Establishing Jurisdiction at the International Criminal Court

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For most international attorneys seeking to bring to accountability for violations of international law at the International Criminal Court (ICC), establishing jurisdiction remains one of main problems to bring those who commit the worst crimes in the world to justice.

The ICC is a Court of last resort and serves as an international tribunal for the worst of the worst and only comes into play when domestic judicial mechanisms are unwilling or not able to deliver credible justice. Before the ICC was established, the United Nations (U.N.) General Assembly had to be mobilised under Article 22 to create a subsidiary of the U.N. Charter body with 2/3rd of the world required to vote for an international criminal tribunal (ICT) to be established or via vote at the U.N. Security Council with no vetoes by the permanent members of the Security Council.

The ICC is not universal as it cannot investigate crimes within the jurisdiction of the Court as specified in Article 5 of the Rome Statute unless the jurisdictional requirements of Article 12 and 13 are fulfilled. As such, many crimes which have occurred in non-member states of the ICC have no international judicial process following despite the crimes recognised by various international organisations such as the United Nations (U.N.) and its bodies such as the U.N. Human Rights Council (UNHRC).

Missions of state-Parties to the ICC and/or aircrafts as well as vessels registered to state-Parties of the ICC, even by non-governmental organisations (NGO’s), will help fulfill the pre-requisites to jurisdiction required in Article 12 and this may be linked to nationals of non-state parties applying the principles of individual criminal responsibility of Article 25. The ICC may also retroactively investigate crimes of nationals of the non-state parties linked with the relevant case since the Rome Statue entered into force in 2002.

NGO’s are of specific interest to civilians. An example where an NGO vessel registered with an ICC member-State triggered an ICC investigation was the case of the humanitarian Turkish flotilla “M.V. Mavi Marmara” headed to Gaza in the State of Palestine to provide aid.
This flotilla was illegally raided in international waters by Israeli Defence Forces (IDF) and its crew members were killed. The flotilla was registered in the ICC member-State of the island nation of Comoros which allowed the ICC to establish jurisdiction. Comoros invoked Article 14 which allows for a referral of the situation by a state-Party but the Mavi Marmara preliminary examination did not proceed as it did not fulfill admissibility requirements under Article 17 (1) (d) as there was not enough “gravity”. In other words, there were not enough victims but jurisdictional requirements were fulfilled this way.[4] Referrals by a state-Party are not required if the victims have sufficient evidence given that jurisdictional requirements are met as the Office of the Prosecutor (OTP) can start a proprio motu investigation under Article 15.

With the advances of communications, science, and signal intelligence technology; the jurisdiction at the ICC for the following crimes as well as components of a crime can be established:

1. Torture under sub-sections “f” as well as “k” of Article 7 and Article 8 (2) (ii).

2. Elements of intent under Article 8 related to War crimes.

3. Use of chemical weapons under the “Convention On The Prohibition Of The Development, Production, Stockpiling And Use Of Chemical Weapons And Their Destruction (1997)”, known as the “Chemical Weapons Convention (CWC)”.[5]

Torture can be committed via electronic communications under the “U.N. Convention of Torture (CAT)” of 1984[6] which is in relation to human experimentation. These are crimes against humanity/war crimes as per Articles 7 and 8 of the Rome Statute of the ICC.

Domestic implementing legislature of the international conventions in most countries related to torture including the United States (U.S.) are present. With regards to torture, the important principles of the CAT have been maintained in the as torture is a crime where U.S. Courts can invoke universal jurisdiction overriding diplomatic immunity except that of the Head of State. The latest case in the U.S. was United States v. Belfast II (2010)[7] where a Liberian diplomat’s conviction of torture was upheld by the U.S. Court of Appeals (11th Federal Circuit).

For example, if a group of people are continuously subjected to “mental suffering” as well as “physical suffering” caused by advances in new signal intelligence technology, this would fall under both crimes against humanity of torture and war crimes of human experimentation. This can be done via new communication as well as signal intelligence technologies such as directed energy weapons, laser weapons, and other electronic weapons.[8][9] There are U.S. Department of Army documents proving the bio-lethal effects. The U.S. Department of Justice (DOJ) in 1992 recommended to local as well as federal law enforcement to use these weapons along with “knockout gases” against civilians despite their contradictions to domestic as well as international law since it is harmful to civilians.[10] Military weapons of this kind can only be supplied by the U.S. Department of Defense which is required to report their sales and details of the usage of the weapons to the Head of State.[11]

