

Rome Statute

Article 25 - Individual Penal/Criminal Responsibility; established through state practice and previous tribunals

1. Court has jurisdiction over individuals from state-parties; 2. a person who commits a crime within jurisdiction of ICC = individually responsible & liable for punishment under Statute

Article 5 - Crimes w/in jurisdiction of ICC

Limited to most serious crimes of concern to the international community = gravity threshold; genocide (genocide convention), CAH (Nuremberg tribunal), war crimes (customary practice), aggression (product of post-war tribunals); all offences established in customary int. law

Elements of Crime

Developed for prosecution purposes; broke definitions of offences into actus reus & mens rea

Art 12 - Grounds for exercise of jurisdiction

1. Signing = accepting jurisdiction over crimes in Art 5; 2. State Parties - if a state party has either territorial (2(a)) or nationality (2(b)) jurisdiction; 3. non-state parties may accept the Jurisdiction of the ICC by declaration.

Jurisdiction over Nationals of non-state parties

Rome Statute (cont)

Arrest warrants for Netanyahu & Hamas leaders - Jurisdiction = offences take place within territory of state party (Palestine); pre-trial chamber determining jurisdiction: Key argument against jurisdiction = Palestine not recognised in int. law as a state & territory of non-state cannot est. court jurisdiction; Counter argument = secretary general has accepted Palestine registration, & UN GA has passed resolution recognising Palestine as a state.

Legal arguments against ext. jurisdiction to non-state parties

Violation of pacta tertiis rule (you cannot in int. law, adjudicate over the actions of a state that is not a party to the treaty without that states consent). e.g., Monetary Gold case - ICJ refused jurisdiction b/c state wasn't a party to UN charter. **counter argument** not violating pacta tertiis rule b/c not over the actions of another state, b/c prosecuting individuals not entire states. **Delegation of jurisdiction to ICC** pro ICC: you can do anything regarding jurisdiction unless there is a specific rule stopping you (rely on SS Lotus)

Art 13 - Jurisdictional Triggers

Rome Statute (cont)

referral to prosecutor by (a) state party [must refer whole situation] (b) Security Council acting under Ch VII powers [gives non-parties authority to refer situations to ICC, or (c) prosecutor launches investigation

Art 15 - Prosecutor has proprio motu powers

1. Prosecutor can initiate investigations based on info (often from NGOs) 2. Must analyse serious of info 3. Must conclude reasonable basis for investigation & submit to PTC for authorisation [if PTC says no, prosecutor can request again w/ new evidence

Role of SC in jurisdiction of ICC

Relationship Agreement betw/ the ICC and UN & RS Art 4: ICC designed to be independent institution; stands outside of UN. **SC powers under RS:** referral (13(b)), deferral (16) [political interference eroding the independence]

Requirements for Admissibility

Rome Statute (cont)

Gravity Test - 17(1)(d) - "sufficient gravity to justify further action by the court" tested by quant & qual factors re: scale, nature, modus operandi, impact and/or high rank of accused.

Complementarity - Art 17(1) inadmissible if: (a) Case is being investigated/prosecuted by a state with jurisdiction, or State is unwilling or unable to genuinely investigate/prosecute, or (b) Case has been investigated by a state that has decided not to prosecute, unless the decision resulted from unwillingness or inability to genuinely prosecute.

Negative complementarity - court steps in when there is no activity at national level

1. Is there activity at nat. level? - Muthara: domestic & ICC investigations must contain substantially the same conduct. 2. is qual of activity sufficient to meet the threshold in Art 17. • Complementarity = aimed at balancing CRJU with state sovereignty

17 Threshold



Rome Statute (cont)

Unwillingness 17(2)*1. Proceedings used to shield accused 2. unjustified delay 2. proceedings not independent/impartial.

Inability 17(3) 1. total/substantial collapse of state's CRJU 2. unavailability of CRJU = state cannot obtain the accused/evidence/otherwise proceed.

Complementarity in Kenya

P v William Samoei Ruto et al: Kenya challenging arrest warrants re: nat. activity. 1. case inadmissible if same suspects investigated for substantially same conduct. 2. Being investigated = mere preparedness not enough, must prove to have taken sufficient investigatory action

Enforcement

General duty to comply (86) & finding of non-compliance (87(7)) Non-compliance by Sth Africa re: request for arrest & surrender of Al-Bashir
exceptions to 86: 98(1) if state would have to act inconsistently with the diplomatic or State immunity of a third state; 98(2) if compliance = requested State to act inconsistently with its obligations under international agreements [US used SOFA agreements to undermine jurisdiction of ICC]. **Punishment 103(1)(a)** sentences serves in designated states willing to accept accused

War Crimes

Structural elements differentiate int. crimes from common law crimes

contextual elements link crimes to specific situations - **war crimes** = violation of rules of armed conflict. **Structural requirements of applying IHL** 1. Must be armed conflict 2. Must be a nexus between crime & armed conflict. 3. Must prove that accused was aware that there was an armed conflict 4. there must be a victim

Rules of Armed Conflict (AC) - int. humanitarian law

Hague law - restricts conduct in war: 1. distinction between civilian [lawful] & military [unlawful] targets [surrendered military = unlawful] 2. minimal military suffering 3. minimal collateral damage. **Geneva Law - protection of persons/property potentially affected:** protection of all non-combatants incl. POWs, injured combatants

P v Tadic requirements of a war crime

1. violation of IHL - must be custom or treaty 2. must be serious (gravity). 3. must entail individual criminal responsibility. **"AC = resort to armed force betw/ states or armed violence betw/ govt & organised armed groups in state**

International Armed Conflict

War Crimes (cont)

Art 2 Geneva Conv. = armed conflict betw/ states of **any gravity** including an occupation that meets no resistance. **categorisation difficulty** 1. wars of national liberation [Additional Protocol I, article 1(4) - fighting against colonial domination/alien occupation/racist regime = int. AC]. 2. Internationalised non-int. AC - Tadic appeal chamber re: Belgrade involvement = "overall control test"

Non-International AC

Art 3 Geneva Conv.: Threshold = enough control over a territory to be able to apply humanitarian law to themselves. If there is a threshold of territory & activity in order to apply law, some degree of organisation must exist. **P v Ljube Boskoski & John Tarculovski** facts of the conflict (frequency of AC, heavy weaponry, etc.) used to est. intensity threshold & relevant facts (no. of members, leadership structure) used to est. organisational level. **Akayesu:** control of territory not necessary but indicative. **P v Bosco Ntaganda:** non-int. AC = at least two organised armed groups + armed violence of a certain intensity.

Nexus between the crime & the armed conflict

War Crimes (cont)

Art 3 of ICTY = crime closely related to AC. **P v Kunarac** = 1. entire territories of warring states or parties in internal conflicts 2. Violations of war laws can occur in places/times without active fighting, if related to conflict. 3. Crimes geographically/temporally remote from combat still = war crimes if tied to hostilities elsewhere. 4. AC doesn't need to cause the crime but must play a significant role in its execution. 5. Acting in furtherance of the conflict is enough to link crimes to the conflict.

Awareness of AC

P v Kordic: nullum crimen sine lege principle does not require accused knowing specific legal definition of each element of a crime he committed; sufficient = aware of the factual circumstances

Victim

Geneva law: distinction between lawful targets [military] and victims of AC who are protected [civilians, wounded etc.] **Hague law:** distinction between lawful/unlawful means/methods of warfare. **victim** reflected in these distinctions

Specific Offences