Programme Budget 2007⁸⁵.

⁸⁵ ICC-ASP/5/9, 22 August 2006, at page 65, available from www.icc-cpi.int/library/asp/ICC-ASP-5-9_English.pdf.

4.1. General overview

According to Article 43 (1), the Registry is responsible for the “non-judicial aspects of the administration and servicing of the Court”. The Registry provides administrative and operational support to the judicial and prosecutorial pillars of the Court. It deals with such matters as judicial administration, maintaining court records, interpretation and translation matters, detention arrangements and public information, outreach and external relations. It serves as the “channel of communication of the Court”⁸⁶. It is also responsible, through the **Victims and Witness Unit**, for implementing measures of protection, support and assistance to victims and witnesses⁸⁷.

The Registry is headed by the Registrar, who is “the principal administrative officer of the Court” and works under the authority of the President⁸⁸. The judges elect the Registrar, “by an absolute majority by secret ballot, taking into account the recommendations of the Assembly of States Parties”⁸⁹.



THE REGISTRAR OF THE ICC

On 23 June 2003, **Mr. Bruno Cathala**, a French citizen, was elected by the judges of the ICC as Registrar of the ICC in a plenary meeting of the judges⁹⁰. He will serve a five-year term, renewable once⁹¹.

The Regulations of the Registry

On 6 March 2006, the Regulations of the Registry (Regulations (RR))⁹² came into force. These Regulations concern the general functioning, organisation and management of the Registry.

4.2. Units of the Registry specifically dedicated to Victims and Witnesses

Two units specifically dedicated to victims and witnesses have been established within the Registry:

- the Victims and Witnesses Unit (VWU);
- the Victims Participation and Reparation Section (VPRS);

4.2.1. The Victims and Witnesses Unit (VWU)⁹³

Structure and composition

The Victims and Witnesses Unit (VWU) is composed of three sub-units: the Support sub-unit, the Operations sub-unit and the Protection sub-unit, all of which work under the supervision of the Chief of the Unit. The VWU has a permanent presence in the field.

The members of staff of the VWU are to include persons with expertise in trauma, including trauma related to crimes of sexual violence. It may also include staff with experience in the following areas: witness protection and security; children, in particular traumatized children; elderly persons, in particular in connection with armed conflict and exile trauma; and persons with disabilities⁹⁴.

⁸⁶. Rule 13.

⁸⁷. Rules 16 -19.

⁸⁸. Article 43(2).

⁸⁹. Article 43(4); Rule 12 contains further details of the election procedure.

⁹⁰. See www.icc-cpi.int/registry/registrar.html.

⁹¹. Article 43(5).

⁹². Enacted in accordance with Rule 14.

⁹³. See www.icc-cpi.int/victimissues/witnessprotection.html.

⁹⁴. Rule 19.

Functions

The VWU was created in accordance with Article 43 (6), to provide “protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses⁹⁵”. It is the main body responsible for ensuring the implementation of measures of protection, support and assistance to victims and witnesses at all stages of proceedings⁹⁶.

The VWU has a vital role in advising other organs of the Court on protection issues. The VWU advises the Prosecutor and the Chambers on appropriate protective measures to be taken⁹⁷ and provides more general advice, training and assistance to all organs of the Court on how to ensure the safety and well-being of victims and witnesses.

The VWU also has responsibility for the negotiation of agreements with states concerning the resettlement on state territory of witnesses or victims that are traumatised or threatened⁹⁸.

4.2.2. The Victims Participation and Reparation Section (VPRS)⁹⁹

The creation of the Victims Participation and Reparation Section was not provided for in the Statute or in the Rules of Procedure and Evidence. It was first envisaged by the Preparatory Commission for the ICC in the Court’s budget for 2002 and 2003 and later further refined by the Assembly of States Parties in the draft budget for 2004 and by the Court in Regulation 86(9)¹⁰⁰. The Section was assigned functions including those listed in Rule 16, which had initially been assigned to the VWU.

Structure and composition

The VPRS has a permanent presence in the field. VPRS officers work both on participation and reparation issues, either with a general or a situation-country approach. Within this section there is also a Trust Fund Liaison Officer, who serves as a communication channel between the Registry and the Board of Directors of the Trust Fund.

