

Trigger mechanisms and the role of the Prosecutor of the International Criminal Court

Ismail Zitouni

Ph.D. Candidate

DOI: 10.29322/IJSRP.15.06.2025.p16227

<https://dx.doi.org/10.29322/IJSRP.15.06.2025.p16227>

Paper Received Date: 15th April 2025

Paper Acceptance Date: 6th June 2025

Paper Publication Date: 28th June 2025

Abstract

The court was established in July 1st 2002 to prosecute war crimes, crimes against humanity, genocide and the crime of aggression when member states are unwilling or unable to do so themselves. It can prosecute crimes committed by nationals of member states or on the territory of member states by other actors. It has 125 member states. The court's budget for 2025 is around €195 million. The Court has jurisdiction to prosecute the following international crimes: genocide, crimes against humanity, war crimes, and aggression (once the elements of aggression and the conditions of jurisdiction have been established).

Key words: Court, humanity, crime, genocide

Introduction

The judges of this court rendered 11 convictions and four acquittals. Twenty-one people were held in the detention center of the Court in The Hague and appeared before the court, and 31 people are still at large. Charges were dropped against seven people for their deaths. Of the 11 convictions, only six were for the underlying criminal offenses of war crimes and crimes against humanity. The rest were for crimes such as witness tampering. The six convicted men were leaders of African militias from the Democratic Republic of the Congo, Mali and Uganda. The sentences ranged from nine to 30 years in prison. The maximum possible sentence is life imprisonment. The ICTY, located in The Hague, Netherlands, has indicted more than 160 individuals. Those indicted by the ICTY include heads of state, prime ministers, chiefs of general staff, ministers of interior, and many other high- and mid-level political, military, and police leaders on various sides in the conflicts.

Mechanisms that can trigger a court reaction

Although the Court is supported by many members of the United Nations and the European Union, other countries such as the United States, China and Russia are not members, arguing that the Court can be used for politically motivated prosecutions. Myanmar is not a member of the Court, but in 2018 and 2019 judges ruled that the Court had jurisdiction over alleged cross-border crimes that occurred in part in neighboring Bangladesh, a member of the Court, such as deportation and persecution. The judges therefore said that prosecutors could open a formal investigation. Israel is not a member of the Court and does not recognize its jurisdiction, but the Palestinian territories were admitted to the Court in 2015. This, together with the judges' decision, means that the Court can investigate possible war crimes committed by Hamas fighters in Israel and Israelis in the Gaza Strip.

Prerequisites for the exercise of jurisdiction

The prerequisites for the exercise of jurisdiction of the ICC are set out in Article 12(2) of the Rome Statute.¹ This article - like many others, the product of intensive negotiations and compromises - has its advantages and disadvantages. On the one hand,

¹ Article 12 ('Preconditions to the exercise of jurisdiction')

it is valuable because it allows nationals of a non-signatory State to be prosecuted internationally for crimes committed on foreign soil. An important class of persons who fall into this category would be soldiers serving abroad; for example, troops of one country who commit crimes in another country. It is true that they can be prosecuted under the Statute. It would be wrong to think that the Rome Statute imposes obligations on non-signatory States (for example, the United States, if - as expected - they never sign and ratify the treaty).

Nationals of third States who commit crimes at home are, of course, not subject to the jurisdiction of the ICC. However, if they commit crimes abroad, they may become subject to the jurisdiction of the Court if the territorial State has accepted the jurisdiction of the Court. However, the territorial State would in any case have jurisdiction over the crimes — territorial jurisdiction over crimes is firmly established in international law, together with the principles of active and passive personality.

