The Rome Statute, which established the International Criminal Court (ICC), entered into force on 1 July 2002. The statute was the result of a concerted international effort to combat impunity for what are considered to be the most egregious international crimes – crimes that, in the words of the preamble to the statute, ‘deeply shock the conscience of humanity’.

The Court, which sits in The Hague, is a permanent institution with jurisdiction to prosecute individuals accused of committing war crimes, crimes against humanity and genocide.

There are, at the time of writing, 108 States Parties to the Court, 30 of which are African.¹ As we shall see in this chapter, the Rome Statute is based on the principle of complementarity, a principle that ensures that the Court does not usurp the primary responsibility of states to deal with the crimes that also fall under the jurisdiction of the Court. A case is, accordingly, inadmissible before the Court if a state with jurisdiction is either genuinely investigating it or prosecuting the alleged perpetrators, or has already done so (International Criminal Court 2002: article 17).

**HOW DOES THE ICC ACQUIRE JURISDICTION?**

The principle of complementarity and the Court’s subject-matter jurisdiction

The ICC functions differently from national criminal courts in a number of important respects. For the purposes of this section, two points of difference are especially relevant:
Intervention by the Court can only take place where the relevant national criminal courts have been unwilling or unable to conduct a genuine investigation or prosecution.

The category of crimes over which the Court may exercise jurisdiction is much narrower than is ordinarily the case in national criminal courts. It is clear from the preamble to the Rome Statute that the intention was for the Court to have jurisdiction over ‘the most serious crimes of concern to the international community as a whole’. Under article 5 of the Rome Statute, therefore, the Court can only deal with war crimes, crimes against humanity and genocide. Once the States Parties have agreed on a definition of aggression, and on the conditions under which the Court may exercise jurisdiction in relation to this crime, the Court will also be able to investigate and prosecute individuals for aggression. A working group of States Parties is currently involved in coordinating work on a definition of aggression, and the earliest opportunity to amend the Rome Statute to include the crime of aggression will be at the review conference scheduled for 2009 or 2010.

**Territorial and national jurisdiction and Security Council referrals**

Not only is the ICC’s subject-matter jurisdiction limited, but the Rome Statute further restricts the jurisdiction of the Court to the most clearly established bases of jurisdiction known in criminal law: the territorial principle and the active national principle. As we shall see below, the Court may act only where its jurisdiction has been accepted by the state on whose territory the crime occurred, or the state of nationality of the alleged perpetrators. All states that become parties to the Rome Statute thereby accept the jurisdiction of the Court with respect to these crimes.

A State Party may refer a situation to the Prosecutor where any of these crimes appears to have been committed if the alleged perpetrator is a national of a State Party or if the crime in question was committed on the territory of a State Party or a state that has made a declaration accepting the jurisdiction of the Court. A State Party may also refer a situation where the crime is alleged to have occurred on board a vessel or aircraft of which the state of registration is a State Party or a state that has made such a declaration. Acceptance of jurisdiction may thus be expressed through adoption of the statute or through a declaration of acceptance of jurisdiction (International Criminal Court 2002: article 12(3)).

In addition to these two bases, the Court may also intervene in any situation referred to it by the UN Security Council, invoking its powers under chapter VII of the UN Charter (International Criminal Court 2002: article 13(b)), even in respect of crimes committed on the territory of or by nationals of non-States Parties. We shall discuss such referrals in detail below when considering the ICC’s current investigation of crimes committed in the Darfur region of Sudan. The UN Security Council’s powers to refer situations to the Prosecutor illustrate that while the ICC has a distinct legal personality to that of the UN, by design and as a matter of political reality it has a close and vital relationship with the UN. This is also reflected in the provisions empowering the Security Council to request the deferral of an investigation or prosecution (International Criminal Court 2002: article 16), and in the UN’s relationship agreement with the Court.

**Temporal jurisdiction**

The Court may only exercise jurisdiction in respect of crimes committed after the Rome Statute entered into force. For countries that became parties to the statute after 1 July 2002, the Court has jurisdiction over crimes committed on their territories or by their nationals after the date on which they become party to the Rome Statute. What this means is that the Court is not designed to punish crimes that occurred before the Rome system became operational, and that these crimes must be addressed by national or other international or hybrid initiatives.

**Exercising the Court’s jurisdiction**

As previously mentioned, a situation may be investigated by the Prosecutor following a referral from a State Party or the UN Security Council. Crucially, the Prosecutor also has the power to open an investigation on his or her own initiative on the basis of information indicating the commission of crimes within the Court’s jurisdiction (International Criminal Court 2002: article 15(1)). Although these powers greatly enhance the independence of the Office of the Prosecutor, as a matter of practice and with a view to conducting investigations in circumstances that are optimally conducive to securing cooperation from the states concerned...
the Prosecutor has, in the past, encouraged referrals from states as one method of founding the Court’s jurisdiction. The investigations relating to Democratic Republic of the Congo, Uganda and Central African Republic are examples of referrals from States Parties on whose territory crimes have occurred.

An ICC investigation may be triggered in three different ways: by a referral from a State Party, a referral from the UN Security Council or by the Prosecutor, acting on his own initiative (proprio motu) on the basis of information from any credible source.