Functions

Its main function is to provide assistance to victims and groups of victims in both the participation and the reparation processes, including providing notification to victims and their legal representatives of relevant court decisions and developments in the proceedings, disseminating standard application forms, assisting them in obtaining legal advice, organising their legal representation, and assisting them in their participation to the proceedings¹⁰¹.

In order to identify and reach victims, the VPRS is developing relationships with victims’ groups, civil society organisations, and other national and international institutions.

The VPRS is also required to deal with additional functions relating to participation of victims in the proceedings¹⁰², and concerning reparations to victims¹⁰³.

⁹⁵. Article 43(6), see Chapter VI, *Protection Support and Assistance*.

⁹⁶. Article 43(6); Rule 17(2)(a)(i); and Regulation (RR) 101.

⁹⁷. Article 68(4) and Rule 17 (2)(a)(ii).

⁹⁸. See www.icc-cpi.int/victimissues/witnessprotection.html&l=en.

⁹⁹. See www.icc-cpi.int/victimissues/victimsparticipation.html; and generally Chapter IV, *Participation*.

¹⁰⁰. See *Draft Budget for the First Financial Period of the Court*, Preparatory Commission for the ICC, PCNICC/2002/1/Add.1, 23 July 2002, paras. 90 and 91; *Draft Programme Budget for 2004*, Assembly of States Parties, ICC-ASP/2/2, 23 May 2003, paras. 174-184; and Regulation 86(9).

¹⁰¹. See, e.g., *Proposed Programme Budget for 2006 of the International Criminal Court*, 24 August 2005, ICC-ASP/4/5, pp. 105-106, paras. 435-445.

¹⁰². See Chapter IV, *Participation*.

¹⁰³. See Chapter VII, *Participation and the Trust Fund for Victims*.



VICTIMS PARTICIPATION AND REPARATION SECTION

ICC - International Criminal Court

Victims Participation and Reparation Section

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4.3. The Office of Public Counsel for Victims¹⁰⁴

The Office of Public Counsel for Victims (OPCV) was established within the Registry under the Regulations of the Court, on 19 September 2005. Although the OPCV is situated within the Registry, under Regulation 81 (2) it is a “**wholly independent office**”, and comes within the remit of the Registry only for administrative purposes.

Structure and composition

The Office is composed of legal counsel who meet the necessary qualification criteria to offer legal representation, legal assistants and administrative assistants¹⁰⁵.

Functions

The OPCV plays a key role in ensuring effective victim participation in the proceedings before the ICC. Under Regulation 80 (2) “the Chamber may appoint counsel from the Office of Public Counsel for Victims” as a legal representative of victims.

Under Regulation 81 (4), the role of the OPCV is also to:

“[P]rovide support and assistance to the legal representative for victims and to victims, including, where appropriate:

- Legal research and advice;
- Appearing before a Chamber in respect of specific issues”.



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Office of Public Counsel for Victims

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¹⁰⁴. See www.icc-cpi.int/victimsissues/victimscounsel/OPCV.html; and Chapter V, *Legal Representation*.

¹⁰⁵. Regulation 81(3).

III - THE TRUST FUND FOR VICTIMS¹⁰⁶

The Trust Fund for Victims was established by the Assembly of States Parties (ASP) in 2002, in the *Resolution on the establishment of a fund for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims*¹⁰⁷.

1. Structure and composition

The Trust Fund is an independent entity. The Trust Fund has its own funding, which does not form part of the regular budgetary framework of the Court, and the Court is not entitled to use the resources of the Fund.

The resolution of the ASP established a **Board of Directors** to supervise the activities of the Trust Fund¹⁰⁸. The Board is composed of five members, each serving for a three-year term, renewable once. The members serve in an individual capacity and on a voluntary basis¹⁰⁹. They are elected by the Assembly of States Parties according to the following criteria: an equitable geographical distribution; an equitable gender distribution; and an equitable representation of the principal legal systems of the world¹¹⁰.



THE BOARD OF DIRECTORS OF THE TRUST FUND

On 12 September 2003, the Assembly of States Parties elected the first members of the Board of Directors. On 30 November 2006, the ASP re-elected 4 members of the Board. At the time of writing, one post remains vacant. The current members of the Board are:

- **Mr. Arthur N.R. Robinson** (Trinidad and Tobago) (replaced His Excellency **Mr. President Oscar Arias Sanchez**, former President of Costa Rica on 16 May 2006)
- His Excellency **Mr. Tadeusz Mazowiecki**, former Prime Minister of Poland
- Madame **Simone Veil**, former Minister of Health of France and former President of the European Parliament
- **Archbishop Desmond Tutu**, former Chairman of the Truth and Reconciliation Commission of South Africa.