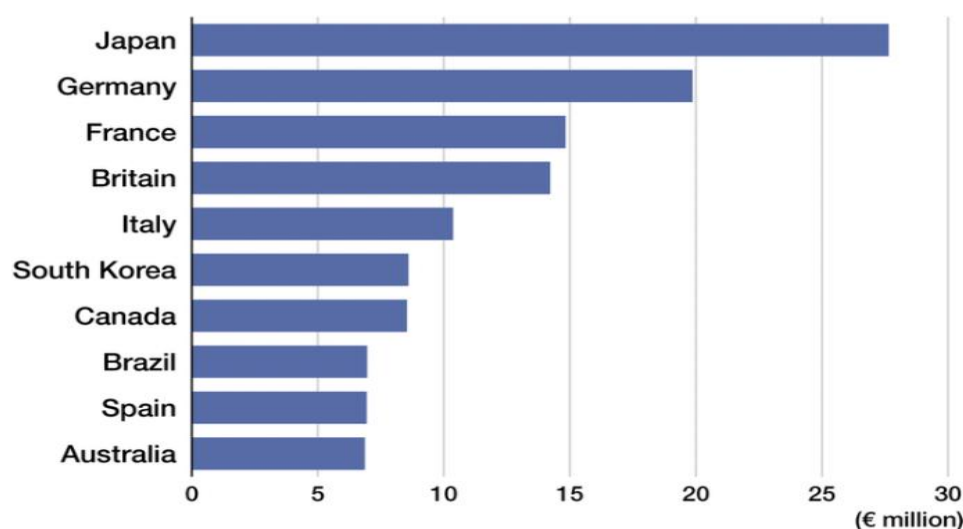
The ICC would simply exercise its jurisdiction in place of the territorial State. Therefore, the Rome Statute does not impose obligations on third States. It simply empowers the Court to exercise its jurisdiction over nationals of third States whenever those nationals have committed crimes on the territory of a State Party (or a State accepting the ad hoc exercise of the Court's jurisdiction).

The Rome Statute therefore empowers the ICC to replace a consenting State, which would thereby waive its right to exercise its criminal jurisdiction. This does not appear to be contrary to international law. However, a serious problem may arise whenever a third State concludes an agreement with a State Party or a State accepting the ad hoc jurisdiction of the Court, whereby the other State either waives its criminal jurisdiction over crimes committed on its territory by nationals of the first State or undertakes to extradite those nationals to another State.

The Rome Statute does not impose an obligation on States Parties to give priority to a request for surrender by the Court: Article 90(6) simply sets out a set of factors that the requested State must take into account when deciding on the matter. This regulation would appear to be questionable for three reasons: first, it does not take into account the possibility that under its national law the requested State may be obliged to waive its jurisdiction without even initiating extradition proceedings; second, it does not provide for the case of a requested State which, although not a party to the Rome Statute, has accepted the jurisdiction of the Court ad hoc; third, it does not impose an obligation on the requested State to give priority to a request for surrender by the Court. The

Figure 1

Top 10 Countries for ICC Budget Contributions in 2023



Created by Nippon.com based on data from the International Criminal Court.

nippon.com

Source: Japan Top Financial Contributor to International Criminal Court. Available at

<<https://www.nippon.com/en/japan->

data/h02027/#:~:text=In%20the%202023%20ranking%20for,and%20Canada%20seventh%20(4.9%25.

ICC's annual budget for 2024 stands at roughly \$187 million, the vast majority of which comes from member states. In 2022 and 2023, the largest contributions came from five (5) highly industrialized economies: Japan (15.9%), Germany (11.4%), France (8.5%), the United Kingdom (8.2%), Italy (5.9%), South Korea (5.0%), and Canada (4.9) (see Figure 1 for the top 10 ICC contributors).

Figure 1. Top budgeting countries in ICC for 2023. ²

Trigger mechanisms and the role of the prosecutor

It is well known that two tendencies clashed at the Rome Conference: some states (including the United States, China and others) insisted that the authority to initiate investigations and prosecutions be given only to states and the Security Council; other states (a group of so-called like-minded states) were determined to advocate the institution of an independent prosecutor capable of initiating investigations and prosecutions *proprio motu*. The conflict was between states oriented towards sovereignty and states eager to implement the rule of law in the world community. The final result was a compromise. First of all, the right to conduct investigations and prosecutions was not left to the authorities of individual states nor entrusted to a commission of inquiry or similar bodies; this option, which was undoubtedly open to the Rome Conference, was rejected.

When deciding to appoint a prosecutor, states had two options:

- (i) the Nuremberg model, where the prosecutor is an official of the investigating and prosecuting state, and is therefore appointed by that state and remains under its control at all times;
- (ii) the ICTY and ICTR models, where the prosecutor is a completely independent body. Fortunately, the latter option was chosen.

