



***THE INTERNATIONAL CRIMINAL COURT:
A TRUE CRIMINAL COURT***

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Summary

The following paper describes the International Criminal Court (ICC) as a true criminal court. This issue is particularly important for US advocacy because many Americans do not necessarily perceive the ICC as a true criminal court. However, when they do, they quickly understand and approve of its functions. Some of the US government's opposition to the ICC derives from this inability to recognize it as a criminal court of the same kind as those found in US legal systems. US critics therefore also find it difficult to understand the Court's widespread international support which derives from other states' recognition of the ICC as a true criminal court. The following explores the ICC's status as a true criminal court through a comparison of its structure, officials, accountability mechanisms and procedural practices with those of US courts.

I. Introduction

The imposing wood-paneled room may be easily mistaken for any courtroom in the United States. The scene is the same; judges in robes sitting at a bench above the prosecution and defense teams, witnesses testifying under oath, carts of documents. But this is not a description of a trial in the United States. It is in fact the view from the public gallery of the International Criminal Court, situated in The Hague. The similarities between the International Criminal Court and courts of the United States extend far beyond the décor of the courtroom, however.

II. The Court

The International Criminal Court has broadly the same processes, units and personnel as criminal courts in the US. The following sections discuss the various components of the ICC, comparing them to their counterparts in US courts.

1. Office of the Prosecutor

The prosecutor is central to the administration of justice in both the ICC and US courts. The Office of the Prosecutor (OTP) is responsible for conducting investigations and prosecutions of crimes that fall within the jurisdiction of the ICC. The ICC's chief legal official for prosecution is simply known as the Prosecutor or Chief Prosecutor; Mr. Luis Moreno-Ocampo is the present Prosecutor of the ICC. The head of prosecutions in the US and its 50 states may however be known by any of several names depending on the legal jurisdiction. In the US federal system, the chief prosecutor is known as the US Attorney. Despite the difference in their formal titles, criminal prosecutors for the ICC and in US courts have the same responsibility to initiate and carry out investigations into alleged crimes, with broad discretion over the course of the criminal proceedings.

The Investigation Division and the Prosecution Division of the Office of the Prosecutor perform the same functions found in US prosecutions. The Investigation Division conducts investigations in a similar way to the police in the US justice system, while the Prosecution Division litigates cases as US Attorneys do. The Jurisdiction, Complementarity and Cooperation Division is however a feature unique to the ICC. This is because its mandate, including the analysis of situations submitted to the ICC and diplomatic efforts to secure cooperation among states, is not necessary in the US justice system.

2. Judiciary

The qualifications and selection of ICC judges is another aspect which is similar to US courts. A successful judicial candidate of the ICC must demonstrate high moral character, impartiality, integrity and experience in criminal proceedings or international law. Article 36(3) of the Rome Statute shows the parallel between the international and US judicial election criteria; it states that a successful candidate will “possess the qualifications required in their respective States for appointment to the highest judicial offices.” The common features of US courts and the ICC further extend to the procedures used to elect judges; Article 36(4)(a) of the Rome Statute states “Nominations of candidates for election to the Court may be made by any State Party... (i) By the procedure for the nomination of candidates for appointment to the highest judicial offices in the State in question.” Both US and ICC judges are also confirmed by

a legislative body; Congress confirms US federal and the Assembly of State Parties (ASP), the ICC's governing and oversight body, approves ICC judges.

Although no special qualifications are formally required to become a US federal judge, those nominated are typically highly accomplished private or government attorneys, judges in state courts, magistrate judges, or law professors. The American Bar Association participates in the federal judicial nomination process by vetting nominees and giving them a rating ranging from "not qualified" to "well qualified". This practice is both respected and used by the committees of Congress involved in judicial appointments. Additionally, the US government carries out a stringent screening process of federal judge candidates. The procedures used in the election of ICC judges therefore provide equivalent checks to those used to review the suitability of judicial candidates in the US legal system.

Similarities also exist in the mechanisms to ensure judicial ethics. After confirmation, federal judges must abide by the "Code of Conduct for United States Judges", a set of ethical principles and guidelines adopted by the Judicial Conference of the United States. These rules impose many of the same requirements on US judges as those in the ICC's Code of Judicial Ethics, including judicial integrity, independence, judicial diligence, impartiality and the avoidance of impropriety. Both US and ICC judges must abide by these codes of conduct for the entirety of their term to avoid disciplinary action.

The ICC's judges are organized into Pre-Trial, Trial and Appeals Divisions. The Pre-Trial Chamber (PTC), composed of either a single judge or a bench of three judges, is responsible for a variety of tasks at this pre-trial stage (Rome Statute, Article 39(2)(b)(iii)). Although US courts do not have a PTC as such, many of the tasks it carries out are similar to pre-trial proceedings in the US; before a US trial begins, the prosecution and defense can file a number of motions to request the court rule on a particular matter. The Pre-Trial Chamber authorizes or rejects the beginning of an investigation by the OTP and makes preliminary determinations that a case falls within the jurisdiction of the Court (Article 15(4) and (5)). The PTC can issue warrants of arrest and summons to appear before the Court at the request of the Prosecutor (Article 57(3)(a) and 58) and make orders to grant victims' rights to participate in

proceedings and seek reparations. Where necessary it can also protect the safety and privacy of victims and witnesses, preserve evidence and safeguard national security information (Article 57(3)). Pre-trial motions in US courts can also request pre-trial rulings from judges on similar issues, with the exception of authorization to begin prosecutorial investigations. In contrast to ICC judges, US judges do not have over the power to approve the prosecutorial decision to start an investigation.