The **Trust Fund Secretariat** was established by a resolution of the Assembly of States Parties in 2004¹¹¹ to assist and support the Board of Directors with the day-to-day operation and administration of the Trust Fund, including the conduct of fund raising activities. In 2004, the Assembly of States Parties approved a proposal by the Board of Directors for the creation of a post of Executive Director of the Secretariat¹¹², to be responsible for providing assistance to the members of the Board on matters relating to the administration of the Trust Fund, conducting consultations and participating in negotiations with representatives of states parties and other organizations, and generally to ensure the proper functioning of the Trust Fund. However, recruitment to the Secretariat has been postponed until the Executive Director takes up his position (expected in February 2007).

¹⁰⁶. See www.icc-cpi.int/vtf.html.

¹⁰⁷. Resolution ICC-ASP/1/Res.6, 9 September 2002.

¹⁰⁸. Annex to Resolution ICC-ASP/1/Res.6 (2002), para. 7; see www.icc-cpi.int/vtf/vtfboard.html.

¹⁰⁹. Annex to Resolution ICC-ASP/1/Res.6 (2002), para. 2 and Regulation (VTF) 16.

¹¹⁰. Annex to Resolution ICC-ASP/1/Res.6 (2002), para. 3.

¹¹¹. ICC-ASP/3/Res.7, Establishment of the Secretariat of the Trust Fund for Victims, adopted 10 September 2004.

¹¹². Resolution ICC-ASP/3/Res.7, 10 September 2004.

2. Functions

Under Article 75 (2), Article 79 and Rule 98, as clarified by the **Regulations of the Trust Fund for Victims**, the Trust Fund is responsible for the implementation of reparations orders of the Court; and the design of projects of assistance to victims and their families (using only voluntary contributions).



The main roles of the Trust Fund:

- To actively seek out voluntary contributions and establish transparent procedures for the receipt and management of these and other resources transferred to it, including fines and forfeitures and funds from reparation orders;
- To help implement reparation awards ordered against a convicted person;
- To use the contributions it receives from voluntary contributions to finance projects for the benefit of victims and their families¹¹³.

The funds collected by the Trust Fund for Victims will come from two main sources:

- Funds collected through fines, forfeitures and reparations ordered by the Court against convicted persons; and
- Voluntary contributions from states, individuals, and organizations.

The Regulations of the Trust Fund for Victims

The Regulations of the Trust Fund for Victims (Regulations (VTF)) were prepared by the Board of Directors and finally adopted at the 4th Session of the Assembly of States Parties in 2005¹¹⁴. They set out general provisions concerning the management and oversight of the Trust Fund, the receipt of funds, and the activities and projects of the Trust Fund.



Contributions and Pledges to the Trust Fund for Victims as of 29 August 2006¹¹⁵

- Amount received: EURO 1 630 237.20
- Amount pledged: EURO 275 000.00

¹¹³. See *The Draft Regulations for the Trust Fund for Victims: Questions and Answers*, Victims' Rights Working Group, July 2005, p. 2, www.vrwg.org/Publications/01/VRWG_Juilo5_TVF_Q&A_ENG.pdf.

¹¹⁴. Resolution ICC-ASP/4/Res.3, adopted 3 December 2005.

¹¹⁵. The total sum of contributions and pledges to the Trust Fund at any given time can be obtained from the Court's website at www.icc-cpi.int/vtf.html.

IV - THE ASSEMBLY OF STATES PARTIES

The Assembly of States Parties is a management oversight and legislative body of the ICC. It is composed of representatives from each state party to the Rome Statute and observers from other states. Its functions include the adoption of normative texts and the annual budget, as well as the election of judges and of the Prosecutor and the Deputy Prosecutors. The Assembly meets once a year. In order to assist the Assembly in discharging its responsibilities, the Rome Statute has provided for the creation of a Bureau, which consists of a President, two Vice-presidents and 18 members elected by the Assembly for a three-year term.

