



Pravna fakulteta
Univerza v Ljubljani



The cooperation between ICC and States Parties

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Part I

The relations between ICC and State Parties

Ius cogens vs. International Criminal Law

Ius cogens

- Rules accepted and recognized as mandatory by International Law Community
- Article 53 of Vienna Convention on the Law of Treaties (1969).
- Protection of the values on which the International Community stands

International Criminal Law

- A set of rules punishing the most serious violations in the world
- Traditional description of international crimes without – or with very few – references to ius cogens

BUT

- Instrument to protect the values on which the International Community stands

Vienna Convention on the Law of Treaties Article 53

Article 53. TREATIES CONFLICTING WITH A PEREMPTORY NORM
OF GENERAL INTERNATIONAL LAW (“JUS COGENS”)

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.



Rome Statute of ICC

Article 1

Article 1 **The Court**

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.

Court Jurisdiction *ratione materiae*

- Genocide (Article 6).
- Crimes against Humanity (Article 7).
- War Crimes (Article 8).
- Crime of Aggression

Genocide

The intentional action to destroy a people, in whole or in part.



(S. MICHILINI, *Genocidio*, 1976)



Crimes against Humanity

Attack directed against any civilian population or an identifiable part of a population.



War Crimes

Serious violation of the Law of War (for example, intentional killing of the prisoners or civilians)



The war which is coming (Bertolt Brecht)

The war which is coming
Is not the first one. There were
Other wars before it.
When the last one came to an end
There were conquerors and conquered.
Among the conquered the common people
Starved. Among the conquerors
The common people starved too.



Court Jurisdiction

ratione temporis

The Court doesn't prosecute the crimes committed before the entry into the force of Rome Statute (Article 11.1)

National Criminal Jurisdiction vs. Court Jurisdiction

National Criminal Jurisdiction

- The case is being investigated or prosecuted by the State;
- The case has been investigated by the State, but the State decided not to prosecute it;
- The person concerned has already tried;
- The case is not of sufficient gravity to justify further actions by the Court.

(Article 17.1)

Court Jurisdiction

- State which has jurisdiction over the case, doesn't want to take action.
- State which has jurisdiction over the case, doesn't have the possibility to take action.

Conflicts of Jurisdiction

There is a *conflict of Jurisdiction* between the Court and States when the Court takes action on a case over which States have jurisdiction and which want to pursue.

Previous experiences

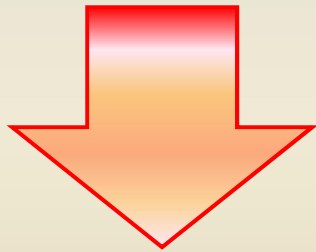
- International Military Tribunal of Nuremberg
 - International Military Tribunal for the Far East
 - International Military Tribunal for the former Yugoslavia
 - International Military Tribunal for Rwanda
- Tribunals established:
 1. *Ex post facto*;
 2. In areas without autonomous and organized State structure.



Nowadays

Case Lubanga

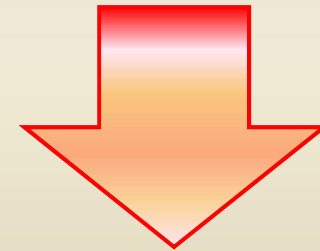
- The State (Democratic Republic of Congo) doesn't want to pursue Mr. Lubanga



- The ICC Prosecutor applies the Warrant of Arrest.

Case Katanga

- The State (Democratic Republic of Congo) doesn't have the possibility to pursue Mr. Katanga



- The Court (Trial Chamber II) exercises its jurisdiction over the Case *Katanga*.

Previous experiences vs. ICC

Previous experiences

- The problem of State sovereignty didn't exist
- The Tribunals Jurisdiction were exclusive

ICC

- *Lis pendens* rule (Article 17 of Rome Statute)
- The Court Jurisdiction is complementary to domestic criminal jurisdictions
- States are the final arbiters in this area

D. Anzilotti, “Corso di diritto internazionale”

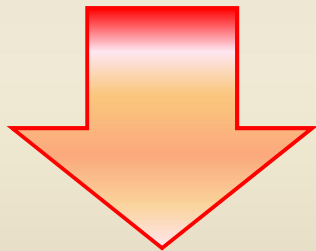
«La delimitazione territoriale degli Stati è la premessa su cui riposano ed il punto di partenza da cui si svolgono le loro relazioni»

(1928)

Complementarity vs. Subsidiarity

Complementarity

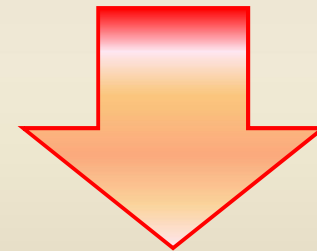
- Principle of ICC (Article 17 of Rome Statute)
- Subjective criterion: wish of States to take action



- ICC exercises its jurisdiction over a case only after checking that States don't want take action.