The important role of the Pre-trial Chamber

Different national legal systems have varying approaches to the involvement of Judges in the investigation stage of the criminal process. The Rome Statute represents a compromise in that elements of both the inquisitorial and adversarial approaches have been incorporated into the role of the Pre-trial Chamber. The chamber is empowered, among other things, to consider challenges concerning jurisdiction and admissibility, and to consider these issues on its own motion (International Criminal Court 2002: articles 18 and 19).

At the request of the Prosecutor, the Pre-trial Chamber may issue arrest warrants, summons to appear and other orders and warrants as may be required for an investigation (International Criminal Court 2006c: article 57(3)(a)). It may also, upon request, take such steps and seek such cooperation as may be necessary to assist the defence (International Criminal Court 2006c: article 57(3)(b); International Criminal Court 2000, rule 116). It may provide for the protection and privacy of victims and witnesses, the protection of arrested persons, the protection of national security information, and may take protective measures for the purpose of forfeiture, particularly for the benefit of victims (International Criminal Court 2002: article 57(3)(c) and (e)). The Pre-trial Chamber also acts as a check on the Prosecutor in certain respects. As we shall see, for instance, a decision by the Prosecutor to initiate an investigation pursuant to information received from a credible source or sources, pertaining to a particular situation, is subject to the authorisation of the Pre-trial Chamber of the Court.

Gravity

Even where all the jurisdictional requirements have been met, the case in question must meet an additional threshold of gravity before the Court can intervene. This criterion is most clearly expressed in article 17(1)(d) of the Rome Statute. In determining whether a case is grave enough to justify further action by the Court, the Office of the Prosecutor will take into account factors, such as the nature of the crimes, the scale and manner of their commission as well as their impact.

Interests of justice

One of the factors that the Prosecutor must consider in deciding whether there is a reasonable basis upon which to begin an investigation is whether, 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 (International Criminal Court 2002: article 53(1)(c)). Where an investigation is not initiated based solely on the view that the interests of justice would not be served, the Prosecutor must inform the Pre-trial Chamber of the Court accordingly. The Pre-trial Chamber may, on its own initiative, review this decision, in which event it becomes final only when confirmed by the chamber.

The term ‘interests of justice’ is not defined in the statute. What is clear is that it is an exceptional basis on which a decision not to investigate or prosecute may be made. Indeed, the wording of article 53(1)(c) suggests that gravity and the interests of victims would tend to favour investigation. Consequently, the Office of the Prosecutor has indicated that there is a presumption in favour of investigation or prosecution where the criteria stipulated in article 53(1)(a) and (b) and 53(2)(a) and (b) have been met. The Office of the Prosecutor’s policy paper on the interests of justice emphasises that the criteria for the exercise of the Prosecutor's discretion in relation to this issue ‘will naturally be guided by the objects and purposes of the Statute – namely the prevention of serious crimes of concern to the international community through ending impunity’.

Procedure for initiating an investigation

The initiation of an investigation is preceded by an analysis of relevant available information on the crimes alleged to have been committed.

A decision by the Prosecutor to initiate an investigation pursuant to information on crimes provided by any credible source is subject to the authorisation of the Pre-trial Chamber of the Court. If the chamber concurs in the Prosecutor’s finding and determines that the case appears to fall within the Court’s jurisdiction, it is obliged to authorise the investigation. Where the
Prosecutor is of the view that the information examined as part of the analysis of the alleged crimes does not provide a reasonable basis to commence an investigation, the Prosecutor informs the relevant information providers accordingly.

Where a situation has been referred to the Prosecutor, an investigation must be initiated in the absence of a finding that there is no reasonable basis on which to do so. With regard to both referrals and information on crimes provided by a reliable source, the decision to proceed with an investigation is predicated on a determination that there is a reasonable basis to do so.

In deciding whether to initiate an investigation, the Prosecutor must consider whether:

- The available information provides a reasonable basis to believe that a crime within the Court’s jurisdiction has been or is being committed
- The case is or would be admissible under article 17
- Taking into account the gravity of the crime and the interests of the victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice

INSTITUTIONS OF THE COURT

The Rome Statute provides that the ICC is to be composed of the Presidency, an Appeals Division, a Trial Division and a Pre-trial Division, the Office of the Prosecutor, and the Registry. The regulations of the Court provide that the Registrar shall establish an Office of Public Defence Counsel, which is an independent office with a key role in ensuring respect for the rights of persons appearing before the Court.

The Office of the Prosecutor: mandate and functions

The Office of the Prosecutor is an independent organ of the Court headed by the Prosecutor, who is assisted by one or more Deputy Prosecutors.

Mr Luis Moreno-Ocampo of Argentina was elected to serve as the Prosecutor, and he took office in June 2003. The Deputy Prosecutor responsible for prosecutions is Ms Fatou Bensouda of The Gambia.

The Office of the Prosecutor’s mandate is to contribute to the Court’s overall objective of combating impunity for war crimes, crimes against humanity and genocide. To this end, the Office of the Prosecutor receives referrals and information pertaining to the alleged commission of crimes within the jurisdiction of the Court, examines the information available and conducts investigations and prosecutions in accordance with the statute.