The Assembly may establish subsidiary bodies as it considers necessary. Among other bodies, it has established a Committee on Budget and Finance¹¹⁶ and a Special Working Group on the Crime of Aggression¹¹⁷. The Permanent Secretariat provides support and assistance to the Assembly and its Bureau and subsidiary bodies in the discharge of their responsibilities¹¹⁸.

V - THE STRATEGY OF THE PROSECUTOR



COMMUNICATIONS RECEIVED BY THE PROSECUTOR (as of September 2006)

- 1732 communications from 103 different countries.
- 3 referrals from states parties (Uganda, the Democratic Republic of Congo (DRC) and the Central African Republic). 1 referral from the UN Security Council (Darfur, Sudan). 80% of communications were found to be manifestly outside jurisdiction after initial review.
- 10 situations have been subjected to intensive analysis; of these, 3 proceeded to investigation, 2 were dismissed, and 5 analyses are ongoing¹¹⁹.

Three investigations have been opened, in situations involving thousands of wilful killings and large-scale sexual violence and abductions. Small teams are investigating cases in sequence. Upon completion of each case, the OTP examines whether other cases in the situation warrant investigation or whether to select a new situation¹²⁰.

¹¹⁶. Resolution ICC-ASP/1/Res.4, adopted on 3 September 2002.

¹¹⁷. Resolution ICC-ASP/1/Res.1, adopted on 9 September 2002.

¹¹⁸. Resolution ICC-ASP/2/Res.3, adopted on 12 September 2003.

¹¹⁹. *Update on communications received by the Office of The Prosecutor of the ICC*, 10 February 2006, available at www.icc-cpi.int/organs/otp/OTP_Update_on_Communication_10_February_2006.pdf.

¹²⁰. *Ibid.*

The three situations under investigation are: DRC, Uganda and Sudan (Darfur)

Negative responses by the Prosecutor¹²¹

On 10 February 2006, the Prosecutor decided that following the analysis of communications received:

- **concerning Iraq**, that the Statute's requirements were not satisfied:
“Even where there is a reasonable basis to believe that a crime has been committed, this is not sufficient for the initiation of an investigation by the International Criminal Court. The Statute then requires consideration of admissibility before the Court, in light of the gravity of the crimes and complementarity with national systems¹²².”
- **concerning Venezuela**, that the Statute's requirements were not satisfied:
“A considerable challenge in analysing the information received was the lack of precision as well as external inconsistencies in the information¹²³”.

Source: www.icc-cpi.int [September 2006]

Before initiating an investigation, the Prosecutor must determine whether “there is a reasonable basis to proceed” with an investigation. In order to make this decision, the Prosecutor must consider the factors listed under Article 53(1), namely:

- a) That there is a reasonable basis to believe that a crime within the *jurisdiction* of the court has been committed or is being committed. This includes consideration of the material jurisdiction, personal and/or territorial jurisdiction as well as the temporal jurisdiction of the ICC.
- b) That the cases that might potentially arise from the investigation would be admissible before the Court. The admissibility test is composed of two aspects: *gravity and complementarity*. Although any crime within the jurisdiction of the Court is “grave”, the Statute requires that even where the subject-matter jurisdiction is satisfied, an additional threshold of gravity be attained to “justify further action by the Court”¹²⁴. As for complementarity, the Prosecutor can only proceed if potential cases on which the ICC would likely focus have not been genuinely investigated or prosecuted by the national tribunals of the state concerned¹²⁵.
- c) That the investigation will serve the *interests of justice*.

In deciding whether to prosecute a case, the Prosecutor is required to apply a similar test, taking into consideration jurisdiction, admissibility and the ‘interests of justice’¹²⁶.

The OTP has issued a draft policy paper setting out criteria to analyse the ‘gravity’ of crimes within the jurisdiction of the ICC and to select situations and cases for investigation and prosecution. In this draft paper, the OTP recognises that the assessment of gravity is a complex process, based not only on the number of victims but on other factors, including the scale, nature, manner of commission and impact of the crimes. FIDH submitted comments and recommendations to the OTP, which stressed the importance of taking into account the impact of crimes on victims and communities, on regional peace and security, and the potential impact of investigations as a deterrent element for commission of further crimes¹²⁷.

¹²¹. See www.icc-cpi.int/organs/otp/otp_com.html.