Subsidiarity

- Principle of EU Law (Article 5 TFEU)
- Objective criterion: the most efficient action



- The norm describes a purpose; States or international organizations take action, depending to the most efficient subject.

Situation vs. Case

Article 13 Exercise of jurisdiction

The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:

- (a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;
- (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or
- (c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.

Article 14 Referral of a situation by a State Party

1. A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes.
2. As far as possible, a referral shall specify the relevant circumstances and be accompanied by such supporting documentation as is available to the State referring the situation.

P. Kirsch, D. Robinson
“Referral by States Parties”

«Neither the Statute nor the Rules of Procedure and Evidence offer a clear explanation of the concept of a “situation”»

Relations between ICC and States Parties

- ICC exercises its jurisdiction after checking that States, which have jurisdiction on the case, don't want or don't have the possibility to pursue the case (*Lis pendens rule* – Article 17);
- States unwilling to pursue the case refer it to the Prosecutor (Articles 13-14);
- Prosecutor evaluates if there are sufficient elements to prosecution (Article 53.1: he is *dominus* of the criminal action).

Rome Statute of ICC

Article 53.1

Article 53

Initiation of an investigation

1. The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether:
 - (a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;
 - (b) The case is or would be admissible under article 17; and
 - (c) Taking 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.

If the Prosecutor determines that there is no reasonable basis to proceed and his or her determination is based solely on subparagraph (c) above, he or she shall inform the Pre-Trial Chamber.



Part II

International Cooperation and Judicial Assistance

Direct enforcement model vs. Indirect enforcement model

Direct enforcement model.

- Shared criminal judicial system
- Police headed by shared criminal judicial system
- Prison system headed by shared criminal judicial system

Indirect enforcement model.

- The Court will have to rely on the cooperation with States Parties to investigation, trial and execution of sentences

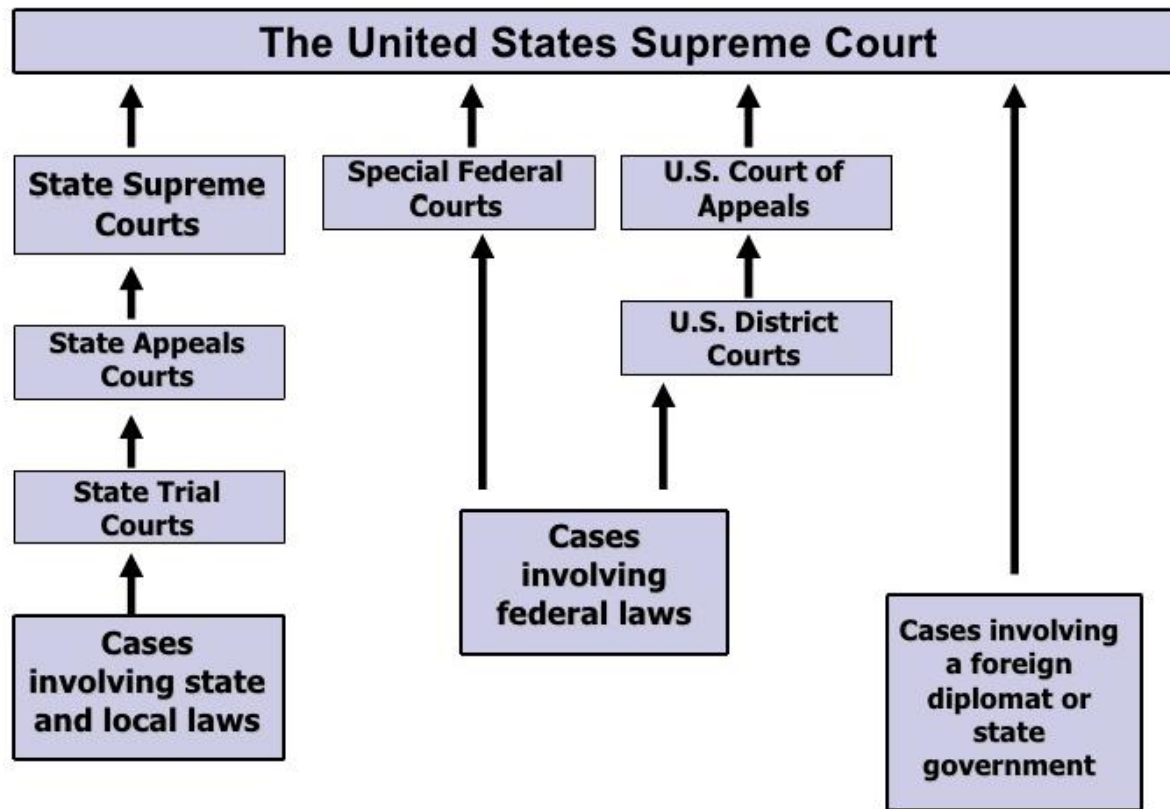
Direct enforcement model.

