Introduction

The International Criminal Court ("ICC") was created by the Rome Statute as an international tribunal with jurisdiction to prosecute individuals for crimes, including genocide, war crimes, crimes against humanity and the crime of aggression. The ICC is based in The Hague, Netherlands.

Since being created, 17 individuals have been arrested (the ICC does not have its own police force and relies on the cooperation of States to arrest suspects) and the ICC has heard 30 cases against individuals. There have been 10 convictions.

Background and Scope of Jurisdiction and Powers

The ICC can investigate and prosecute the following crimes:

a) genocide;

b) crimes against humanity;

c) war crimes (which includes, by way of example, wilful killing, torture and attacking civilians or civilian infrastructure); and

d) the crime of aggression (which is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations).

The ICC only has jurisdiction to investigate and prosecute alleged crimes if: (i) the State referring the matter to the ICC is a party to the Rome Statute; (ii) the State in which the alleged

---

2 Facts and Figures, About the Court, available here: https://www.icc-cpi.int/about
crimes occurred accepts the jurisdiction of the ICC; or (iii) the accused person is a national of a State that accepts the jurisdiction of the ICC.⁴

Neither Ukraine nor Russia are parties to the Rome Statute.⁵ However, Ukraine registered a declaration with the ICC that it accepts the jurisdiction of the ICC with respect to crimes that take place within Ukraine.⁶ With the exception of the crime of aggression (see below), the ICC therefore has jurisdiction to investigate and prosecute crimes committed by Russia in Ukraine.

The ICC does not have jurisdiction to investigate and prosecute the crime of aggression in Ukraine, which is the subject of a separate jurisdiction test. In summary, the ICC only has jurisdiction to investigate and prosecute the crime of aggression if: (i) the alleged crime is committed by a national of a State that is a party to the Rome Statute (which Russia is not); or (ii) the alleged crime is referred to the ICC by the UN Security Council (which Russia would block using its veto).

Are all international prosecutions for war crimes conducted through the ICC?

No, the international community has previously set up special ad-hoc tribunals to investigate and prosecute war crimes. For example, the International Criminal Tribunal for the former Yugoslavia ("ICTY") was established to investigate and prosecute war crimes committed in the former Yugoslavia. The ICTY was established by the United Nations Security Council. Some commentators have suggested that a tribunal should be established to investigate and prosecute crimes of aggression committed by Russia in Ukraine (which, as explained above, the ICC does not have jurisdiction to investigate and prosecute).

Process and Procedure

Before an investigation can take place, the prosecution for the ICC must conduct a preliminary examination to determine if the ICC has jurisdiction over the matter, the sufficiency of the evidence available, the ability of national courts to redress the situation and whether an investigation would serve the interests of justice and of the victims.⁷ If an investigation is to proceed, the ICC must notify any State that may have jurisdiction over the alleged crimes of its intention to open an investigation.

---

⁶ Ukraine resolution “On the Declaration of the Verkhovna Rada of Ukraine “On the recognition of the jurisdiction of the International Criminal Court by Ukraine over crimes against humanity and war crimes committed by senior officials of the Russian Federation and leaders of terrorist organizations “DNR” and “LNR”, which led to extremely grave consequences and mass murder of Ukrainian nationals” and the accompanying note, available at: https://www.icc-cpi.int/iccdocs/other/Ukraine_Art_12-3_declaration_08092015.pdf#search=ukraine
⁷ How the Court Works, available at https://www.icc-cpi.int/about/how-the-court-works
During the investigative phase, the prosecution for the ICC collects evidence and requests the cooperation of States and international organisations.

When deciding who to charge, it is the ICC’s policy to focus on those who, having regard to the evidence gathered, bear the greatest responsibility for the crimes. In some circumstances, a person in a position of authority may be held responsible for crimes committed by those acting under his or her command or orders. After identifying a suspect, the prosecution for the ICC formally requests a 'Pre-Trial Division' of the ICC (composed of not less than 6 judges) to issue an arrest warrant and a summons to appear by presenting the court with a description of the alleged crimes, a summary of the evidence and reasons why it is necessary to arrest the suspect.8

Judges will issue the warrant if they believe arresting the suspect is necessary to ensure: (i) the suspect attends the trial; (ii) that the investigation is not obstructed; and (iii) that the suspect will not commit further crimes. As noted above, the ICC relies on the cooperation of States to arrest suspects.9

What is the procedure if the prosecutor brings charges and what sentences can be passed by the ICC?

The first thing to note is that ICC hearings will not begin without the presence of the suspect, making the arrest a crucial stage in ICC proceedings. Accordingly, even if the prosecution for the ICC brings charges against an individual, if the individual is not arrested, the matter will not go to court.

During the pre-trial stage of the court process, the suspect will appear before the judges to confirm the identity of the suspect. The court ensures that the suspect understands the charges and listens to statements from the prosecution, the defence and legal representatives of victims. The judges will then decide if there is sufficient evidence for the case to proceed to trial.

If a case does proceed to trial, the prosecutors must prove the suspect’s guilt beyond a reasonable doubt.10 After all evidence is presented, the (3) judges issue a verdict. The court may sentence individuals to a period of up to 30 years of imprisonment, but also have the power to order reparations and, in exceptional cases, issue life sentences.

The prosecution and defence can both appeal verdicts. Victims and convicted persons also have the right to appeal reparation verdicts. Appeals are managed by a team of (5) judges who have the ability to uphold the verdict, amend it, reverse it or order a retrial. If the convicted individual is sentenced to imprisonment, the sentence is carried out in States that agree to enforce ICC sentencing.11

---

8 How the Court Works, available at https://www.icc-cpi.int/about/how-the-court-works
9 How the Court Works, available at https://www.icc-cpi.int/about/how-the-court-works
11 How the Court Works, available at https://www.icc-cpi.int/about/how-the-court-works
Past/Existing Examples of Proceedings and Results

On 28 February 2022, Karim A.A Khan QC, the chief prosecutor for the ICC, announced that he had sought authorisation to open an investigation into alleged crimes in Ukraine falling within the jurisdiction of the ICC. This followed a preliminary investigation which found a reasonable basis to believe crimes within the jurisdiction of the ICC have been committed.

Following a referral from 39 States that are signatories to the Rome Statute, the ICC has confirmed that it is now investigating allegations that Russia has committed war crimes, crimes against humanity and genocide in Ukraine since November 2013 (i.e. in addition to investigating alleged crimes committed since Russia invaded Ukraine in March, it is also investigating alleged crimes committed before Russia invaded Crimea in 2014).