¹²². See www.icc-cpi.int/library/organs/otp/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf, p.9.

¹²³. See www.icc-cpi.int/library/organs/otp/OTP_letter_to_senders_re_venezuela_9_February_2006.pdf, p.3.

¹²⁴. Article 17(1)(d).

¹²⁵. For further analysis on the “complementarity” principle, see Section I – 1.4 “Complementarity and Admissibility” above.

¹²⁶. Article 53(2).

¹²⁷. FIDH, *Comments on the OTP draft policy paper on criteria for selection of situations and cases*, September 2006, available at www.fidh.org/article.php?id_article=3988.



THE INTERESTS OF JUSTICE

Under Article 53 (1) (c), “[i]n deciding whether to initiate an investigation, the Prosecutor shall consider whether . . . [t]aking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that **an investigation would not serve the interests of justice**”.

Article 53 (2) (c) envisages that the Prosecutor may come to the conclusion, “upon investigation . . . that there is not a sufficient basis for prosecution because: [a] **prosecution is not in the interests of justice**, taking into account all the circumstances, including the gravity of the crime, the **interests of victims** and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crimes”.

FIDH has repeatedly expressed its opposition to the concept of ‘interests of justice’ being used as justification not to open or to suspend investigations and/or prosecutions, on the basis of political considerations including in the context of peace negotiations. In light of the objectives and scope of the Rome Statute, FIDH believes that the concept “interests of justice” must be interpreted to include only factors relating to the good administration of justice and the right to a fair trial¹²⁸.

The ICC has jurisdiction over the most serious crimes of international concern and is an institution with limited resources. Taking these two factors into consideration, prosecutions will focus mainly on those who bear the greatest responsibility for the crimes concerned. It is a policy of the OTP to conduct only a limited number of prosecutions in each situation¹²⁹.

As a result of the strategy of focusing exclusively on the leaders or high-ranking officials, the Court will leave an “impunity gap” unless national authorities take steps toward bringing to justice perpetrators who are lower down in the chain of command¹³⁰. The OTP is to play a role in encouraging the strengthening and rebuilding of national justice systems through what it calls “positive complementarity”¹³¹.

The Prosecutor has also indicated that he does not intend to conduct long trials with numerous charges, but rather short, expeditious trials where the accused is charged only for a limited number of crimes. The counts for which the accused is prosecuted should be representative of the overall criminal activity in which the person concerned was involved¹³².

Finally, it should be pointed out that the OTP works with small and multidisciplinary investigation teams. The Prosecutor has adopted a sequential approach, which means that an investigation regarding a case within a situation must be completed, before he will open an investigation into a new case within the same situation¹³³. FIDH believes that this approach might have adverse effects on the preservation of evidence and effectiveness of the investigation¹³⁴.

¹²⁸. *Reflexions sur la notion ‘intérêts de la justice’, au terme de l’Article 53 du statut de Rome*, FIDH, 20 June 2005, see www.fidh.org/article.php3?id_article=2856; and FIDH, *Comments on the OTP draft policy paper on the interests of justice*, September 2006, available at www.fidh.org/article.php3?id_article=3987. Only the Security Council has the power to request that an investigation be suspended through adoption of a Chapter VII resolution (i.e. to maintain international peace and security). See Article 16.

¹²⁹. Paper on some policy issues before the Office of the Prosecutor, see www.icc-cpi.int/library/organs/otp/030905_Policy_Paper.pdf, September 2003, para. 2.1.

¹³⁰. *Ibid.*, para. 2.2.

¹³¹. See, for example, Statement by Prosecutor Luis Moreno Ocampo on Prosecutorial Strategy in *Seventh Diplomatic Briefing of the ICC*, 29 June 2006, at 7, available at www.icc-cpi.int/library/about/DB7-St_English.pdf

¹³². *Ibid.*

¹³³. *Update on communications received by the Office of The Prosecutor of the ICC*, 10 February 2006, available at www.icc-cpi.int/organs/otp/OTP_Update_on_Communication_10_February_2006.pdf, page 5.

¹³⁴. Similar concerns about the loss of evidence and distortion of witness evidence were voiced by Antonio Cassese in his *Observations on Issues Concerning the Protection of Victims and the Preservation of Evidence in the Proceedings on Darfur Pending before the ICC*, ICC-02/05 of 25 August 2006.

