GETTING A CASE TO THE ICC

Step I: Ratification of the ICC Statute
The Statute must be ratified by 60 States to take effect and establish the ICC. (Article 126(1))
The ICC will have jurisdiction only over crimes committed after the Statute enters into effect. (Article 11(1))

Step II: Preconditions to the exercise of the ICC’s jurisdiction
Before the ICC can act its jurisdiction must be accepted by either:
(Article 12(2))

<table>
<thead>
<tr>
<th>The Territorial State</th>
<th>The State of Nationality of the Accused</th>
</tr>
</thead>
<tbody>
<tr>
<td>(where crime was allegedly committed)</td>
<td>(The US in the case of US nationals)</td>
</tr>
</tbody>
</table>

“A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.” Article 12(1)

When necessary, other states may also accept ICC jurisdiction by declaration. (Article 12(3))

Step III: Initiation of investigations and prosecutions
Who can initiate investigations leading to possible ICC prosecutions? Three possibilities under Article 13:

<table>
<thead>
<tr>
<th>Referral of a situation by a State-Party</th>
<th>Referral of a situation by the Security Council</th>
<th>Initiation of an investigation by the Prosecutor proprio motu (on his own authority)</th>
</tr>
</thead>
<tbody>
<tr>
<td>A basic right of a party to the Statute</td>
<td>No need for precondition in Step II to be met in this case</td>
<td>Special limits apply to the Prosecutor's initiation of an investigation proprio motu (Article 15)</td>
</tr>
</tbody>
</table>

Based on the special role of the Council under the UN Charter in maintaining international peace and security

Could involve the Security Council in enforcing the ICC’s requests for cooperation from states (Article 87(7))

Pre-trial Chamber of the ICC must approve any investigation initiated by the Prosecutor by finding:

“reasonable basis to proceed with an investigation”

that the case “appears to fall within the jurisdiction” of the ICC

Step IV: Admissibility/Complementarity
The deference of the ICC to the jurisdiction of national courts

The most general and effective jurisdictional limit on the ICC lies in its relationship to national courts

The jurisdiction of the ICC "shall be complementary to national criminal jurisdictions." (Article 1)

A threshold of "admissibility" applies to ensure that the ICC will have jurisdiction only in exceptional cases, as a sort of "safety net" to prevent impunity for serious international crimes

This provides the best assurance for the US that US nationals are unlikely ever to be tried by the ICC unless the US government decides to allow it

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The Standard of Admissibility (Article 17)

The ICC shall not proceed with any case if:

(a) It is being investigated or prosecuted by a State which has jurisdiction

(b) It has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned

(c) The person has already been tried for the same conduct

(d) The case is not of sufficient gravity to justify further action by the Court

The only exception to (a) and (b) is if:

the state concerned "is unwilling or unable genuinely to carry out the investigation or prosecution"

Unwillingness standard requires "one of more" of the following:

- national proceedings or decision made for the purpose of shielding the person from criminal responsibility
  - Article 17(2)(a)
- unjustified delay in the proceedings is inconsistent with an intent to bring the person concerned to justice
  - Article 17(2)(b)
- proceedings not being conducted independently or impartially, and conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice
  - Article 17(2)(c)

Inability standard 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"

- Article 17(3)

Admissibility can be challenged at various stages, but only once by any person or state (Article 19(4))

Preliminary Ruling on Admissibility at the Initiation of a Case

Any state with jurisdiction over the case can assert its superior right to exercise that jurisdiction (Article 18)

- the ICC Prosecutor must notify all states with jurisdiction of any investigations commenced
- States have one month to notify Prosecutor of their own investigation of the persons concerned
- ICC Prosecutor must defer to any State’s investigations, unless a Pre-Trial Chamber decides to authorize the investigation (i.e. finds the case to be admissible)
- The State may appeal the Pre-Trial Chamber’s decision

Other challenges to the admissibility of a case (Article 19)

- Admissibility may be determined by the ICC on its own motion, or
- An accused may bring a challenge, or
- A state with jurisdiction, may also bring a challenge on the ground it is investigating or prosecuting the case, or has already done so
- A state whose acceptance of jurisdiction is required, as a precondition of the exercise of jurisdiction under Article 12

Step V: Possibility of Deferral Pursuant to Decision of the Security Council

"No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions."

(Article 16)
Step VI: Investigation/Evaluation by the Prosecutor

After the referral of a situation by a State Party or by the Security Council, the Prosecutor evaluates the information made available to him or her.

Prosecutor makes a preliminary decision whether to proceed with the investigation based on whether:

(Article 53)

(a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;

(b) The case is or would be admissible under article 17; and

(c) 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.

If the Prosecutor decides not to proceed the referring State Party or the Security Council if it referred the case is informed along with the Pre-Trial Chamber.

<table>
<thead>
<tr>
<th>Decision there is no reasonable basis to proceed</th>
<th>Otherwise Prosecutor proceeds to investigate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Referring Party, and Pre-Trial Chamber are notified</td>
<td>Collects evidence, seeks testimony, seeks cooperation of states and international organizations</td>
</tr>
<tr>
<td>Pre-Trial Chamber may review the decision at the request of the referring party or on its own initiative</td>
<td>Is to respect rights of persons during the investigations (Article 55)</td>
</tr>
<tr>
<td>Process may end here</td>
<td></td>
</tr>
</tbody>
</table>

Step VII: Pre-Trial Chamber decides upon the issuance of orders and warrants requested by Prosecutor for purposes of investigation (Articles 57-58)

Summons to appear, measures to preserve evidence, arrest warrants

Article 58 sets out the standards for issuance of an arrest warrant

Ideally the arrest warrant leads either to:

- arrest by the custodial state and surrender to the ICC, or
- voluntary appearance before the ICC of the person whose arrest is sought

Step VIII: Confirmation of charges before trial (Article 61)

Within a reasonable time after the person's surrender or voluntary appearance before the Court or

in the absence of the person charged if the presence of that person cannot be secured

After informing the person charged, and/or his or her counsel, of all charges and evidence, The Pre-Trial Chamber holds a hearing to determine whether to confirm the charges

Document setting out the charges must be provided to the person and his or her counsel

At the hearing, the Prosecutor shall support each charge with sufficient evidence to establish substantial grounds to believe that the person committed the crime charged.

Pre-Trial Chamber confirms or dismisses each charge