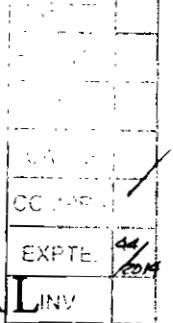


MODERN INTERNATIONAL
CRIMINAL JUSTICE



The Jurisprudence of the
International Criminal Court

Raphael KAMULI



intersentia

Cambridge – Antwerp – Portland

CONTENTS

Acknowledgements	v
Preface	vii
Table of Cases	xvii
Table of Treaties, Statutes and Other Selected Instruments	xxxi
Abbreviations	xliii
Chapter 1. Introduction	1
Chapter 2. Jurisdiction, Admissibility and Applicable Law	9
1. Jurisdiction	9
1.1. The parameters of the jurisdiction of the ICC	11
1.2. Barriers to the exercise of the jurisdiction	14
1.3. Challenges to the jurisdiction of the Court	15
1.4. Exercise of jurisdiction	17
1.4.1. Referral of a situation by a State Party	17
1.4.2. Referral of a situation by the Security Council acting under Chapter VII of the UN Charter	18
1.4.3. Initiation of an investigation upon the Prosecutor's own initiative	19
1.4.3.1. The applicable standard	20
2. Admissibility	22
2.1. Challenges to the admissibility of a case	24
2.2. The admissibility test	25
2.2.1. Complementarity principle	25
2.2.2. Gravity threshold	29
3. Applicable law	30
3.1. Primary sources	31
3.2. Subsidiary sources	31
3.2.1. Treaties and the principles and rules of international law	31
3.2.2. National laws	32
3.3. General principles on the interpretation of the Rome Statute	33
3.4. Interpretation in accordance with internationally recognised human rights	35
3.5. The role of the <i>travaux préparatoires</i> in the interpretation	36
3.6. Role of the jurisprudence of other international criminal tribunals ..	37

Chapter 3. Composition and Administration of the Court	39
1. Introduction	39
2. Presidency	39
3. Judicial divisions	39
3.1. Excusing and disqualification of judges	40
3.2. Relationship between the different Chambers	44
4. Office of the Prosecutor	45
4.1. Power of the Prosecutor to conduct investigations	46
5. The Registry	46
Chapter 4. Evidentiary Standards	49
1. Levels of evidentiary standards	49
2. Evidentiary standard at the issuance of a warrant of arrest	50
3. Evidentiary standard at the proceedings for confirmation of charges	51
4. Evidentiary standard at the trial phase	57
Chapter 5. Relevance, Admissibility and Probative Value of Evidence	59
1. Presentation of evidence	59
2. Admissibility, relevance and probative value of evidence	61
3. Direct and indirect evidence	66
4. Documentary or summary evidence	68
5. Inconsistencies	69
6. Format	70
7. Circumstantial evidence	73
8. Evidence obtained by means of violation of human rights	74
9. Hearsay evidence	76
10. Expert witnesses	78
11. Corroboration of evidence	79
12. Evidence pertaining to a person's civil status	81
13. Preventive relocation of witnesses	81
14. Witnesses with dual status	82
Chapter 6. Individual Criminal Responsibility	85
1. Introduction	85
2. Modes of criminal liability under the Rome Statute	86
3. Modes of criminal responsibility under Article 25(3)(a) of the Statute	87
4. The doctrine of 'control over the crime'	90
5. Elements of co-perpetration based on joint control over the crime	97
5.1. Objective elements of co-perpetration based on joint control over the crime	98
5.1.1. Common plan	98
5.1.2. Coordinated essential contribution	101
5.2. Subjective elements of co-perpetration based on joint control over the crime	103
5.2.1. Intent and knowledge	103
5.2.2. Mutual awareness and acceptance that the implementation of common plan may result in the realisation of the objective elements of the crime	105
5.2.3. Suspect's awareness of factual circumstances enabling him or her to jointly control the crime	107
6. The doctrine of 'control over the organisation'	108
7. Organised and hierarchical apparatus of power	111
8. Co-perpetration vis-à-vis other modes of liability under Article 25 of the Statute	113
8.1. Liability under Article 25(3)(d) of the Statute	113
8.2. Liability under Article 25(3)(c) of the Statute	113
Chapter 7. Material and Mental Elements of Crimes	115
1. Introduction	115
2. Genocide	115
2.1. Contextual elements of the crime of genocide	116
2.2. Specific elements of the crime of genocide	118
2.2.1. Victims' membership of a targeted group	118
2.2.2. Genocidal intent	119
2.2.3. 'Substantive part'	121
2.3. 'Knowledge-based approach'	122
3. Crimes against humanity	123
3.1. Contextual elements of crimes against humanity	123
3.1.1. 'Widespread'	127
3.1.2. 'Systematic'	130
3.1.3. 'As part of'	131
3.1.4. 'Civilian population'	132
3.1.5. The relevant <i>mens rea</i>	133
3.2. Specific elements constituting crimes against humanity	134
3.2.1. Murder	134
3.2.2. Rape	135
3.2.3. Sexual slavery	137
3.2.4. Torture	138

