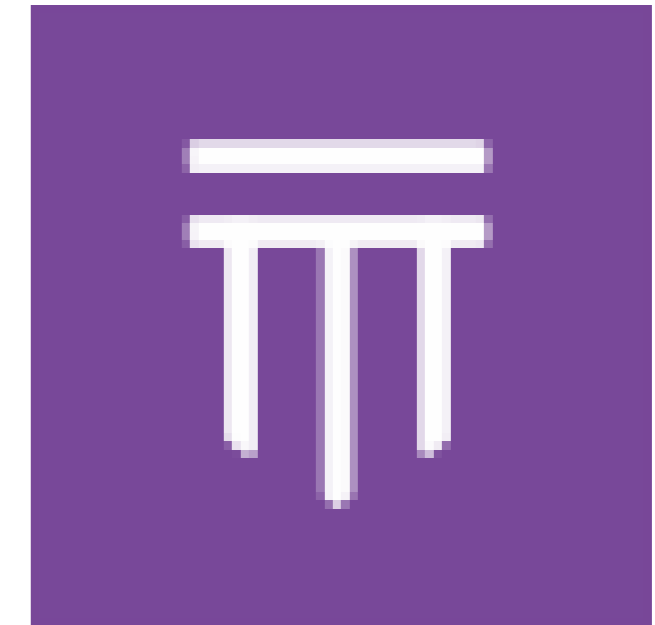


Brno, 13 October 2021

International criminal court & regional actors



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International criminal law (recapitulation)

- Crime under international law
 - Legal concept, grounded in:
 - Article 1 [Convention on prevention and punishment of the crime Genocide 1948](#)
 - [Principles of International Law recognized by Nuremberg Tribunal Charter 1950](#)
 - [Draft Code of Crimes against the Peace and Security of Mankind 1996](#)
- Nuremberg Charter: recognised 3 categories of crimes
 - Crimes against peace
 - War crimes
 - Crimes against humanity
- Statutes of International ad hoc tribunals: prosecute grave violations of international law
- Careful! International crime vs crime under international law



Crime under international law

1. Crimes against peace (recapitulation)

- UN Charter, Art. 2.4 prohibition of the use of force
- ICJ: Military and Paramilitary Activities in and against Nicaragua 1986
- Nuremberg, Tokyo: **crime of aggression**

2. Grave violations of humanitarian law (War crimes)

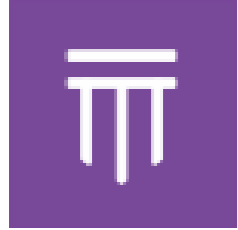
- Regulated in Customary law
- Need to be committed during an armed conflict
- Discussed in International Court of Justice case: [Barcelona Traction](#)
- A common article 3 of Geneva convention (humanitarian minimum) prohibiting
 - Attacks on life and health, murder, torture, mutilation
 - wounded, sick and shipwrecked be collected and cared for
 - It grants the ICRC the right to offer its services to the parties to the conflict.
 - It calls on the parties to the conflict to bring all or parts of the Geneva Conventions into force through so-called special agreements.

3. Crime of genocide

- Widespread systematic attack against civil population
- Intention to **exterminate whole** protected group

4. Crimes against humanity

- Systemic crimes against civil population, can happen also outside of the armed conflict



International Criminal Court

- The idea emerged immediately after WW2
- 1947 Nuremberg Laws (created by International Law Commission) – guidelines on what constitutes a war crime, recognised individual accountability and inspired the Rome Statute of the current ICC
- 1954 first attempt – however, due to the lack of consensus, put ad acta
- Committee for International law – proposal in 1994
- 1996 Preparatory Committee of the UN General Assembly tasked to prepare a statute of a future Court
 - **PROBLEMS**
 - Diverse preferences of states
 - Disagreement on the extent of jurisdiction
 - Some countries vote for stronger (Czechia) some for weaker competences of the court
- International conference in Rome, 15-17 July 1998
 - Created ICC Statute
 - Signed by 120 of 148 states
 - Effective ratification required 60 countries, achieved on 11 April 2002. Since this day, statute in effect, the ICC could have been established
 - Today: 123 contracting parties
- Drawbacks:
 - Speed (negotiations took a long time)
 - Agenda linkage (countries expected various informal benefits for their support and ratification of Rome statute)
 - Diplomacy (are we creating a political or legal institution?)