More recently, U.S. Presidential Directive PPD/28[12] of January 17th, 2014 ordered usage of advances in signal intelligence technology to collect intelligence both domestically and internationally within the framework of U.S. laws. These military weapons cause wireless electric
shocks, electromagnetic waves, holograms, microwave auditory effects, etc. “Mental/physical suffering” occur as these are military weapons can kill as well as attack and destroy objects without solid particles as proven in U.S. Department of Army Reports.[13] While the medical effects of the advances in signal intelligence are out of the scope of this article, the continued exposure to radiation is relevant to “physical suffering” despite any Presidential Directive. Any who experience such suffering under the provisions of the CAT may request the legal assistance of a state-Party of the ICC party as further explained.

In the interests of justice as described in the Preamble of the U.N. Charter, persons responsible for these matters within the Mission of a state-Party to the ICC and/or via an aircraft or vessel registered to a state-Party.

NGO’s can also extend their assistance by monitoring these communications as well as signals acting as an intermediary fulfilling jurisdictional requirements under Article 12. This will affect those monitoring the communications and signals since they will be tortured or be exposed to chemical weapons as well. Some NGO’s registered with the United Nations Economic and Social Council (ECOSOC) have the mandate of investigating human rights violations, violations of international law, etc in order to share this information with the U.N. and other international organisations.

Article 25 for individual criminal responsibility is applied so the ICC can then trace these communications, gases, and signals even if it is originating from a non-state party; thus establishing jurisdiction over both the state-Party including non-state party for the crimes.

This method can also be used for proving and establishing ICC jurisdiction when chemical weapons are used. An aircraft or vessel registered to a state-Party, even if by an NGO, can land in an area where chemical weapons are being used with consent of the state where the crime is occurring. That aircraft or vessel will now have been exposed to chemical weapons allowing for jurisdiction to be established by the ICC. Chemical weapons for the purposes of the CWC are defined under Article II (2) as any “toxic substance” which has the ability to cause death as well as temporarily or permanently incapacitating a person such as causing sleep. Even tear gas, used by law enforcement in protests, was to be put as a banned chemical weapon under the CWC but since there are legal warrants to use it, it was not banned but defined as a “riot control agent”. Nevertheless, such agents, such as when used for prolonged periods beyond the scope of law enforcement, cannot be used as methods of warfare under Article I (5) among other provisions of the CWC.

Any other gas such as a malodorant which is a foul smelling gas capable of causing incapacitation will fit the criteria of a chemical weapon since it falls under Article II (9) for “Purposes Not Prohibited Under This Convention” such as “military purposes not connected with the use of chemical weapons…”. Under Article XIII of the CWC, the Convention is in relation to the “Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (1925)”, otherwise known as “The Geneva Protocol of 1925”.[14]

Legal avenues to especially relevant to diplomats and other internationally protected persons as torture or use of chemical weapons against diplomats can provoke wars. Diplomats of governments that are not members of the ICC can also use this legal strategy to bring their cases to the ICC as per the “U.N. Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including
As per Article 30 (1) of the latter, the residence of a diplomat has the same status as the Mission, in that it is not the territory of the state where the residence is in, but the territory of the government the diplomat is in service of. Where this type of torture occurs in a diplomat’s residence, the government may seek the assistance of a friendly nation which is a member-State of the ICC to establish jurisdiction or request the assistance of an NGO who has an airplane and/or vessel registered to a state-Party of the ICC to establish jurisdiction.

Proving genocide has been a difficult task examining international criminal case law due to the fact that mens rea or the intent for genocide as defined under Article 2 of the “Convention on the Prevention and Punishment of the Crime of Genocide (1948)” can be difficult to establish. This is where communications and advances in signal intelligence technology can help prove intent if proven as credible information as well as collect information but not establish jurisdiction.

With the consent of a non-state party where genocide is occurring, a state-Party to the ICC as mentioned in the example torture case involving Missions and aircraft/vessels registered in the territory of a state-Party can play an intermediary role in receiving information with regards to intent as well as receiving other information relevant to the crime. The case of the self-termed terrorist group “Islamic State” or popularly known as ISIS/ISIL in Iraq and Syria is of relevance since it has been alleged that crimes against humanity as well as war crimes including use of chemical weapons have been alleged to be committed by not just terrorists but governments such as the United States (U.S.), Turkey, Syria, etc.