U.S. judicial system / 1

1. U.S. Federal Court System (Supreme Court, U.S. Courts of Appeals, U.S. District Courts).
2. U.S. State Court System (State Supreme Court, State Appeals Courts, State Trial Courts).



Direct enforcement model. U.S. judicial system / 2



Direct enforcement model. U.S. judicial system / 3

U.S. Federal Supreme Court refers «to the evolving standards of decency that mark the progress of a maturing society to determine» – for example – «which punishments are so disproportionate as to be cruel and unusual».

(Roper vs. Simmons – 1st march 2005)



Indirect enforcement model. Goran Jelusic



(www.sense-agency.com)

Italy gave its disponibility for the execution of sentences of International Tribunal for the Former Yugoslavia. Jelusic was imprisoned in Padua prison.



Indirect enforcement model.

U. Grozio: “Aut dedere, aut iudicare”

(De iure belli ac pacis, libro II, cap. XXI, parr. III e IV (1642))

The offender that takes refuge in different State from *locus commissi delicti*, must be:

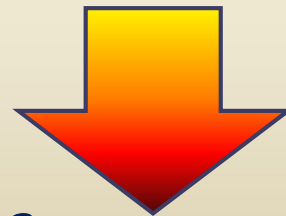
a) extradited;

b) prosecuted

by the State which welcomed him.

International Military Tribunal of Nuremberg

- Created by London Agreement (8 august 1945)
- Exclusive jurisdiction on the matters of Article 6 of Tribunal Charter.
- Distinction between State jurisdiction and International Military Tribunal jurisdiction.



Direct enforcement model

Crimes against peace

Namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.

(Art. 6, litt. a) of the Tribunal Charter)

War Crimes

Namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.

(Art. 6, litt. b) of the Tribunal Charter)

Crimes against humanity

Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

(Art. 6, litt. c) of the Tribunal Charter)



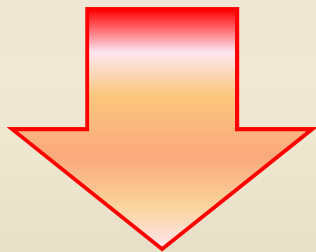
... and ICC ???



Assistance vs. Cooperation

Assistance

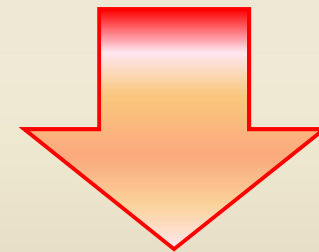
States recognize ICC as the only jurisdiction for the core crimes.



Hoped **direct enforcement model.**

Cooperation

States take every action which allow the Court to pursuit the case.



Existing **indirect enforcement model.**

Article 86 of the Rome Statute

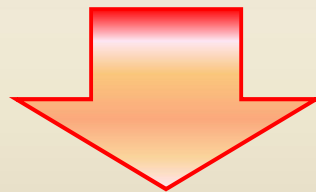
Article 86

General obligation to cooperate

States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.

Fully cooperation

- In official French version, *pleinement*
- In official Spanish version, *plenamente*
- ...
- In not official Italian version, *pienamente*



States are the *longa manus* of ICC

States are *Court-friendly*

(B. Swart)

Forms of cooperation

- Surrender of persons to the Court (Article 89)
- Identification of persons (Article 93)
- Taking testimony, expert opinions and report necessary to the Court (Article 93)
- Interrogation of persons being investigated or prosecuted (Article 93)
- Inspections, searches, seizures (Article 93)
- Protection of victims (Article 93)
- ... and “any other type of assistance which is not prohibited by the law of the requested State” (Article 93)

Part III
The current problems
of ICC

Current problems

Complicated relationship between ICC and U.S.



South Africa, Gambia and Burundi want to withdraw from ICC



President Omar al-Bashir in Khartoum, Sudan, 2015. PHOTO: GETTY IMAGES

Complicated relationship between ICC and U.S. / 1

ICC to Investigate US War Crimes in Afghanistan? Hold the Cheers

By [Stephen Lendman](#)

Global Research, November 03, 2016

Region: Asia, Middle East & North Africa
Theme: Crimes against Humanity, Law and Justice



Like 48



According to Professor David Bosco, writing in *Foreign Policy*, “(t)he prosecutor’s office of the International Criminal Court (ICC) is ready to initiate a full investigation of a range of possible war crimes and crimes against humanity in Afghanistan, including some by US personnel, according to several knowledgeable sources.”