After the PTC has preliminarily decided on the admissibility of a case and confirmed the charges, the Presidency refers the case to a Trial Chamber to carry out the trial (Article 61(11)). The Trial Chamber has the same responsibilities as a US judge in an American criminal trial. Finally, as in US appeals courts, the Appeals Chamber deals with appeals against the decisions of the Pre-Trial and Trial Chambers by the Prosecutor or convicted person.

3. Defense

Just as in US courts, a defendant standing trial in the ICC has the right to conduct the defense in person or to appoint legal representation of his or her choosing, to be informed of the right to counsel if he or she does not have one, and, if destitute, to have the Court appoint defense counsel where the interests of justice so require (Article 67(1)(d)). These rights are also guaranteed by the Sixth and Fourteenth Amendments of the US Constitution where, as Judge Black stated in *Gideon v. Wainwright* 372 U.S. 335 (1963), “reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.” This was extended by *Brewer v. Williams* 430 U.S. 387 (1977) to “mean at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him, whether by formal charge, preliminary hearing, indictment, information, or arraignment.”

At the ICC, the Registrar must make sure certain standards are met by the defense team. He or she must ensure the competence and independence of the defense counsel, and provide support and assistance to them. For example, the Registrar must maintain a list of counsel meeting the requirements set out under the Rules of Procedure and Evidence. According to this document, legal counsel must have established competence in international criminal law and

procedure, relevant experience in criminal proceedings, and fluency in at least one of the working languages of the Court. The necessary relevant experience for counsel as described in the Rules of Procedure and Evidence must amount to at least 10 years. To ensure the integrity and independence of defense counsel, the Registry prepared a Code of Professional Conduct for Counsel, which was adopted by the ASP during its fourth session in 2005. A further obligation of the ICC Registrar is the development of an Office of Public Counsel for the Defense (OPCD). This Office represents and protects the rights of the defense during the initial stages of the investigation, and provides support and assistance to the defense team. This support can take the form of legal research and advice or, where appropriate, the appearance before a Chamber in respect of a specific issue.

Defense counsel in US criminal courts must also meet certain requirements; *McMann v. Richardson* 397 U.S. 759 (1970) states “the right to counsel is the right to the effective assistance of counsel.” Furthermore, court-appointed counsel must provide “effective aid in the preparation and trial of the case” (*Powell v. Alabama*, 287 U.S. 45 (1932); *Glasser v. United States*, 315 U.S. 60 (1942)). A defendant in US criminal proceedings is assigned counsel from the Public Defender’s Office or similar publicly-funded entity. This system is analogous to the selection of defense counsel from the predetermined list maintained by the Registrar at the ICC. The Public Defender’s Office integrates the dual objectives the ICC achieves in the appointment of counsel by the Registrar and the establishment of the OPCD, providing both support and assistance to a defendant.

4. Administration

The Registry is the administrative branch of the ICC, which is responsible for the non-judicial aspects of the Court. The Registry performs a variety of functions, including the administration of legal aid matters, court management, victims and witnesses’ matters, defense counsel, and the detention unit. It also provides services in finance, translation, building management, procurement and personnel. In addition, the Registrar has the power to receive, obtain and provide information and establish channels of communication between States, the Court, inter-governmental organisations and non-governmental organisations.

The Administrative Office of the United States Courts is the equivalent central support agency for US federal courts. In a similar way to the Registry, this branch performs a wide range of administrative, legal, management, program and information technology services. The Administrative Office also facilitates communications within the judiciary and between Congress, the executive branch, and the public on behalf of the judiciary. At the state level, the District Clerk, or an official of a similar title, is the corresponding administrator responsible for the day-to-day operation of the justice system. The responsibilities of this position include maintaining the court's records and collecting fees and other deposits of money made with the court.

The Presidency is a separate organ of the ICC, and is composed of the President and First and Second Vice Presidents, who are elected by an absolute majority of the 18 judges of the Court from among themselves (Article 38(1)). The Presidency is responsible for “the proper administration of the Court, with the exception of the Office of the Prosecutor”, and ensures the effective daily functioning of the ICC (Article 38(3)). This additional administrative feature provides further oversight of the day-to-day operation of the Court, and is similar to the administrative responsibilities placed on US federal judges, especially the Chief Justice of the United States Supreme Court.

III. Office of the Prosecutor and Standard Prosecutorial Practices

1. Investigations

The prosecutorial procedures and objectives of US courts in the investigation of alleged crimes are parallel to those of the ICC. In the US, when a criminal offense is committed or reported, the police commence the criminal process by investigating the circumstances surrounding the alleged crimes. In the same way, the Investigation Division of the OTP is responsible for the conduct of investigations, which includes collecting and examining evidence. Unlike prosecutors within the US court system however, the Prosecutor of the ICC has no police force as such to help with the investigatory process. The Office of the Prosecutor instead relies on its own investigators with the cooperation of States Parties. Nevertheless, at this stage both US courts and the ICC collect and preserve relevant evidence in preparation for a possible trial.