For example, if Iraq or Syria allows a friendly country that is a state-Party to the ICC or a non-governmental organisation (NGO) who have aircrafts or vessels registered in a state-Party to intercept communications and signals; information regarding the intent of all belligerents under international humanitarian law (IHL) committing violations of international law can be collected, if not proven, as it is not a violation of sovereignty under Article 2 (4) of the U.N. Charter. Interpol does not send agents around the world to arrest or investigate but Interpol may exercise the powers of its Constitution which include investigating international crimes if a country which has consented. This is also relevant to Missions, Embassies, Representative Offices, and other diplomatic residences as the government can make a request for Interpol to investigate.

However, where genocide, crimes against humanity, etc occur; this method may not be able to be utilised since no crime has occurred on the actual jurisdiction of the Mission, aircraft, and/or vessel of a member-State to the ICC unlike crimes of torture as well as usage of chemical weapons so only information can be collected. This information may be useful if there is ever an investigation by the ICC with jurisdiction established for crimes against humanity which require widespread and systematic attacks, war crimes which require large scale commission of such crimes, as well as genocide.

Jurisdiction at the ICC on a non-state party can also be established if it is found that a member-State has aided and abetted crimes within the jurisdiction of the Court such as procuring arms for genocide as was in the cases such as Prosecutor v. Furundzija (2009) also known as
Case No. IT-95-17/1,[19] Prosecutor v. Vasiljevic (2009) also known as Case No. IT-98-32-T,[20] and Prosecutor v. Blaskic (2000) also known as Case No. IT-95-14[21] at the International Criminal Tribunal for the former Yugoslavia (ICTY). This was also held at the International Criminal Tribunal for Rwanda in cases such as Prosecutor v. Akayesu (1998) also known as Case No. ICTR-96-4-T. [22] The ICC has taken this into account in when applying the reasonable basis standard for individual criminal responsibility in Article 25 of the Rome Statute as the cases cited form customary international law.

The U.S. is not a state-Party to the ICC but has been alleged of grave violations of international law within its own territory. Until now, the U.S. has only had jurisdiction over its own territory like most other states but when there are civilians, organisations, etc that use the legal strategy mentioned above, the U.S. can also be held accountable at the ICC for these crimes committed within their own territory. The same is for other countries as well so it is not required that a government necessarily needs to be involved as the average citizen with resources can have access to the Court for such grave crimes.

The ICC issues arrest warrants for of those who have committed grave violations of international law but under Article 28 as superiors that did not support the crime or was not involved but should have known are guilty such as Heads of State. Extradition of persons with ICC arrest warrants is also possible as an ICC arrest warrant does not mean the wanted person can sit within their country not being able to travel to one of the 124+ member-States of the ICC which have an obligations to extradite wanted persons under ICC agreements and treaties. Governments have the power to issue an international arrest warrant through Interpol, known as the “Red Corner Notice” and can do so for these leaders even if they are Heads of State, high ranking diplomats or members of armed forces, etc.

Interpol notifies police of every country to arrest these wanted persons and where the country refuses, it may face diplomatic as well as political repercussions. In addition, there are bi-lateral extradition treaties between most countries where double jeopardy, or the situation where a person is tried for a crime twice in two nations, does not apply as held in U.S. Supreme Court Cases such as Heath v. Alabama (1985).[23] U.S. government legal authorities such as U.S. DOJ Consultant Mr. Bassiouni in his book International Extradition: United States Law And Practice also reaffirms that the double jeopardy clause of the 5th amendment of the U.S. Constitution does not prevent extradition unless the treaty expressly prohibits this.[24]

With regards to the usage of chemical weapons, the Nobel Peace Prize winning Organisation for the Prevention of Chemical Weapons (OPCW) plays a major role in disarming nations which have used chemical weapons against civilians. The U.N. has stepped in throughout history to disarm nations which use chemical weapons via U.N. Security Council Resolutions or sending U.N. Peacekeeping Contingents for the same purpose which can also be done under U.N. General Assembly Resolution 377 or the “Uniting For Peace” Resolution[25] to send the OPCW to disarm nations.
Under the CWC, the Director-General of OPWC has 12 hours once given authorisation by the inspected state-Party or otherwise authorised by the U.N. to dispatch inspectors to remove the chemical weapons. Under Article 5 as well as Article 6 of the U.N. Charter, a country that continuously refuses to abide by U.N. Security Council Resolutions or the U.N. Charter can be suspended and/or expelled from the U.N.

Therefore, while the ICC was not intended to have universal jurisdiction, there are many ways for average citizens of non-state parties to invoke the Court for certain crimes as mentioned in this article.