The ICC move would mark the first time that a formal ICC investigation has scrutinized US actions and sets up a possible collision with Washington.

(Global Research – Article by Stephen Lendman – 3^o november, 2016)

Complicated relationship between ICC and U.S. / 2

- ICC doesn't pursue crimes committed before the entry into the force of the Rome Statute (**Juli 1, 2002**)
- ...
- US-led NATO forces attacked Afghanistan without just cause on **7 October, 2001.**
- ICC is not an universal jurisdiction of direct enforcement model
-  Actually, indirect enforcement model → Respect of State sovereignty
- ...
- U.S. is **not a participant** in the ICC.

Complicated relationship between ICC and U.S. / 3

- It is true that Article 11.1 of Rome Statute defines the Court jurisdiction *ratione temporis* ...
- It is true that the American War in Afghanistan began before the entry into the force of Rome Statute

BUT

- Actually war crimes continue daily.

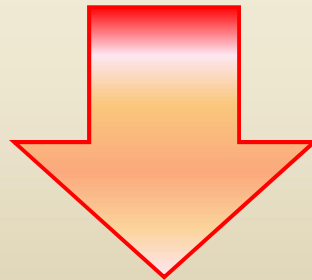
All post-WW II US wars were and continue being waged illegally against nonbelligerent countries reflecting over 70 years of unaccountability.

(Global Research – Article by Stephen Lendman – 3^o november, 2016)

Complicated relationship between ICC and U.S. / 4

- 2000. Bill Clinton signed the Rome Statute.
- May 6, 2002. Note of President George W. Bush's Administration.

**THE U.S. RECOGNIZED NO OBLIGATION
TOWARD THE ROME STATUTE.**



- U.S. protect military personnel against criminal prosecution by ICC.

Complicated relationship between ICC and U.S. / 5

This is “one of the most difficult investigations [which] the Court has undertaken, both practically and politically”.

(Prof. David Bosco)

South Africa, Gambia and Burundi want to withdraw from ICC / 1

THE WALL STREET JOURNAL.

Oct. 31, 2016

OPINION | COMMENTARY

Cracks in the International Criminal Court

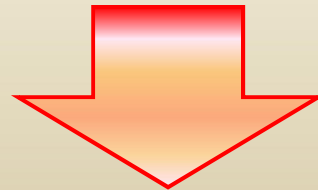
Human-rights violators may not fear the ICC, but sovereign nations and their elected officials should.

South Africa, Gambia and Burundi want to withdraw from ICC / 2

- African Nations didn't want the arrest and the referral of Sudan's President Omar al-Bashir to ICC.

BUT

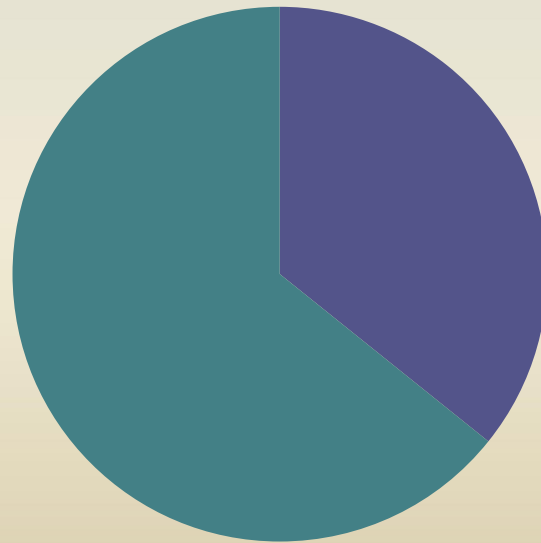
- ICC took action: Sudan didn't have the possibility to pursue the case (*Lis pendens* rule).



- Africa's discontent for the ICC project.

South Africa, Gambia and Burundi want to withdraw from ICC / 3

U.N. and ICC



- U.N. members unwilling to join to ICC (69/193)
- U.N. members which have signed the Rome Statute (124/193)

South Africa, Gambia and Burundi want to withdraw from ICC / 4

- A lot of ICC cases are against Africans.
- ICC is an European project (the last European neocolonial pretext to interfere in African national affairs?).
- ICC compromises African justice systems.
- ICC compromises all the justice systems in the world: for this reason, U.S., Russia, China, India, etc. don't join to ICC.



South Africa, Gambia and
Burundi want to withdraw from
ICC.

South Africa, Gambia and Burundi want to withdraw from ICC / 5

“ICC advocates also argue the Prosecutor is supervised by the Rome Statue’s 124 State Parties. This is purest fantasy. Anything supervised by 124 gouvernements isn’t supervised by anyone”.

(John Bolton)

The end

Thank you all!

A decorative graphic consisting of several horizontal lines of varying lengths and colors (teal, light blue, and white) extending from the right side of the slide towards the center.