The OTP has jurisdictional limits similar to those of US prosecutors. Like US prosecutors, the ICC Prosecutor can only investigate crimes within the jurisdiction of the Court. US federal prosecutors are limited to the investigation and prosecution of cases under federal question, diversity of citizenship or supplemental jurisdiction. The ICC Prosecutor however is more restricted in this respect as the jurisdiction of the Court is limited to the crime of genocide, crimes against humanity, war crimes and, when a definition is formulated, the crime of aggression (Article 5). These crimes must have been committed either on the territory or by a national of a State Party (Article 12(2)), although a State which is not a party to the Rome Statute may also accept the jurisdiction of the Court (Article 12(3) and Rule 44). In addition, the OTP may only exercise jurisdiction if one of the requirements in Article 13 of the Rome Statute is satisfied; a State Party or the Security Council refers a situation to the Court, or the Prosecutor initiates a case and the PTC authorizes it. In the case of investigations initiated by the Prosecutor, he or she must decide following a preliminary examination of the evidence that there is a reasonable basis to proceed; only then will the Prosecutor submit the case to the Pre-Trial Chamber to request authorization to conduct a more in-depth investigation (Article 42(2)).

The responsibilities of the ICC Office of the Prosecutor and US prosecutors when collecting evidence have an important difference. While US prosecutors need only disclose exculpatory evidence if they collect it, Article 54(a) of the Rome Statute specifically requires the ICC Prosecutor to extend the investigation to evaluate both incriminating and exonerating facts, which are then both presented to the Pre-Trial Chamber. In this respect, the duties of the ICC Prosecutor are more onerous, and therefore more restricting, than those of US prosecutors.

2. Arrest and Surrender

As in almost all criminal proceedings, the ICC has a procedure for ensuring that suspects are brought to the Court for indictment and trial. At any time after the initiation of an investigation, the Prosecutor can apply to the Pre-Trial Chamber to issue a warrant of arrest for a suspect (Article 58(1)). This is subject to certain conditions: there must be reasonable grounds to believe the person has committed a crime within the jurisdiction of the court and the arrest of the person must appear necessary. An arrest will be necessary if it is to ensure the person's appearance at trial, to prevent that person from obstructing or endangering the court proceedings,

or to stop the person from continuing to commit that crime or related crimes. Under the Rome Statute, a State Party which has received a request for provisional arrest or for arrest and surrender shall immediately take steps to apprehend the person in question (Article 59). Once the accused is in custody, the ICC makes an order of surrender; the defendant is then delivered to the Court (Article 59(6)) and detained in the ICC's detention center at the seat of the Court unless interim release is granted.

In US criminal courts, the procedure for arrest and surrender is often sequenced differently, although the same results are achieved. In many cases a police officer arrests a suspect on the spot without an arrest warrant; this will happen either when a crime is committed in a police officer's presence or if an officer has probable cause to believe that certain misdemeanors or any felony has been committed that he or she did not see happen. The officer then submits a request for charges or a warrant to the prosecutor's office, suggesting potential charges to be authorized. At this stage, the prosecutor determines whether a person should be charged with a crime and, if so, what the crime should be. The prosecutor may seek a warrant if he reasonably believes that there is probable cause to believe that the suspect committed the offense. If probable cause is proved and the suspect is not already in custody, he or she will be apprehended at this stage. In the event that the suspect is apprehended in either a US state other than where the arrest warrant was issued or internationally, he will be surrendered in a similar way to the ICC's process for securing delivery of a suspect.

3. Prosecutorial Discretion

One criticism of the ICC by US commentators is the scope of the Prosecutor's discretion (see Statement of David Scheffer, Ambassador-at-Large for War Crimes Issues, Developments at the Rome Treaty Conference: Hearings before the Senate Committee on Foreign Relations, 105th Congress (July 23, 1998)). National legal systems around the world show that prosecutorial discretion is an inherent part of a true criminal court. Prosecutorial discretion is not only an integral feature of the US court system, but is also fundamental to the criminal proceedings of a variety of other countries including the United Kingdom, Canada, Japan, The Netherlands, Belgium, Norway, Brazil, South Africa and Botswana. The following sections

compare the discretion exercised by the OTP and US prosecutors at the specific stages of criminal proceedings.

A. Discretion over starting an investigation

The ICC Prosecutor first has discretion over starting an investigation. After preliminary examination of a situation referred by a State Party or the Security Council, the Office of the Prosecutor must decide whether there is a reasonable basis to proceed to a formal investigation of the alleged crimes. Article 53(1) of the Rome Statute states that to initiate an investigation the Prosecutor must have a reasonable basis to believe a crime has been committed within the jurisdiction of the Court; in addition, the situation must be sufficiently serious, serve the interests of justice and be admissible under Article 17 such that the case is not or has not been investigated or prosecuted by a nation which has jurisdiction over it, or if that nation is unwilling or unable genuinely to carry out the investigation or prosecution. The Prosecutor also has the power to independently start an investigation based on information received from other parties such as individuals and non-governmental organizations (Article 15(1)). If the Prosecutor independently takes up a situation, his or her discretion is further limited by the need to gain authorization from the Pre-Trial Chamber to begin a formal investigation (Article 15(3)). This provides a significant check on prosecutorial discretion at the ICC.

US prosecutors, in contrast to the ICC, have absolute discretion both to initiate and continue with an investigation into alleged criminal activities. However, US judges can throw out unmeritorious claims at various pre-trial phases in a similar way to the PTC. Thus there are similar checks on the discretion of the OTP as on US prosecutors.

B. Discretion over what charges to bring

The ICC Prosecutor has discretion over what charges to file; US prosecutors also have broad discretion to direct criminal investigations and decide on charges. In the ICC's case against Thomas Lubanga Dyilo, the Prosecutor has faced disapproval over his choice of charges. Critics argue that the charges against the accused should have extended beyond the conscription and enlistment of children to include mass rape, torture and killing of civilians. The Prosecutor's decision however reflects his duty as a true criminal court prosecutor; he or she must only file

charges for which sufficient evidence is available to secure a conviction. Such criticisms therefore may be used against any common law legal system.