As an independent and impartial body, the prosecutor is given the power to investigate and prosecute *ex officio*, albeit with significant limitations. Second, the power to initiate investigations is given to both the prosecutor (subject to judicial review) and states, as well as to the Security Council. In short, a three-part system is envisaged:

- (a) investigations may be initiated at the request of a state, but the prosecutor must then immediately notify all other states, in order to enable those intending to exercise jurisdiction to rely on the principle of complementarity.
- (b) investigations may be initiated by the prosecutor, but only under two conditions:
 - (i) they must be approved by the Pre-Trial Chamber and
 - (ii) they must be notified to all states.
- (c) investigations may be initiated at the request of the Security Council, and in this case the intervention of the Pre-Trial Chamber is not required, nor is it necessary to notify all States. This is clearly a balanced system, taking into account both the interests of States and the requirements of international justice.

In addition, as has rightly been pointed out,³ the Prosecutor acts both as an “administrator of justice” (in the sense that he acts in the interests of international justice by pursuing the objective of identifying, investigating and prosecuting the most serious

² <https://www.eurasiareview.com/wp-content/uploads/2025/04/Screen-Shot-2025-04-12-at-2.51.46-PM.png>

³ Zappalà, ‘Il procuratore della Corte Penale Internazionale: luci ed ombre’, 82 *Rivista di diritto internazionale* (1999) 39 et seq

international crimes) and, as in customary legal orders, as a party to the adversarial system. The best safeguard for the proper administration of international justice can be found in a key provision of the Statute: Article 53(2). Under this provision, the Prosecutor enjoys broad powers in screening cases brought by either politically motivated entities (States) or a political organ (the Security Council).

Under Article 53(2), the Prosecutor may decide that there is no sufficient basis for prosecution even where the case has been brought by a State or the Security Council. It is worth noting that under this provision the Prosecutor may conclude that prosecution is not justified not only because

(i) there is no legal or factual basis for issuing an arrest warrant or summons, but also because

(ii) the case is inadmissible under Article 17 because it is being investigated or prosecuted by a State that has jurisdiction over the crimes, and - more importantly - if

(iii) “prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of the victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime”.

This rule is crucial, as it assigns the Prosecutor the role of an independent and impartial authority responsible for ensuring that the interests of justice and the rule of law prevail. The Prosecutor can therefore prohibit any initiative by states or even any delay by the Security Council that may prove politically motivated and contrary to the interests of justice.

In short, “prosecutorial discretion” is enshrined in the Statute (subject to review by the requesting State and by the Pre-Trial Chamber); an important principle, since not every crime technically falling within the jurisdiction of the ICC should be prosecuted before the Court. It could be objected that this balanced and just relationship between political entities (States and the Security Council) and an “executor of justice” such as the Prosecutor may be frustrated whenever the Security Council decides, under Article 16 of the Rome Statute, to request the Prosecutor to postpone any investigation or prosecution for a period of 12

Table 2
Regional Distribution of Member-State Party and Cases
(as of January 2025)

Region	Member-State Party	% Distribution	Cases	% Distribution
Africa	33	26%	31	72%
Asia-Pacific	19	15%	4	9%
Eastern Europe	20	16%	7	16%
Latin America and the Caribbean	28	22%	1	2%
Western Europe and Others	25	20%	0	0%
Total	125	100%	43	100%

Source: The States Parties to the Rome Statute at <https://asp.icc-cpi.int/states-parties>. Data processed by the author.

months (or a shorter period).

Figure 2. Regional distribution of state cases ⁴

Conclusion

A proper interpretation of this provision leads to the conclusion that the powers of the Security Council are not unlimited. A request can only be made by a resolution adopted under Chapter VII of the Charter of the United Nations. Therefore, the Security Council can request the Prosecutor to suspend his activity only if it expressly decides that the continuation of his investigation or

⁴ <https://www.eurasiareview.com/wp-content/uploads/2025/04/a-50.jpg>

prosecution may constitute a threat to the peace. The Prosecutor is undoubtedly bound by that request, but the whole context of the Statute and the reference in Article 16 to Chapter VII of the Charter of the United Nations seem to exclude the possibility that the request is arbitrary.

References:

- Article 12 ('Preconditions to the exercise of jurisdiction')
- <https://www.eurasiareview.com/wp-content/uploads/2025/04/Screen-Shot-2025-04-12-at-2.51.46-PM.png>
- Zappalà, 'Il procuratore della Corte Penale Internazionale: luci ed ombre', 82 *Rivista di diritto internazionale* (1999) 39 et seq
- <https://www.eurasiareview.com/wp-content/uploads/2025/04/a-50.jpg>