International Criminal Court

- COMPOSITION
 - Article 34: four internal bodies
 - Presidency of the Court
 - Three divisions
 - Appeal (second instance)
 - Trial (first instance)
 - Pre-Trial (preparation of cases)
 - The Office of the Prosecutor
 - The Registry
 - Article 36.1: minimum 18 judges
 - Selection criteria: high moral quality, impartiality, integrity, the qualifications required in their respective states for appointment to highest judicial offices
 - Competence in criminal law and procedure (experience as judge, prosecutor, advocate)
 - Competence in relevant areas of IL
 - Every state nominates 1 candidate (not necessarily a national)
 - Election: 2 lists of candidates according to qualifications
 - Election by secret ballot at a meeting of the Assembly of States Parties
 - No two judges may be nationals of the same state





International Criminal Court

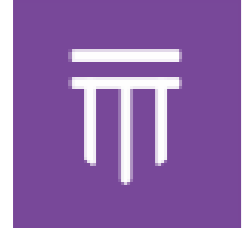
- The key to selection (18 judges represent different geographic regions) is to achieve geographic, but also gender balance, representation of different legal systems
- Judges are selected for 9 years, election is done in cycles by 3 (6 new judges every 3 years)
- The Office of the Prosecutor:
 - Article 42: separate independent body of the Court
 - Responsible for receiving referrals and information on crimes within the jurisdiction of the ICC, examining them, conducting investigations and prosecutions before the Court





ICC: Jurisdiction (Article 5)

- The crime of genocide
- Crimes against humanity
- War crimes
- **The crime of aggression**
 - Inserted by resolution 6 of 11 June 2010
 - Invasion or attack by the armed forces of a state of the territory of another state, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force
 - Bombardment by the armed forces of a state against the territory of another state
 - The blockade of the ports or coasts
 - Attack by the armed forces on the land, sea, or air forces, or marine and air fleets
- TIME: crimes committed after 1 July 2002



ICC – Initiation of investigation

- Initiation of investigation
 - Referral by a treaty party (gives information to Prosecutor)
 - Referral by UN Security Council (Chapter VII)
 - Prosecutor on his own motion (proprio motu)
A15 (for example in Kenya)

- Conditions for valid initiation:
 - Ratification of the statute by the investigated country
 - Competence of the court acknowledged (ad hoc) by at least 1 of the states under investigation
 - Principle of complementarity





ICC - Controversies

- Execution of punishments
 - Part 7.
 - Imprisonment (max. life or 30 years) – is it sufficient
 - Financial punishment
 - Forfeiture of property etc.
 - Part 10
 - List of countries willing to take convicted in their national prisons
 - ICC oversees the execution of sentence
 - Conditions: based on national legal order



ICC - Controversies

- Cooperation with member and third countries
 - Regulated in Part 9.
 - Every contracting party has a general obligation to implement its international commitments. General principle of treaty law
 - Core responsibilities of parties to ICC
 - Cooperation on investigation and prosecution
 - Compatibility of national laws and cooperation
 - ICC cannot impose commitments on third countries, but it can ask them for ad hoc help
 - Arrest and surrender
 - Rule of specialty (see below)
 - Domestic immunities are **NOT** applicable
- Generally, state can refuse the cooperation only when it hands over information demonstrating that it would pose a threat to its own security



ICC – Controversial cooperation with USA

- Clinton's role
 - He was standing behind preparation of the Rome statute, he signed the Statute in 2000
 - This was a turning point as in 1998 voting, USA was among countries that were against, next to Iraq, Israel, Libya, Cina, Qatar and Yemen
 - Clinton argues he would ratify only after USA has a chance to observe the functioning of the Court, but, he supported the proposed role of ICC:

“The United States should have the chance to observe and assess the functioning of the court, over time, before choosing to become subject to its jurisdiction. Given these concerns, I will not, and do not recommend that my successor, submit the treaty to the Senate for advice and consent until our fundamental concerns are satisfied. Nonetheless, signature is the right action to take at this point. I believe that a properly constituted and structured International Criminal Court would make a profound contribution in deterring egregious human rights abuses worldwide, and that signature increases the chances for productive discussions with other governments to advance these goals in the months and years ahead.”