US prosecutors similarly have an absolute discretion over what charges to bring, and established practice dictates that charges should be brought only if the available evidence, minus probable defense evidence, is so strong that the defendant is likely to be convicted. This practice is also recognized by the International Association of Prosecutors in its Standards of professional responsibility and statement of the essential duties and rights of prosecutors:

In the institution of criminal proceedings, [prosecutors] will proceed only when a case is well-founded upon evidence reasonably believed to be reliable and admissible, and will not continue with a prosecution in the absence of such evidence; throughout the course of the proceedings, the case will be firmly but fairly prosecuted; and not beyond what is indicated by the evidence.

Furthermore, many US prosecutors in practice apply a higher standard when filing charges: reasonable belief that the charge can be proved beyond a reasonable doubt at trial, with the information known at that time. Therefore despite US critics' opposition to the restraint of the OTP in filing charges, it is possible to see that US prosecutors apply a similar or higher standard to determine charging decisions.

4. Checks on Prosecutorial Power

The issues of independence and accountability of prosecutors are central to criminal justice both in the ICC and in US courts. Although the ICC and US courts ensure the accountability of their prosecutors in different ways, the ICC actually imposes more stringent checks and balances on the powers of the OTP. The structure of the ICC incorporates many safeguards to protect against prosecutorial abuse, resulting in intensive oversight of the Office of the Prosecutor. The OTP is foremost accountable to the Assembly of States Parties, which both elects the Prosecutor and Deputy Prosecutors by an absolute majority (Article 42(4)), and may remove them from office (Article 46(2)(b) and (c)). The power of removal may be exercised if there is a serious breach of duty, serious misconduct or an inability to carry out the functions required by the Rome Statute (Article 46(1)). ICC judges also review the actions of the Office of

the Prosecutor in several ways during the early stages of the proceedings. Where the Prosecutor independently initiates examination of a situation, the Pre-Trial Chamber must approve the investigation (Article 15(3)). The Prosecutor's request for an arrest warrant must also be justified to the PTC (Article 58). Moreover, in every situation investigated by the OTP, the Pre-Trial Chamber is responsible for conducting a confirmation of charges hearing to determine whether there is a reasonable basis to proceed to trial (Article 61(1)).

The possibility of prosecutorial abuse at the ICC is also severely limited by the stringent admissibility procedures required by the Rome Statute to bring the case under the Court's jurisdiction. These include the serious nature of the alleged crimes, which must satisfy Article 5 of the Rome Statute, and the requirement that the Prosecutor find a reasonable basis to believe such a crime has been committed (Article 15). The Article 12 preconditions to the exercise of jurisdiction and Article 13 triggers, both described above, must also be satisfied.

US prosecutors are subject to many similar checks and balances. US courts also have admissibility and jurisdictional restrictions, which limit the powers of federal prosecutors to take up an investigation. In addition, preliminary hearings and grand jury proceedings are regarded as the primary system of safeguards protecting the accused from oppressive prosecution. In grand jury proceedings, an impartial panel of ordinary citizens must determine whether probable cause exists to commit the case to trial based on the evidence submitted by the prosecutor. In the case of preliminary hearings, this decision is the responsibility of a single judge. Since the role of the grand jury is only to determine probable cause, there is no need for the panel to hear all of the evidence, or even conflicting evidence. US courts leave this presentation of conflicting evidence to the good faith of the prosecutor. By contrast, at the confirmation of charges hearing held by the Pre-Trial Chamber of the ICC, both defense counsel and victims' legal representatives are invited to present evidence and views.

IV. Proceedings

1. Indictment Process

A comparison may also be drawn between the ICC and US courts in the confirmation of charges or indictment process. The confirmation hearing in the ICC's Pre-Trial Chamber is similar to either the indictments by grand jury system or indictment by judge, both found in US courts. At this stage the charges against the accused are either confirmed or dismissed. There are however distinctions between grand juries in the US and the Pre-Trial Chamber of the ICC. In the US it is felt that the decisions of grand juries, which are made up of laypersons, can be and often are dominated by the prosecutor. In contrast however, the ICC Prosecutor is subject to the stringent review of the Pre-Trial Chamber, which is made up of judges with distinguished backgrounds in criminal law and procedure. The compositional differences between grand juries and the PTC therefore mean the ICC Prosecutor is subject to more stringent checks on his or her discretion at this preliminary stage when compared with US federal prosecutors.

The Court's rules on representation of the defendant at these preliminary hearings provide even greater protection to the rights of ICC defendants. During the ICC's confirmation of charges hearing, the defendant and his or her counsel have the right to be in attendance, present evidence and rebut the charges. In state or federal grand jury proceedings however, the defendant has no right to counsel. In exceptional circumstances, the ICC confirmation of charges hearing may be held in the absence of the person charged (Article 61(2)). This is also true in the US with regard to fugitives in grand jury proceedings or preliminary hearings of this kind. In the same way as grand jury proceedings, the ICC's power to hold a confirmation of charges hearing in the absence of the accused is severely limited however by Article 61(2) of the Rome Statute. This restricts the circumstances in which the exception may come into effect to a situation in which a defendant has either waived his right to be present, or has fled and cannot be found. Note that it is not a trial which is taking place at this stage, but an initial hearing where the Pre-Trial Chamber may either confirm or decline to confirm the charges against the defendant.

