

ROY S. LEE

SIMULATION EXERCISE Background

•
1.. The jurisdictional framework of the ICC in brief¹
The Rome Statute sets up a multi-tiered system for determining whether the ICC can prosecute an individual for a particular crime. Beyond traditional jurisdictional questions, the Statute introduces the concept of complementarity and the attendant concepts of deferral and admissibility. Even if the court has jurisdiction, prosecution may not proceed if it is deferred or ruled inadmissible.

A. Jurisdiction.

Assuming it has temporal and subject matter jurisdiction, the Court may exercise jurisdiction if one of the following events occurs:

- (a) A State Party refers the case to the Prosecutor;
- (b) The Security Council acting under Chapter VII of the Charter of the United Nations refers a situation to the Prosecutor;
- (c) The Prosecutor initiates an investigation in accordance with article 15.²

If a State Party refers the case or the Prosecutor initiates his or her own investigation, Article 12 imposes a further requirement: the alleged crime must have been committed on the territory of or by a national of a State that accepts the jurisdiction of the Court.³ A State accepts the jurisdiction of the Court either by becoming a State Party or, for purposes of the alleged crime only, by lodging a declaration with the Registrar to that effect.⁴

B. Complementarity

If the Prosecutor concludes there is a reasonable basis to proceed with an investigation, he or she must notify all states parties and those states which could exercise jurisdiction over the alleged crime and give these states the option to conduct their own investigations.⁵ A State has one month to notify the Court that it is conducting or has conducted its own investigation. At the same time, a State may ask the Prosecutor to defer its investigation.

¹ This is just a quick guide for the participants. The text of the Rome Statute is final in case of any conflict.

² Art. 13.

³ Art. 12(2).

⁴ Art. 12(1) and (3).

⁵ Art. 18(1).

C. Deferral

The Security Council may request a deferral. “No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.”⁶

D. Admissibility.

Under Article 17, a case is inadmissible if the Court determines one of the following:

- (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution.
- (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute.
- (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3.
- (d) The case is not of sufficient gravity to justify further action by the Court.⁷

“Unwillingness“ and “inability“ are further defined in Article 17.

E. Pre-trial

The Prosecutor shall initiate an investigation if he or she concludes there is a reasonable basis to proceed but it shall defer to a State investigation upon request unless the Pre-Trial Chamber orders otherwise.⁸ In determining whether there is reasonable basis to proceed, 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

⁶ Art. 16.

⁷ Art. 17(1).

⁸ Articles 15 and 53.

Article 15 (3) – “If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation.”

Article 15(4) – “If the Pre-Trial Chamber [...] considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case.”

- (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.⁹

If after investigation, the Prosecutor believes charges are warranted, he or she can apply to the Pre-Trial Chamber for arrest warrant or summons to appear.¹⁰ If the accused is surrendered or transferred to Court without a warrant or a summons, the Pre-Trial Chamber must hold a hearing within a reasonable time to confirm the charges upon which the Prosecutor intends to seek trial.¹¹ “Prior to the confirmation of the charges, challenges to the admissibility of a case or challenges to the jurisdiction of the Court shall be referred to the Pre-Trial Chamber.”¹²

The court’s jurisdiction or a case’s admissibility may be challenged by:

- (a) An accused or a person for whom a warrant of arrest or a summons to appear has been issued under article 58;
- (b) A State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted; or
- (c) A State from which acceptance of jurisdiction is required under article 12.¹³

“In proceedings with respect to jurisdiction or admissibility, those who have referred the situation under article 13, as well as victims, may also submit observations to the Court.”¹⁴

⁹ Art. 53(1).

¹⁰ Art. 58.

¹¹ Art. 61.

¹² Art. 19(6).

¹³ Art. 19(2).

¹⁴ Art. 19(3).