ICC – Controversial cooperation with USA

- Clinton's role
 - BUT: he did not submit the Statute to the Senate for the ratification
- George W. Bush: explicitly against ICC.
 - Sent a note to UN Secretary General in May 2002: USA no longer intends to ratify and does not recognize any obligation towards the Rome Statute – withdrawal from the depository list
- Obama
 - re-established the cooperation as an observer. 2009.
 - Repeated support voiced also on the ground of UN, plus support of investigation in Sudan
 - Removed sanctions to BIAs (see next slide no 15)
 - US has a delegation in Kampala, plus promise to help prosecute atrocity crimes and investigation of rebel group Lord's Resistance Army and Joseph Kony (Uganda)



ICC – Controversial cooperation with USA

- Trump
 - very critical of the court in UN and UN Human Rights Council.
 - USA withdrew the visa of the ICC Prosecutor Fatou Bensouda (anticipation of the investigation into possible war crimes committed by US forces during the War in Afghanistan – authorized in March 2020)
- Biden:
 - lifted sanctions against heads of ICC's jurisdiction, Complementarity and Cooperation Division. Still object to ICC's jurisdiction over personnel of non-state parties such as US and Israel, but: wants to engage



ICC – Controversial cooperation with USA

- ASPA – American Service-Members' Protection Act (2002)
 - the right of the President to take soldiers from the ICC jurisdiction
 - A number of provisions
 - Prohibition of US co-operation with ICC
 - President can use all means necessary to bring about any release of any US or allied personnel detained by, on behalf of or at the request of the ICC PLUS prohibiting the US providing military aid to countries which had ratified the treaty establishing the court. (if they do not have BIA – see next slide).



ICC – Controversial cooperation with USA

- **BIAs: Bilateral Immunity Agreements**
- Article 98 of the Statute: prohibits ICC from requesting assistance or a surrender of a person to the ICC if to do so would require the state to act inconsistently with its obligations under international law
- Article drafted because of the concern what will happen with existing interstate agreements
- **That means that treaty on non-extradition would prohibit the state to co-operate with ICC**
- US: its citizens cannot be transferred to the ICC by any state that has signed a bilateral agreement with the US prohibiting such a transfer, even if the state is a member to ICC (BIAs)
- After Mali, Namibia, South Africa, Tanzania and Kenya publicly rejected BIAs in 2003 – development aid funding provided by USA was cut by more than 89 million dollars
- Romania – EU requested it not to sign BIA -> common position by the CEU 2002: permitting members states to enter into A98 agreements with the USA but only



ICC – Criticism

- Conflicting authority outside of a classical constitutional system of compliance enforcement
- Elastic jurisdiction
- Lack of definitions of crimes in the Statute
- No act of terrorism
- Fear of prosecution of their own soldiers – see incident in My Lai, for example
- Too independent Prosecutor
- Ineffective (lengthy proceedings, lack of action, politicization)
- It is not part of the UN
- Violation of the traditional concept of state sovereignty
- Due process (no jury trials, retrials allow errors of fact, hearsay evidence, no bail...)