In addition, the nature of the ICC confirmation of charges hearing offers a way to address the criticism that the Court is isolated from the country in which the crimes were alleged to have

been committed; in remarks made to the Federalist Society in November 2002, former US Under Secretary for Arms Control and International Security John Bolton described the Court as “a distant forum”. The limited number of people involved in a confirmation of charges hearing, and the less extensive evidence and testimony presented at this stage than at the trial itself, make it easier and cheaper to conduct a preliminary hearing close to where the crimes were alleged to have been committed. This is however subject to safety, security and the politics in the country involved.

A. Jurisdiction

A defined jurisdictional mandate is a further feature required for an effective criminal court. For the ICC, strict jurisdictional boundaries are set out under the Rome Statute. Article 5 limits the jurisdiction of the Court to crimes of genocide, crimes against humanity, war crimes and, when a definition is established, the crime of aggression. The accused must also either commit the alleged crimes on the territory of a State Party, or be a national of such a State (Article 12(2)). Additionally, a State can specially accept the jurisdiction of the court with respect to a situation (Article 12(3)). Even where there is a reasonable basis to believe that these elements have been satisfied, this is not sufficient to establish the ICC’s jurisdiction. The Statute then requires not only that the crimes were committed after the entry into force of the Rome Statute on 1 July 2002 (Article 11(2)), but also establishes a high standard for the seriousness of the crimes and that relevant national court systems are unwilling or unable to try the crimes themselves (Article 17).

Article 53(1)(c) sets out a general condition that crimes must be sufficiently serious to fall within the ICC’s jurisdiction, although other requirements specific to particular crimes are also contained within the Statute. For crimes to qualify as crimes against humanity under the Rome Statute they must form part of a “widespread or systematic attack directed against any civilian population” (Article 7(1)). Article 8(1) states that the ICC has jurisdiction over war crimes “in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.” Similarly, genocide by its very nature is one of the gravest crimes known to humanity.

Complementarity places further stringent limits on the jurisdiction of the ICC (Article 17 and 18). The ICC can only initiate an investigation or prosecution where national courts are unwilling or unable to investigate. Conversely, the ICC has no jurisdiction where a state has already carried out a genuine, independent and impartial investigation or trial consistent with an intent to bring justice. The nature of complementarity shows that the ICC carries out the same functions as US courts, but can only take up this role where circumstances prevent justice from being served at the national level.

Similarly, courts in the US possess jurisdiction only over matters granted to them by the Constitution. A distinction between the US courts and the ICC is evident however when comparing the scope of their jurisdictional mandates. Although the ICC is given powers only over a limited set of crimes, courts in the US by contrast have jurisdiction over all criminal activities. As a final note on jurisdictional mandates: all true criminal courts have a contempt power. This refers to a special type of jurisdiction over offences against the administration of justice. Article 70 of the Rome Statute gives the ICC jurisdiction over such offences, while Title 18 U.S. Code §401 allocates the same discretion to US federal courts to punish contempt of its authority.

An effective criminal court also has “jurisdiction to determine jurisdiction”, which is the power of a court itself to determine whether it has jurisdiction over the parties and subject matter of the case. Article 19 of the Rome Statute confers this power to the ICC: “The Court may, on its own motion, determine the admissibility of a case in accordance with article 17.” Despite criticism by US commentators of the Court’s “power to self-judge its own jurisdiction” (see remarks by US Department of State Legal Adviser John B. Bellinger III, *The United States and International Law*, The Hague, The Netherlands (June 6, 2007), it is possible to see that this feature actually confirms the ICC’s status as a true criminal court. The courts of the United States, like all true criminal courts around the world, also have the power to interpret their jurisdictional limits.

B. Standard of proof

In the initial hearing of the ICC, the Pre-Trial Chamber must determine that there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged (Article 61(7)). This is essentially the probable cause standard applied in courtrooms throughout the US, where it is necessary to establish a reasonable belief that the person has committed the crime in order to proceed to trial (Fourth Amendment, US Constitution).

2. Trials

The format of an ICC trial achieves an effective hybrid of the procedures used in criminal proceedings in US courts and criminal proceedings in civil law jurisdiction. The trial procedure in many respects follows the traditional adversarial system used in American criminal proceedings, where litigants present their dispute before a neutral, fact-finding judge. Following the common law model, prosecutions at the ICC are directed by an independent prosecutor. Similar to civil law systems however, the ICC Prosecutor is given special responsibilities to ensure that the rights and interests of the defendant are secured. Moreover, the ICC prosecutor is subject to close judicial scrutiny by the PTC, something that would not generally be the case in a common-law system.

An additional civil law feature in ICC trials is the impaneling of three professional judges to replace the traditional jury used in US criminal trials. The ICC's procedural regime also combines the adversarial model of common law systems with the active judge approach of civil law legal systems. In the common law legal system the role of the court is solely that of an impartial referee between parties, as opposed to the civil law approach where the court or a part of the court is actively involved in determining the facts of the case.

A. Standard of proof/general principles of criminal law

The International Criminal Court incorporates many general principles of criminal law which are also common features of US courts. Article 25 of the Rome Statute gives the Court jurisdiction only over natural persons, who are held individually responsible and liable for

punishment of crimes under the Rome Statute. US courts have jurisdiction over natural and legal persons.