The functions of the office are carried out by the immediate Office of the Prosecutor and its three divisions, with assistance from a number of support service units. The Investigation Division is responsible for collecting and examining evidence, while the Prosecution Division guides the conduct of investigations in accordance with the prosecutorial strategy determined by the Prosecutor, and litigates on his or her behalf.

The Jurisdiction, Complementarity and Cooperation Division gathers additional information on and analyses situations referred to the Prosecutor as well as information on crimes provided by various sources. The result of this analysis informs the decision whether there is a reasonable basis to proceed with an investigation. This division is also responsible for assessing the admissibility of cases throughout the investigation.

As the ICC does not have an enforcement mechanism an important part of the division’s mandate is to secure cooperation from states and other actors to facilitate the work of the Office of the Prosecutor.

The Registry

The Registry is the principal administrative organ of the Court headed by the Registrar and is responsible for the non-judicial aspects of the administration of the Court, including Court management, human resources and finance.

In relation to the rights of the defence, the Registry facilitates, among other things, the protection of the right of accused persons to confidential communication with their counsel, assists the defence in obtaining legal advice and the assistance of legal counsel, and supports and assists all defence counsel appearing before the Court as necessary for the effective conduct of the defence.

Regarding victims, the Registry assists in securing legal advice and in arranging legal representation and the facilities necessary for the protection of their rights at all stages of the relevant proceedings.

A particularly important function of the Registry relates to the protection of victims and witnesses. In this regard, the registrar negotiates agreements with states pertaining to the relocation and provision of support services to victims, witnesses and others who are at risk on account of their testimony. It is the
representation of the major legal traditions of the world, equitable geographical representation and a fair representation of male and female Judges.

With respect to the constitution of the chambers, regard is had to the nature of the functions to be performed by each division, and the qualifications and experience of the Judges. The objective is to ensure that an appropriate combination of expertise in criminal law and procedure and international law is available to each division. The Trial and Pre-trial Divisions, particularly, should be composed predominantly of Judges with criminal-trial experience.

The Office of Public Defence Counsel

The right of an accused person to a fair trial is an international standard enshrined in the Rome Statute.13 The incorporation of the normative components of this standard into the statute (such as the right to be presumed innocent until proven guilty) (International Criminal Court 2002: article 66(1)) is supplemented by the provision for the establishment of an Office of Public Defence Counsel (International Criminal Court 2004: regulation 77). Its function is to protect and represent the interests of accused persons during the initial stages of an investigation, and to assist other persons entitled to legal assistance under the statute. The latter category includes persons who have been questioned by the Prosecutor where there are grounds to believe that they have committed a crime within the jurisdiction of the Court.

Although the Office of Public Defence Counsel falls under the Registry for administrative purposes, it is an independent body (International Criminal Court 2004: regulation 77(2); International Criminal Court 2006c).

THE ICC’S FIRST INVESTIGATIONS

State Party referrals: Democratic Republic of the Congo, Uganda and Central African Republic

The Office of the Prosecutor is investigating situations in Democratic Republic of the Congo, Uganda and Central African Republic following referrals from the respective governments.

The Office of the Prosecutor has adopted a policy of focusing on those who bear the greatest responsibility for the commission of crimes within the jurisdiction of the Court.
the Court. The objective of this prosecutorial strategy is to make the best possible use of the resources available by conducting focused investigations and targeted prosecutions; moreover, by targeting those who bear the greatest responsibility, the Office of the Prosecutor hopes to enhance the impact of its work through deterrence (International Criminal Court 2006c).

Democratic Republic of the Congo

In March 2004, Democratic Republic of the Congo authorities referred the situation in the country involving crimes within the jurisdiction of the Court to the Office of the Prosecutor. An investigation was opened in June 2004 and, having analysed the crimes within the Court’s jurisdiction and identified the gravest crimes, the Office of the Prosecutor has focused its initial investigations on the Ituri region.

In February 2006, the Court issued a warrant of arrest for Thomas Lubanga, president of the Union of Congolese Patriots (an armed group operating in Ituri province) on charges of enlisting, conscripting and using child soldiers. Lubanga was arrested and surrendered to the ICC in March 2006.14

The Court also issued a warrant for the arrest of Germain Katanga, former senior commander of the Patriotic Forces of Resistance in Ituri in July 2007. He is charged with crimes against humanity and war crimes. Katanga has since been surrendered to the Court by the Congolese government.15

The third person to be surrendered to the Court was Mathieu Ngudjolo Chui, a colonel in the Congolese armed forces and alleged former leader of the National Integrationist Front. The charges against him, which are yet to be confirmed, are in respect of war crimes and crimes against humanity. Following a decision of the Pre-trial Chamber, the cases against Chui and Katanga have now been joined.

On 28 April 2008, the Pre-trial Chamber unsealed the warrant of arrest against Bosco Ntaganda, former deputy chief of general staff for military operations of the Forces patriotiques pour la libération du Congo. He is alleged to have enlisted, conscripted and used children under the age of 15 years for active participation in hostilities in Ituri between July 2002 and December 2003. Ntaganda is still at large.