3.2.5. Deportation and forcible transfer of population	140	8. Interim release	201
3.2.6. Other inhumane acts	141	8.1. Nature of the decision for interim release or continued detention ...	201
4. War crimes	142	8.2. Relevant factors for the determination of interim release or	
4.1. Contextual elements of war crimes	143	continued detention	203
4.1.1. The concept of international armed conflict.....	144	8.3. Release in case of a conditional stay of the proceedings	205
4.1.2. The concept of internal armed conflict	146	8.4. Duty to periodically review a decision on the release or detention	
4.1.3. Awareness of the existence of an armed conflict	151	of a suspect	207
4.2. Specific elements constituting war crimes	151	8.5. Reasonable period of detention prior to confirmation of charges... 209	
4.2.1. Directing an attack against the civilian population	151		
4.2.2. Wilful killing	154		
4.2.3. Murder.....	158		
4.2.4. Torture.....	159		
4.2.5. Destruction of enemy's property.....	160		
4.2.6. Pillaging	162		
4.2.7. Sexual slavery and rape.....	164		
4.2.8. Inhuman treatment.....	166		
4.2.9. Outrages upon personal dignity	167		
4.2.10. Using, conscripting or enlisting children	168		
4.3. Existence of a nexus between the armed conflict and the alleged			
crimes	174		
5. Crime of aggression.....	175		
5.1. Definition	175		
5.2. Exercise of jurisdiction over the crime of aggression	176		
5.3. Criminal responsibility	177		
Chapter 8. Rights of the Accused and Due Process	179	Chapter 9. Protection of Victims and Witnesses	213
1. Introduction	179	1. The Prosecutor's power to take appropriate protective measures	213
2. Right of the accused to disclosure and inspection	179	2. Redactions.....	214
2.1. Right to disclosure of exculpatory material	179	3. Relocation of witnesses.....	218
2.2. Disclosure of evidence underlying detention	184	4. Non-disclosure of persons who may be placed at risk as a result	
2.3. Non-disclosure of the identities and identifying information		of the activities of the Court	219
of 'potential prosecution witnesses'	188	5. The Prosecutor's powers and duties of protection in emergency	
2.4. Right of the Defence to inspect material in possession or control		situations.....	223
of the Prosecutor	189	6. Protection of 'potential prosecution witnesses'	224
2.5. Disclosure of material obtained pursuant to Article 54(3)(e)		7. Protection of the ICC staff	225
of the Rome Statute	189	8. Summaries as a protective measure	226
3. Right of the accused to be present at the trial.....	191		
4. Right of the accused to remain silent.....	192	Chapter 10. Victims' Participation and Reparation	229
5. Rights of the accused in relation to languages	193	1. Victim-based justice	229
6. Right of the accused to expeditious proceedings.....	195	2. Victims defined	231
7. Right to legal representation	198	3. Victims' participation in Court proceedings	234
		3.1. Personal interests of the victims	235
		3.2. 'Views and concerns'	237
		4. Participation of victims under other provisions.....	238
		4.1. Victims' participation under Article 15 of the Rome Statute.....	238
		4.2. Victims' participation under Article 75 of the Rome Statute.....	239
		4.3. Victims' participation under Article 68(1) and (2) of the	
		Rome Statute	239
		4.4. Victims' participation under Rule 93 of the Rules of Procedure	
		and Evidence	240
		4.5. Victims' participation under Rule 143 of the Rules of Procedure	
		and Evidence	241
		5. Victims with dual status.....	241
		6. Stages of victims' participation	241
		6.1. Victims' participation in the situation	241
		6.2. Victims' participation at the confirmation of charges hearing	243
		6.3. Victims' participation at trial	244

6.3.1. Right to lead evidence pertaining to the guilt or innocence of the accused and to challenge the admissibility or relevance of evidence	246
6.4. Victims' participation in appeals	250
6.5. Victims' participation at sentencing	255
6.6. Victims' participation at the determination of reparations	256
6.6.1. Principles on reparations	257
Chapter 11. Appellate Jurisdiction and Stay of Proceedings	259
1. Appellate jurisdiction	259
1.1. Nature of appellate jurisdiction	259
1.2. Grounds of appeal	261
1.3. Scope of appellate jurisdiction	264
1.4. Nature and scope of interlocutory appeal	265
1.5. 'Appeals' relating to confirmation of charges	267
1.6. Nature of remedies on appeal	268
1.7. The power of the Appeals Chamber to make suspensive effect	269
1.8. Discontinuance of the appeal	273
2. Stay of proceedings	274
2.1. General overview	274
2.2. Inherent power to stay proceedings at the ICC	275
2.3. The difference between stay of proceedings and adjournment	277
2.4. Stay of proceedings because of abuse of process	280
2.5. Timing of stay of proceedings	283
2.6. Stay of proceedings with respect to documents obtained on the basis of confidentiality agreements	285
2.7. Stay of proceedings with respect to rights encompassed in Article 67(1)(b) and (e) of the Statute	285
2.8. Stay of proceedings with regard to disclosure of identities of potentially exculpatory witnesses and their statements	286
2.9. Stay of proceedings for the suspect or the accused to secure services of new counsel	287
2.10. Stay of proceedings with regard cooperation and Defence access to exculpatory documents	287
2.11. Permanent vis-à-vis conditional stay of proceedings	288
2.12. Limitations of the Appeals Chamber with respect to stay of proceedings and other matters	290
Glossary	291
Bibliography	293
Index	299