Another key concept of US criminal courts is the criteria for criminal responsibility. In order to prove criminal responsibility in the ICC, the Prosecutor must establish the necessary conduct (Article 5) and intent (Article 30), minus any defense (Article 31). The same concept exists in US legal systems, which require the same elements to establish criminal responsibility. Intent in particular is the foundation for a finding of criminal liability in a true criminal court. Furthermore, in order to convict the accused, the judges of the ICC must be convinced of his or her guilt beyond reasonable doubt (Article 66(3)). The same standard of proof is an integral feature of the conviction of defendants in US criminal courts (Fifth and Fourteenth Amendments, US Constitution). The application of these general principles of criminal law is therefore a common feature of both ICC and US criminal cases.

B. Uniform/stable body of law

An inherent feature of criminal justice is a consistent and uniform body of law, which originates either from statute or common law. The Statute of Rome, Rules of Procedure and Evidence, and Elements of Crimes are the three primary sources which provide an integrated body of law applicable to ICC decisions, binding judges and the Prosecutor of the ICC. A codified body of criminal law also exists in US courts, provided by the Constitution, federal statutes, international treaties, state constitutions and legislation.

The laws applicable to a true criminal court must also be certain, predictable and unambiguous. This is promoted by the consistency and uniformity of the law applied by the Court, and achieved particularly through the precise drafting of both the Rome Statute and Elements of Crimes. Certainty is also ensured by Article 22(2) of the Rome Statute, which dictates that crime definitions must be strictly construed and not extended by analogy. In addition, Article 21 specifies the sources of law which ICC judges may use to amplify the provisions of the Statute. Despite this precision, US critics argue that the definitions of the crimes leave too much discretion to the ICC (see Office of War Crimes Issues Press Release (May 6, 2002)). In fact, the US established itself as a leading contributor to the definitions

contained in the Elements of Crimes, a document to which US delegates agreed. This is particularly true of the section describing war crimes, which was specifically drafted almost entirely by US military lawyers to be consistent with US military manuals. US critics also often oppose the ICC's prohibition of reservations under Article 120 of the Rome Statute (see Office of War Crimes Issues Press Release (May 6, 2002)). The prohibition however stabilizes the jurisdiction of the Court, and ensures that the law can be applied equally to all States Parties. This reaffirms the ICC's nature as a true criminal court.

A particular source of concern in the US towards the ICC is the perception of customary international law and its possible use in such a forum. In Article 38(1)(b) of the Statute of the International Court of Justice, customary law is defined as "international custom, as evidence of a general practice accepted as law." Since it is subject to evolution and development, customary international law is often criticized as an improper basis for conviction of individuals. This was an argument often forwarded by defendants appearing before the International Criminal Tribunal for the Former Yugoslavia. This criticism of customary international law however is not as relevant to the ICC. During the early stages of drafting, a number of experts were brought together to determine the content of international law to be applied by the ICC. It was decided that the ICC law would be based on existing treaty law, the relevant parts of which were subsequently adapted and codified in the Rome Statute, the Rules of Procedure and Evidence and the Elements of Crime documents. The inclusive nature of these documents, in addition to the ancillary status given to customary international law (Article 21), means that the Court's use of customary international law will be very limited. As the Rome Statute shows, customary international law is a tertiary source of law, used primarily as an aid to the interpretation of the ICC's hard law documents. A trend toward the codification of customary international law principles, such as the Genocide Convention in 1951 and the Convention Against Torture in 1987, has also diminished the problems associated with the ICC's application of this type of law.

C. Procedural rules/due process

The involvement of the US in the negotiations of the ICC's procedural rules has lead to one of the most extensive lists of due process guarantees ever written. Furthermore, some commentators have pointed out that the due process guarantees of the ICC are more

comprehensive and inclusive than those detailed in the US Bill of Rights; Monroe Leigh, former President of the American Society of International Law and former legal advisor to Secretary of State Henry Kissinger, stated in testimony to the House International Relations Committee on July 25, 2000 that “it cannot be denied that the Treaty of Rome contains the most comprehensive list of due process protections which has so far been promulgated.” The guarantees contained in the Rome Statute include the right to remain silent and privilege against self-incrimination (Articles 51(1)(a) and 67(1)(g)), protection from double jeopardy (Article 20), and prohibition of warrantless arrests and searches (Articles 57(3) and 58).

In addition, the Rome Statute gives the accused the right to be present at trial (Article 63(1)), which is also a due process requirement in US courts. As stated in *Illinois v. Allen* (397 U.S. 337, 338 (1970)), “one of the most basic of the rights guaranteed by the Confrontation Clause is the accused’s right to be present in the courtroom at every stage of his trial.” Article 63(2) of the Rome Statute provides a very limited exception to this rule in ICC trials when the accused continues to disrupt the trial. In the event that such circumstances arise, the court must make provision for the accused to observe the trial and instruct counsel from outside the courtroom. Exemptions to this rule however are also made in US courts, for example where the defendant knowingly absents himself from the trial, the court may “proceed with trial in like manner and with like effect as if he were present” (*Diaz v. United States*, 223 U.S. 442, 455 (1912)).

Article 66 of the Rome Statute requires that all accused are presumed innocent until proven guilty and places the burden of proof on the Prosecutor to prove the guilt of the accused. The presumption of innocence, although not formally set out in the US Constitution, has been interpreted from the Fifth, Sixth and Fourteenth Amendments of the US Constitution. The courts have also recognized this feature as integral to US court procedures. *Coffin v. United States* (156 U.S. 432, 453 (1895)) held “the principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.”