Uganda

The Ugandan government referred the situation in its country to the Prosecutor in December 2003, and an investigation was initiated in July 2004. The investigation has focused on northern Uganda where numerous atrocities have been committed against the civilian population. The crimes under investigation include crimes against humanity and war crimes. In July 2005, the Court issued warrants for the arrest of five senior commanders of the Lord’s Resistance Army (one of whom is now deceased), including its leader, Joseph Kony. The Office of the Prosecutor continues to seek the cooperation of relevant members of the international community for the arrest and surrender of the remaining commanders.

Central African Republic

The Prosecutor announced the opening of an investigation into the situation in Central African Republic in May 2007, following a referral in December 2004. The Office of the Prosecutor received information from Central African Republic authorities, non-governmental organisations and international organisations regarding alleged crimes. As is the case in the other investigations, the focus will be on the most serious crimes, most of which were committed between 2002 and 2003. The situation in Central African Republic has been noteworthy for the particularly high number of crimes involving sexual violence.16

The first person to have been arrested (by the Belgian authorities) in relation to this investigation is Jean-Pierre Bemba Gombo, president and commander-in-chief of the Movement for the Liberation of Congo. He is alleged to be responsible for the commission of war crimes and crimes against humanity in Central African Republic, from about 25 October 2002 to 15 March 2003. Since his arrest on 24 May 2008 on a warrant issued by the Court, he is, at the time of writing, still in the custody of the Belgian authorities.

A Security Council referral: Darfur, Sudan

On 31 March 2005, pursuant to resolution 1593(2005), the UN Security Council referred the situation in Darfur, Sudan to the Prosecutor of the Court. This is the first situation that has been referred to the Prosecutor by the Security Council. Resolution 1593 is particularly important in that it underscores the need for a comprehensive solution to the situation in Darfur, and recognises the need for national criminal justice institutions to be supported. Specifically, paragraph 4 of the resolution encourages the Court, within its mandate, ‘to support international cooperation with domestic efforts to promote the rule of law, protect human rights and combat impunity in Darfur’.
After analysing the information available, the Prosecutor determined that there was a reasonable basis to proceed with an investigation, which was duly initiated in June 2005. In his periodic reports to the UN Security Council, the Prosecutor has stated that the evidence available shows a widespread pattern of serious crimes, including murder, rape, the displacement of civilians and the looting and burning of civilian property.20

In February 2007, the Prosecutor requested the Pre-trial Chamber to issue summons to appear or, alternatively, warrants of arrest in respect of Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman (also known as Ali Kushayb). Ahmad Harun is the former minister of state for the interior and the current minister of state for humanitarian affairs, while Ali Kushayb is a militia leader known to have been operating in Darfur at the relevant time.21 The charges against Harun and Kushayb relate to war crimes and crimes against humanity. In April 2007, the Court issued warrants of arrest for these individuals and requests for their arrest and surrender have since been transmitted to the government of Sudan. As of the end of May 2008, neither suspect has been surrendered to the Court.

In his report to the UN Security Council in December 2007, the Prosecutor indicated that he would proceed with a further investigation in view, particularly, of the continuing attacks on displaced civilians. The Office of the Prosecutor will also be looking into allegations of crimes committed by other parties, including alleged rebel attacks against peacekeepers and humanitarian personnel.

On 14 July 2008 the Chief Prosecutor of the Court, Luis Moreno-Ocampo, alleged that President al-Bashir of Sudan bore individual criminal responsibility for genocide, crimes against humanity and war crimes committed since 2003 in Darfur. The Prosecutor accused al-Bashir of having ‘masterminded and implemented’ a plan to destroy the three main ethnic groups, the Fur, Masalit and Zaghawa, with a campaign of murder, rape and deportation. The evidence was submitted to the Pre-trial Chamber of the Court, which, at the time of writing, is considering whether to issue an arrest warrant.

Decisions not to investigate

The responses to information received regarding the alleged commission of crimes in Venezuela and Iraq, outlined briefly below, best highlight how this process functions in practice.22

Venezuela

Most of the information submitted to the Office of the Prosecutor related to crimes alleged to have been committed by the Venezuelan government and associated forces. One complaint related to crimes alleged to have been committed by groups opposed to the government.

In his response, the Prosecutor emphasised his duty to analyse the information received on potential crimes in order to determine whether there was a reasonable basis on which to proceed with an investigation.21 He also stated that the analysis of the situation in Venezuela was conducted under article 15 of the statute since no state referral had been received. The Office of the Prosecutor reviewed the information provided, together with additional material obtained from open sources, media reports and reports of international and non-governmental organisations.

The Office of the Prosecutor noted that, as Venezuela had ratified the Rome Statute in July 2000, the Court had jurisdiction over crimes perpetrated on the territory or by nationals of Venezuela after 1 July 2002, when the statute entered into force. A significant number of the allegations referred to incidents alleged to have occurred prior to 1 July 2002; the Office of the Prosecutor focused only on those that fell within the temporal jurisdiction of the Court.

The Office of the Prosecutor pointed out that, as Venezuela had ratified the Rome Statute in July 2000, the Court had jurisdiction over crimes perpetrated on the territory or by nationals of Venezuela after 1 July 2002, when the statute entered into force. A significant number of the allegations referred to incidents alleged to have occurred prior to 1 July 2002; the Office of the Prosecutor focused only on those that fell within the temporal jurisdiction of the Court.

In the view of the Office of the Prosecutor, the available information did not provide a reasonable basis to believe that the crimes against humanity allegedly perpetrated against opponents of the Venezuelan government were committed as part of a widespread or systematic attack against any civilian population, as required under article 7(1) of the statute.

The allegations relating to crimes against humanity committed by groups opposed to the government were found, with the exception of a few incidents, to be very generalised; they could not, furthermore, be substantiated by open-source information. Again, the Prosecutor found that the information available did not provide a reasonable basis to believe that the crimes in question would have been committed as part of a widespread and systematic attack against any civilian population.

There were no specific allegations of war crimes having been committed; in any event, based on the available information concerning events in Venezuela
since 1 July 2002, the situation was found not to meet the threshold of an armed conflict. There was therefore no reasonable basis to believe that war crimes within the jurisdiction of the Court have been committed.

Finally, there were no allegations concerning genocide, and the available information was found not to provide a reasonable basis to believe that the crime of genocide had been committed. The Prosecutor concluded that the statutory requirements to seek authorisation to initiate an investigation into the situation in Venezuela had not been satisfied. As stated in the response, this conclusion can be reconsidered in the light of new facts or evidence, and the information providers may submit any such information.

Iraq

The allegations regarding crimes committed in Iraq related to the launching of military operations and the resulting fatalities. The Prosecutor’s response to the allegations outlined the process of receiving and analysing information employed by the Office of the Prosecutor. The response noted that the events in question occurred on the territory of Iraq, which was not a State Party and had not lodged a declaration of acceptance under article 12(3). In addition, crimes committed on the territory of a non-State Party only fell within the jurisdiction of the Court when the perpetrators were State Party nationals.

A number of submissions concerned the legality of the war in Iraq in relation to which the Prosecutor advised that the Court cannot exercise jurisdiction over the crime of aggression, and that it has a mandate to examine conduct during the conflict and not the legality of the decision to engage in armed conflict.

Few factual allegations were submitted concerning genocide and crimes against humanity. The Office of the Prosecutor was of the view that the available information provided no reasonable indicia (signs, indications) that coalition forces had ‘intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such’, as required in the definition of genocide (International Criminal Court 2002: article 6). Similarly, the available information provided no reasonable indicia of the required elements for a crime against humanity, namely, a widespread or systematic attack directed against any civilian population (International Criminal Court 2002: article 7).

The Office of the Prosecutor examined allegations relating to the targeting of civilians and to excessive attacks (namely, where the civilian damage or injury was excessive in relation to the anticipated military advantage), and found no reasonable basis to conclude that either crime had been committed.

With respect to allegations concerning the wilful killing or inhuman treatment of civilians by State Party nationals, the Prosecutor concluded that there was a reasonable basis to believe that crimes within the jurisdiction of the Court had been committed. The information available indicated that there were an estimated four to 12 victims of wilful killing and a limited number of victims of inhuman treatment, totalling, less than 20 persons. The Prosecutor’s decision on these crimes was that they did not meet the criteria set out in article 8(1) or the general threshold of gravity.22

THE ICC’S APPROACH TO COMPLEMENTARITY UNDER THE ROME STATUTE

The principles underlying the complementarity regime are, first, that the primary responsibility to investigate and prosecute crimes lies with national authorities, and the preamble to the statute acknowledges this premise; and, second, where national courts fail to do so, jurisdiction reverts to the Court, subject to the provisions of the statute.

As mentioned above, the Office of the Prosecutor’s policy is to focus on those who bear the greatest responsibility for committing genocide, war crimes and crimes against humanity.23 This is significant in that since the Court acts where states have been unwilling or unable to conduct genuine criminal proceedings, there is a very real prospect that lower-ranking perpetrators will not face justice, resulting in what is frequently termed an ‘impunity gap’. The Office of the Prosecutor therefore encourages national prosecutions of lower-ranking perpetrators, and has recognised the necessity for national authorities, the international community and the Court to work together to address this (International Criminal Court 2003).

The Rome Statute provisions dealing with complementarity

According to article 1 of the Rome Statute, the Court is ‘complementary to national criminal jurisdictions’. Consequently, under article 17(1)(a) of the statute, a case is inadmissible before the Court where it is the subject of an investigation or prosecution by a state with jurisdiction unless the state concerned is unwilling or unable genuinely to carry out the investigation or prosecution. If the case has already been investigated and a decision not to prosecute has been made, the case
is only admissible if the decision resulted from the unwillingness or inability of the state genuinely to prosecute (International Criminal Court 2002: article 17(1)(b)). In addition, a case is inadmissible where the person concerned has already been tried for conduct that is the subject of the complaint, and a trial by the Court is not permitted under the statute’s ‘double jeopardy’ provisions.24

In assessing the unwillingness of a state to carry out a genuine investigation or prosecution, the Court will consider, in light of the principles of due process recognised by international law, whether:

- The relevant proceedings or national decision were designed to shield the person concerned from criminal responsibility for crimes within the jurisdiction of the Court
- 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
- 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 inadmissibility in a particular case, the Court considers 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.25 Even after the Prosecutor has made a determination that a case is admissible under article 17, an investigation can only proceed if all the requirements of article 53 relative to the initiation of an investigation are also satisfied.