The Rome Statute similarly provides for the majority of due process rules contained in the Sixth Amendment of the US Constitution. Both articles 64(2) and 67(1)(c) make provision for the right to an expeditious and public trial, while Article 67(1)(b) and (d) grant the accused the right to counsel. The Rome Statute also provides for the examination of adversary witnesses and a compulsory process to obtain witnesses (Article 67(1)(e)), both guaranteed in the Sixth Amendment. In addition, defendants in both US courts and the ICC have the right to a written statement of charges (Article 61(3)). The Rome Statute also prohibits the trial of ex post facto crimes (Article 22 and 24) and excludes illegally obtained evidence (Article 69(7)) in the same way as US courts.

Trial by jury, recognized in the US by the Sixth Amendment, is not used in the ICC. As a practical alternative, given the nature of the ICC's crimes and defendants and the international character of the Court, three professional judges are impaneled in the place of a jury. Nevertheless, the US has long accepted that its citizens, including US servicemembers, will not receive jury trials when accused of crimes in countries where juries are not used, such as France and Japan. The US has also signed extradition treaties with many countries that explicitly permit Americans to be tried without a jury. Additionally, the International Tribunal of the Former Yugoslavia (ICTY) and the International Tribunal for Rwanda (ICTR), both supported by the US, do not have jury trials.

As in the US, the ICC's trial judges are charged with issuing a final judgment (Article 74) and sentencing a convicted person, taking into account the evidence presented at trial as well as other submissions made in additional hearings. (Article 76). The Court may impose sentences of up to 30 years and, when justified by the extreme gravity of the crimes and the individual circumstances of the convicted person, a life sentence. The Court may also order the imposition of a fine or forfeiture (Articles 77-78).

V. Appeals

At the International Criminal Court, a convicted person or the Prosecutor on that person's behalf has a right of appeal on the basis of a factual, procedural or legal error (Article 81(a) and

(b)). An appeal may also be made on any other ground that affects the fairness or reliability of the proceedings (Article 81(b)(iv)) or if the penalty is considered disproportionate to the crime (Article 81(2)). A person convicted in US courts also has a right of appeal under the same circumstances. On this basis, both the Appeals Chamber of the ICC and the US appeals courts have the power to reverse the decision or order a re-trial.

There are differences between the US appellate courts and the Appeals Chamber of the ICC. The ICC Prosecutor can appeal acquittals, unlike US prosecutors. This power is often mistakenly interpreted as the ICC allowing double jeopardy. This is not the case however as a successful appeal of an acquittal by the Prosecutor does not result in a new trial. Instead the existing trial continues to carry out the instructions in the Appeal Chamber's decision. Finally, unlike the criminal courts in the US, the Appeals Chamber can accept new evidence not previously presented at trial.

VI. Checks and Balances – Independence and Accountability of the Court

Critics of the Court also allege that the ICC as a whole lacks accountability. In his remarks before the Center for Strategic and International Studies on 6 May, 2002, former US Under Secretary of State Marc Grossman said that “in the rush to create a powerful and independent court in Rome, there was a refusal to constrain the Court's powers in any meaningful way.” The checks and balances proposed by Mr. Grossman included exclusive UN Security Council authority over referrals to the ICC and a proposal for broad exemptions from the Court for US servicemembers and officials. In the former case, this would have effectively resulted in exemptions from the Court's jurisdiction for the five permanent members of the Security Council because of their veto powers, while the latter request would have provided broad immunity for the US. These suggestions would have prevented the ICC from being a true criminal court. As in the US legal system, true criminal courts are bound to apply the law equally to all parties in a way which is free from external political influences. Nevertheless, the Security Council does have some powers at the ICC. The Security Council can refer a situation to the Court (Article 13(b)), although the Court need not accept such a referral. Under Article 16 of the Rome Statute the Security Council can also defer an investigation or prosecution for a

period of twelve months, in a resolution adopted under Chapter VII of the Charter of the United Nations, and may also renew such a request under the same conditions. The ICC is obligated to comply with a deferral request.

The negotiating countries of the Rome Statute adopted numerous other safeguards to secure an effective system of checks and balances for the Court. Through the Rome Statute, the ICC therefore has independence from existing political structures such as the United Nations, but within its framework has its own political accountability mechanisms primarily through the ASP. As a body which is solely responsible for the ICC and related issues, the ASP is able to make decisions about the Court and its work without the dangers and distractions of extraneous political influences. At the same time however, this legislative body can exercise effective government oversight of the Court, thus ensuring its accountability through democratic means. The Assembly not only elects the judiciary (Article 36(6)(a)), the Prosecutor and the Deputy Prosecutor (Article 42(4)), but also has the power to remove any one of these senior ICC officials from office for serious misconduct or breach of duty. Where the Prosecutor has engaged in conduct of a less serious nature, the ASP is responsible for imposing disciplinary measures; this can be either a reprimand or a fine. In the case of a Deputy Prosecutor, any decision to give a reprimand shall be taken by the Prosecutor himself, while the imposition of a fine will be taken by the ASP on the recommendation of the Prosecutor.

ICC judges also provide effective internal oversight of some of the elements of the Court. The judges elect the Registrar, and a Deputy Registrar if the need arises, by absolute majority taking into account any recommendations of the ASP (Article 43(4)). An absolute majority of judges can also vote to remove from office the Registrar or Deputy Registrar for serious misconduct or serious breach of duty (Article 46(3)). The Presidency imposes disciplinary measures in the case of less serious misconduct of a judge, the Registrar or a Deputy Registrar. Under the Rome Statute, the Registrar must also exercise his or her functions under the authority of the President of the Court (Article 43(2)).