The Office of the Prosecutor’s understanding of complementarity, with select examples from recent referrals

The investigations into the situations in Darfur and Central African Republic provide some insight into how the Office of the Prosecutor has interpreted the statutory provisions relating to complementarity.

Darfur

Prior to initiating its investigation into crimes allegedly committed in Darfur, the Office of the Prosecutor considered whether the cases in which it was likely to take an interest had been the subject of investigation or prosecution by Sudanese courts. The Office of the Prosecutor analysed Sudanese justice institutions, laws and procedures and gathered information from many sources, including the Sudanese government. This information gathered by the Office of the Prosecutor related to issues such as the administration of justice in Darfur, alternative dispute-resolution mechanisms and national proceedings in respect of crimes potentially within the Court’s jurisdiction. As indicated by the Prosecutor in his first report to the UN Security Council following the referral,26 the Office of the Prosecutor examined information on multiple ad hoc mechanisms created by the government of Sudan, such as the committees against rape, the special courts, the specialised courts and the national committee of inquiry.

Following an evaluation of all the available information, the Prosecutor took the view (in which the Pre-trial Chamber concurred) that the admissibility criteria had been met, that is, that the national mechanisms in Sudan were not a bar to the Court exercising jurisdiction over the crimes alleged to have been committed in Darfur.27 It is worth noting, as the Prosecutor has emphasised in his periodic reports to the UN Security Council, that the decision is not a judgment of the Sudanese criminal justice system as a whole but rather an assessment of whether the Sudanese authorities are investigating or prosecuting the same cases as the Office of the Prosecutor. The admissibility assessment is ongoing and is case-specific, and, so far, no admissibility challenges on behalf of Ali Kushayb or Ahmad Harun have been made.

Central African Republic

In deciding to initiate an investigation into Central African Republic, the Prosecutor noted that national proceedings, including investigations and preliminary court hearings, had taken place in relation to some of the crimes that may be the focus of the investigation. A team from the Office of the Prosecutor travelled to Central African Republic in November 2005 to gather additional information on, and carry out an in-depth assessment of, those proceedings. In particular, the Prosecutor noted the finding of the cour de cassation in April 2006, indicating that in relation to the alleged crimes the national authorities had been unable to carry out the necessary criminal proceedings, to collect evidence or to secure the presence of suspects before the courts.28 After a careful consideration of all the relevant facts, the Office of the Prosecutor concluded that the cases that would potentially be the focus of the investigation would be admissible before the ICC.
Arrest and surrender under the Rome Statute

At any time during an investigation, the Pre-trial Chamber shall, subject to certain conditions, issue a warrant for the arrest of an individual suspected of having committed a crime within the jurisdiction of the Court upon application by the Prosecutor. The Court will issue a warrant if it is satisfied that there are reasonable grounds to believe that the person has indeed committed such a crime. The Court must also be satisfied that the arrest of the person appears necessary to ensure his or her appearance at trial, or to ensure that the person does not obstruct or endanger the investigation or the Court proceedings. Where applicable, the Court will consider whether arrest is necessary to prevent the person from continuing with the commission of the crime that he is alleged to have committed, or a related crime that is within the jurisdiction of the Court and that arises out of the same circumstances.

On the basis of the warrant of arrest, the Court may request either the provisional arrest or the arrest and surrender of the person named in the warrant. In urgent cases, the Court may request the provisional arrest of the person sought pending the formal transmission of a request for surrender in the form required under the statute. Once issued, a warrant of arrest remains in effect until otherwise ordered by the Court.

Summons

As an alternative to seeking a warrant of arrest, the Prosecutor may apply for the issue of a summons for the person to appear. If the Pre-trial Chamber finds that there are reasonable grounds to believe that the person committed the crime alleged, and that a summons is sufficient to ensure the person’s appearance, it will issue a summons.

Procedure by State Party

Upon receipt of a request for provisional arrest or for arrest and surrender, a State Party must immediately take steps to arrest the person in question in accordance with its laws and the provisions of the statute, and to ensure that he is brought before a competent judicial authority. The role of the judicial authority is to ensure that the warrant applies to that person, that he has been arrested in accordance with the proper process, and that his rights have been respected.

A person arrested following a request from the ICC may apply for interim release pending surrender. In making its determination on such an application, the national judicial authority is obliged to consider whether, given the gravity of the alleged crimes, there are urgent and exceptional circumstances to justify interim release, and whether the necessary safeguards exist to ensure that the custodial state can fulfil its duty to surrender the person to the Court. The judicial authority may not, however, adjudicate on the propriety of the procedure by which the Court issued the warrant.

The Court may transmit a request for the arrest and surrender of a person to any state on the territory of which that person may be found, and shall request the cooperation of that state in the arrest and surrender of such a person. States Parties are obliged to comply with requests for arrest and surrender in accordance with their national law and with the provisions of the Rome Statute. Where the request for surrender is challenged in the national courts by the person named as a suspect in the request on the basis that he has already been tried for the relevant crime, the requested state must consult the Court to determine if the admissibility of the case has been ruled upon. If the case is admissible, the state must execute the request. If, however, a ruling as to admissibility is pending, the state has a discretion to delay the surrender of the person until the Court makes a determination on admissibility.

International cooperation and judicial assistance under the Rome Statute

Another highly significant difference between the ICC and national prosecuting authorities is that the Court does not have an enforcement mechanism to implement coercive or other measures in furtherance of investigations or prosecutions. Instead, the Rome Statute establishes a system under which the Court receives assistance and cooperation from States Parties, non-States Parties and other international actors to facilitate its work.

States Parties

States Parties have a duty under the Rome Statute to cooperate fully with the Court and to ensure that there are procedures available under national law for all forms
of cooperation specified in part IX of the Rome Statute. In this regard, the Court is authorised to make requests to States Parties through the channel designated by them upon ratification, accession, acceptance or approval. In particular, States Parties have an obligation to comply with requests for a variety of forms of cooperation. These include the arrest and surrender of suspects, the identification and whereabouts of persons or the location of items, the taking of evidence, the questioning of any person being investigated or prosecuted, the protection of victims and witnesses, the preservation of evidence and the execution of searches and seizures.

In the event that the State Party receives a request in relation to which it identifies problems that may impede or prevent the execution of the request, as foreseen in article 97, there is provision for a process of consultation with the Court in order to resolve the matter. Where a State Party has otherwise failed to comply with a request for cooperation, the Court may refer the matter to the Assembly of States Parties or to the UN Security Council, as applicable.

**Assistance from the Court**

The Court may cooperate with and provide assistance to a State Party investigating or conducting trials in respect of crimes within the jurisdiction of the Court or serious crimes under its domestic law (International Criminal Court 2002: article 93(10)). The statute, therefore, foresees the possibility of the Court assisting national authorities; this is significant in the context of the complementarity regime, which encourages states to conduct their own prosecutions for international crimes. It is important to note that if the assistance requested involves the transmission of material obtained with the assistance of a state, that state's consent must first be sought. In the event that the material was provided by a witness or expert, its transmission must be subject to the provisions of article 68 of the Rome Statute.

**Non-States Parties and intergovernmental organisations**

States that are not party to the statute may also assist the Court; to this end, the Court may request the assistance of these states on an ad hoc or other basis. Similarly, the Court can seek the cooperation of any intergovernmental organisation having regard to its mandate and competence. A UN Security Council resolution may also place obligations on non-States Parties to cooperate with the Court.

**The Office of the Prosecutor**

In addition to the provisions set out in part IX of the Rome Statute, article 54 authorises the Prosecutor to take specific investigative steps. The Prosecutor may collect and examine evidence and request the presence of and question victims, witnesses and persons being investigated. He is also empowered to seek the cooperation of any state or intergovernmental organisation or arrangement in accordance with its respective competence and/or mandate. It is open to the Prosecutor to enter into such arrangements or agreements as may be necessary to facilitate the cooperation of a state, intergovernmental organisation or person.

**Freezing and confiscation of criminal assets**

The Rome Statute provides, in addition to imprisonment or the imposition of a fine following conviction for a crime within the jurisdiction of the Court, that the Court may order a forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties (International Criminal Court 2002: article 77(2)(b)). Under article 93(1)(k) of the statute, the Court is authorised to request assistance from States Parties, where applicable, in relation to the identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, again without prejudice to the rights of bona fide third parties. The procedure for the enforcement of orders for forfeiture is set out in rules 217 and 218 of the rules of procedure and evidence of the Court.

**NOTES**

1. For information on States Parties, see http://www.icc-cpi.int/statesparties.html.
2. For an in-depth discussion of each of the crimes, see chapter 2 of this Guide.
3. The relationship agreement between the UN and the ICC is provided for under article 2 of the Rome Statute. It provides for cooperation in a broad range of areas, including information exchange, specific cooperation with the Office of the Prosecutor and requests for assistance from the Court.
4. A declaration under article 12(3) may overcome this limitation.
5. This policy is discussed more fully in International Criminal Court 2006c.
6. According to this provision, the Court is bound to find a case inadmissible where it is 'not of sufficient gravity to justify further action by the Court'. In addition, article 53(1)(b) and 53(2)(b) refer to the admissibility test set out in article 17, indicating that in his or her determination as to whether there is a reasonable basis to initiate an investigation or a sufficient basis for a prosecution, the Prosecutor must have regard to the article 17 criterion of gravity, among others.
The prosecutorial strategy of the Office of the Prosecutor has been published and is available at http://www.icc-cpi.int/otp/otp_events.html.

This position is outlined in the Office of the Prosecutor’s policy paper on the interests of justice, available at http://www.icc-cpi.int/otp/otp_docs.html.