As to the ICC judges themselves, many safeguards are established by the Rome Statute to protect their independence while ensuring accountability. The Court's judges hold office for a

non-renewable term of 9 years, which makes it impossible for outside political influences to exert pressure on them based on the hope of re-election. ICC judges also have control over the Court's jurisdiction in the same way as US judges. In addition, no two judges may be nationals of the same state. Furthermore, ICC judges acting improperly are subject to removal from office, imposition of disciplinary measures or to disqualification from a particular case; these punitive provisions allow for the discipline of misbehaving judges while blocking frivolous attacks. Judicial independence at the ICC is also derived from some of the accountability provisions of the Rome Statute. The election system requires successful candidates to secure a two-thirds majority by the Assembly of States Parties. The Rome Statute also requires a panel of judges to carry out most judicial functions, including the trial verdict and all appeals (Article 39(2)(b)). In addition, judges must give reasons for their decisions, and are instructed to attempt unanimity in their opinion, which may only be replaced by a majority verdict if consensus proves impossible (Article 74(5)). These rigorous selection processes and stringent mechanisms of accountability ensure that the ICC judiciary reflects a diverse bench of well qualified and independent minded officials, free from national influences.

A similar system of checks and balances exists in US courts to ensure the independence and accountability of US judges. The US legislature provides a primary source of accountability for US federal courts, like the ASP in the ICC. In the appointment of the US judiciary, the presidential nomination for a judicial candidate can only be appointed "by and with the advice and consent of the Senate" (Article II, Section 2, Paragraph 2 of US Constitution). The dismissal and disciplinary procedures used in the US legal system may also be seen as a parallel to ICC mechanisms to ensure the independence and integrity of the courts. Disciplinary action may be taken against federal judges for "Treason, Bribery or other high Crimes and Misdemeanors", which involves impeachment by the House of Representatives and conviction by the Senate. Such a conviction results in the automatic removal of the judge from office. Presidential nominations for US Attorney are also subject to confirmation by the Senate (28 U.S. Code § 541). By law, each US Attorney is subject to removal by the President (28 U.S. Code § 541(c)), or may be impeached by the US House of Representatives for certain crimes. The latter is parallel to but more cumbersome than the power given to the ASP in relation to the Prosecutor and Deputy Prosecutor of the ICC.

A further major safeguard which ensures constant supervision of accountability is the Court's obligation to ensure transparency. For example, Article 64(7) of the Rome Statute requires open trials. In addition, the Rules of Procedure and Evidence dictate that decisions of the Trial Chamber must be announced in public and require the Registrar to maintain a public database of the particulars of each case. The Court has also expressed a continued commitment to transparency in all of its activities, and maintains a constant dialogue with States Parties, non-States Parties, international organizations and civil society. This is like the transparency of the US courts, where both courts themselves and reports from judicial proceedings are easily accessible to the public.

VII. The First Trial and the future of the ICC

In examining the blueprint of the ICC as set out in the Rome Statute, it is certainly evident that on paper the Court has all of the defining characteristics of a true criminal court. It remains to be determined however whether the ICC can both retain and exercise these characteristics in practice. The first ICC trial of Thomas Lubanga Dyilo presents an important opportunity in this respect, allowing the court to demonstrate its status as a true criminal court, providing justice with integrity and impartiality. The legitimacy of the ICC's judicial proceedings will be under particular scrutiny by the international community to see whether the ICC can provide a fair and complete hearing. With this in mind, it is imperative for the public perception of the ICC's fairness and independence that the Court's verdict and written decision in the Lubanga trial be based on neutral principles of law. In order to reinforce its status as a true criminal court, the ICC must also ensure that the limited procedural gaps in the Rome Statute are both addressed and remedied. The Court must, for example, continue to develop procedural arrangements to reinforce the rights of defense counsel. These may not have been adequately provided for in the Rome Statute and the Rules of Procedure and Evidence. Although some material steps have already been taken to address this particular issue, the Court has to prove it can respond sensitively and effectively to any gaps in the Rome Statute about resources and assistance for the defense.

The ICC also needs to consider a long-term strategy in order to secure its image as a true criminal court and gain future support, especially from non-States Parties. As more perpetrators of mass atrocities are brought to trial at the ICC, a key priority will be to ensure a fair, consistent and concise pattern of decisions in the same way as a true criminal court. Additionally, it is crucial for the Court to demonstrate that the checks and balances placed on it ensure respect for the limits of its jurisdictional mandate. This is particularly important so as not to alarm the US and other members of the Security Council, who may refer future situations to the Court and whose support may be critical to the future of the ICC.

VIII. Conclusion

From the courtroom to the officials, the court procedures to the applicable law, there can be no doubt that the International Criminal Court is a true criminal court. In the case of states that have not ratified the Rome Statute, it is often the ICC's characteristics as a true criminal court which collide which give rise to political concerns. A particular example of this is the US criticism of the rule against reservations to the Rome Statute, and their opposition to the level of discretion given to the Office of the Prosecutor. An important point which US critics have failed to recognize in their opposition to certain characteristics of the ICC is that these features are not designed to import anti-American sentiments into the Court. Instead they are present in the structure of the ICC to bring the court in line with the practices of a true criminal court, allowing it not only to afford fair and impartial trials for those accused, but also to provide justice to victims.