Detailed information on the Office of the Prosecutor’s policy on the analysis of referrals and submissions alleging the commission of crimes within the jurisdiction of the Court is available on the Internet – see http://www.icc-cpi.int/library/organs/otp/policy_annex_final_210404.pdf.

In analysing the seriousness of such information, the Prosecutor may seek additional information from states, organs of the UN, intergovernmental and non-governmental organisations, among other sources.

Article 53(1) of the Rome Statute provides in relevant part that 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…”

Under article 17(1), a case is admissible before the Court where, among others, it has not been genuinely investigated or prosecuted by a state with jurisdiction over it.

The key provisions are found in International Criminal Court 2002: articles 66 and 67.

His trial was due to begin on 23 June 2008 but was halted on 13 June 2008 when the Court’s Pre-trial Chamber ruled that the Prosecutor’s refusal to disclose potentially exculpatory material had breached Lubanga’s right to a fair trial. The Prosecutor had obtained the evidence from the UN and other sources on the condition of confidentiality, but the Judges ruled that the Prosecutor had incorrectly applied the relevant provision of the Rome Statute and, as a consequence, the trial process has been ruptured to such a degree that it is now impossible to piece together the constituent elements of a fair trial. On 2 July 2008 the Court ordered Lubanga’s release; however, at the time of writing he remains in custody pending the outcome of an appeal by the prosecution.


Detailed summaries of the crimes on which the Office of the Prosecutor has gathered information and evidence can be found in the Prosecutor’s periodic reports to the Security Council on the investigation. They are available on the Court’s website; see http://www.icc-cpi.int/cases/Darfur/s0205/s0205_un.html. For an analysis of the referral, see, among others, Du Plessis & Gevers (2005: 23—34).

Copies of the warrants of arrest are available on the Court’s website; see http://www.icc-cpi.int/cases/Darfur.html.

A summary of the submissions received by the Office of the Prosecutor is available at http://www.icc-cpi.int/library/organ/otp/OTP_Update_on_Communications_10_February_2006.pdf.


Since, as required under article 8(1), they were not committed ‘as part of a plan or policy or as part of a large-scale commission of such crimes’. In addition, although the Prosecutor found that it was unnecessary, in light of this conclusion, to reach a decision on complementarity, the response notes that the Office of the Prosecutor also collected information on national proceedings, including commentaries from various sources, and that national proceedings had been initiated with respect to each of the relevant incidents.

This is not a legal requirement under the Rome Statute but rather a policy position taken by the Office of the Prosecutor. Indeed, the Office of the Prosecutor’s ‘Paper on some policy issues before the Office of the Prosecutor’ acknowledges the possibility that, in some cases, an investigation may target lower-ranking individuals if necessary for the conduct of the whole case. See http://www.icc-cpi.int/library/organs/otp/030905_Policy_Paper.pdf.

International Criminal Court 2002: article 20(3) provides: ‘No person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 [namely conduct constituting genocide, crimes against humanity and war crimes] shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:

(a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or

(b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognised by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.’

International Criminal Court 2003 offers valuable insight into the Office of the Prosecutor’s perspectives on complementarity.

The Prosecutor’s report was presented to the Security Council on 29 June 2005.


In accordance with article 17(3) of the Rome Statute (International Criminal Court 2002), the Court considers, in determining a state’s inability to conduct a genuine prosecution or investigation, ‘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’.

The procedure where the custodial state receives a request for surrender from the Court and a request for extradition in respect of the same individual is detailed in article 90 of the Rome Statute (International Criminal Court 2002).

Under article 93(4) (International Criminal Court 2002), a State Party may deny, in whole or in part, a request for assistance only if the request concerns the production of documents or evidence that relate to its national security.
The idea of an international criminal court has captured the legal imagination for well over a century. It became a reality on 18 July 1998 with the adoption of the Rome Statute. After attracting the necessary ratifications the statute entered force on 1 July 2002. And in just over a year of its existence, by November 2003, the International Criminal Court (ICC), through the Prosecutor, had received over 650 complaints.

It is important to consider these complaints. While in one sense they demonstrate the world’s hopes and aspirations for justice through the ICC, they also reveal a disturbing lack of understanding of the Court and how it functions. Fifty of the complaints contained allegations of acts committed before 1 July 2002. This is problematic because the ICC’s jurisdiction is forward-looking and it does not have retrospective jurisdiction over acts committed prior to 1 July 2002. A number of communications alleged acts that fall outside the subject matter of the Court’s jurisdiction, and complained about environmental damage, drug trafficking, judicial corruption, tax evasion and less serious human rights violations.

Thirty-eight complaints alleged, no doubt correctly, that an act of aggression had taken place in the context of the war in Iraq in 2003. The problem here is that the US is not a party to the statute and, in any event, the ICC cannot exercise jurisdiction over alleged crimes of aggression until the crime is properly defined – something the drafters of the statute expressly left until a future date. Two communications referred to the Israeli-Palestinian conflict. The problem here, too, is that Israel is not a party to the statute, and the Palestinian authority is not yet a