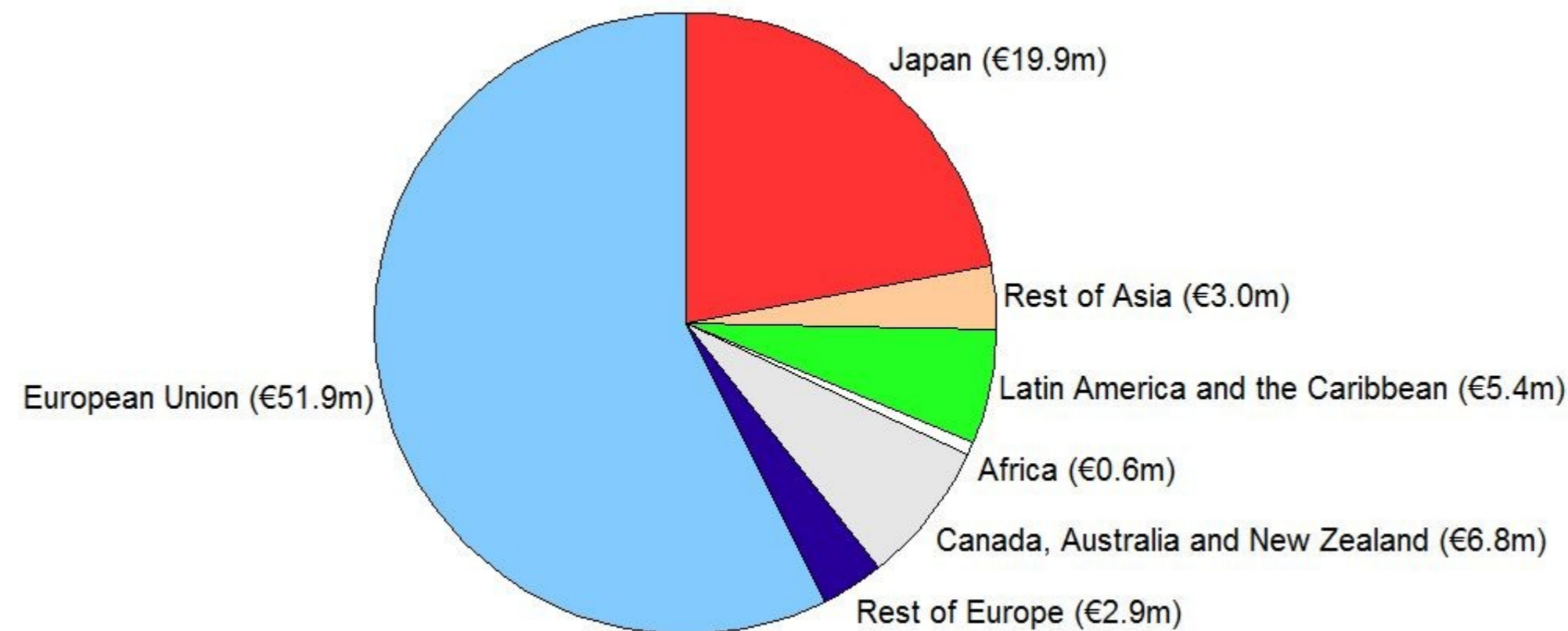
ICC - Controversies

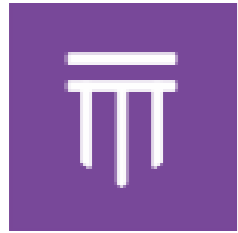




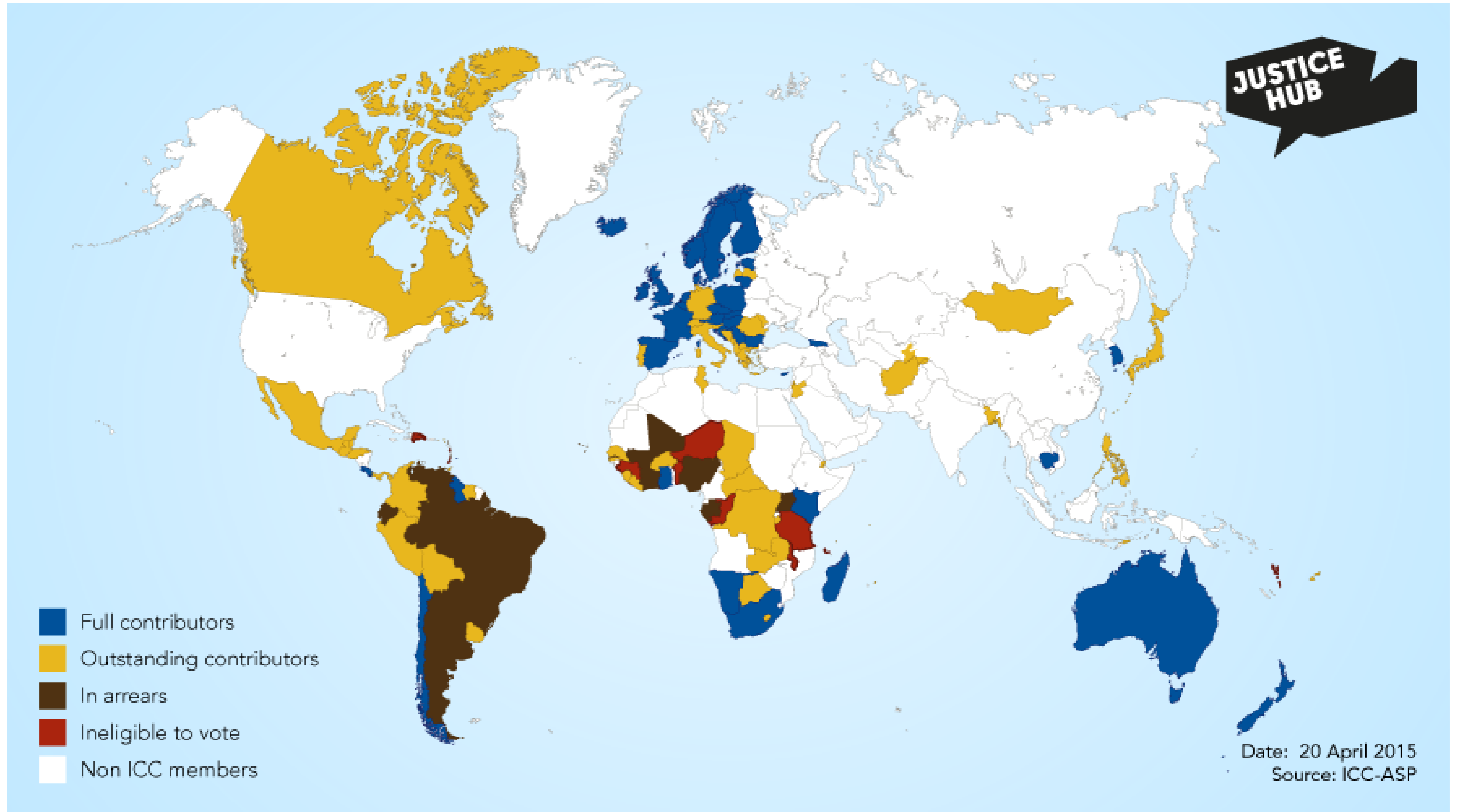
ICC - Controversies

- Finances: contributions from state parties (same as UN contributions system: country's capacity to pay / national income and population)
- Maximum: 22% of Court's budget (Japan in 2008)





ICC - Controversies





ICC - Controversies

- Criticism of Western imperialism:
 - ICC punishes only leaders from small, weak states while ignoring crimes committed by richer and more powerful states
 - Kenya – withdrawal of support (AU summit 2013)
When Omar al-ashir visited several African countries, he was not arrested despite the ICC warrant
Ivory Coast opted not to extradite the first lady Simone Gbagbo and try her at home
- AU: withdrawal proposal 2015



ICC - Controversies

- Czech Republic enters as the very last EU member and candidate country
 - 1 October 2009
 - 10 year long journey to ratification (signatory from 1999)

Constitution and Rome Statute

1. immunities (President, Senators, Constitutional justices)
2. Presidential amnesties
3. X extradition of nationals (Constitution does not allow this)



ICC – Biggest cases

- **Prosecutor:** investigations in 13 situations
- Most famous:
 - Libya
 - Al-Bashir & Darfur
 - Côte d'Ivoire
 - Palestine
 - Kenya
 - Bangladesh
 - Lubanga (DRC)
- **Investigations: Colombia, Guinea, Nigeria, the Philippines, Ukraine, Bolivia, Venezuela**
- **45 indicted people, 19 ongoing cases, 12 fugitives**



ICC – Prosecutors

Ocampo - Bensouda - Khan (June 2021)



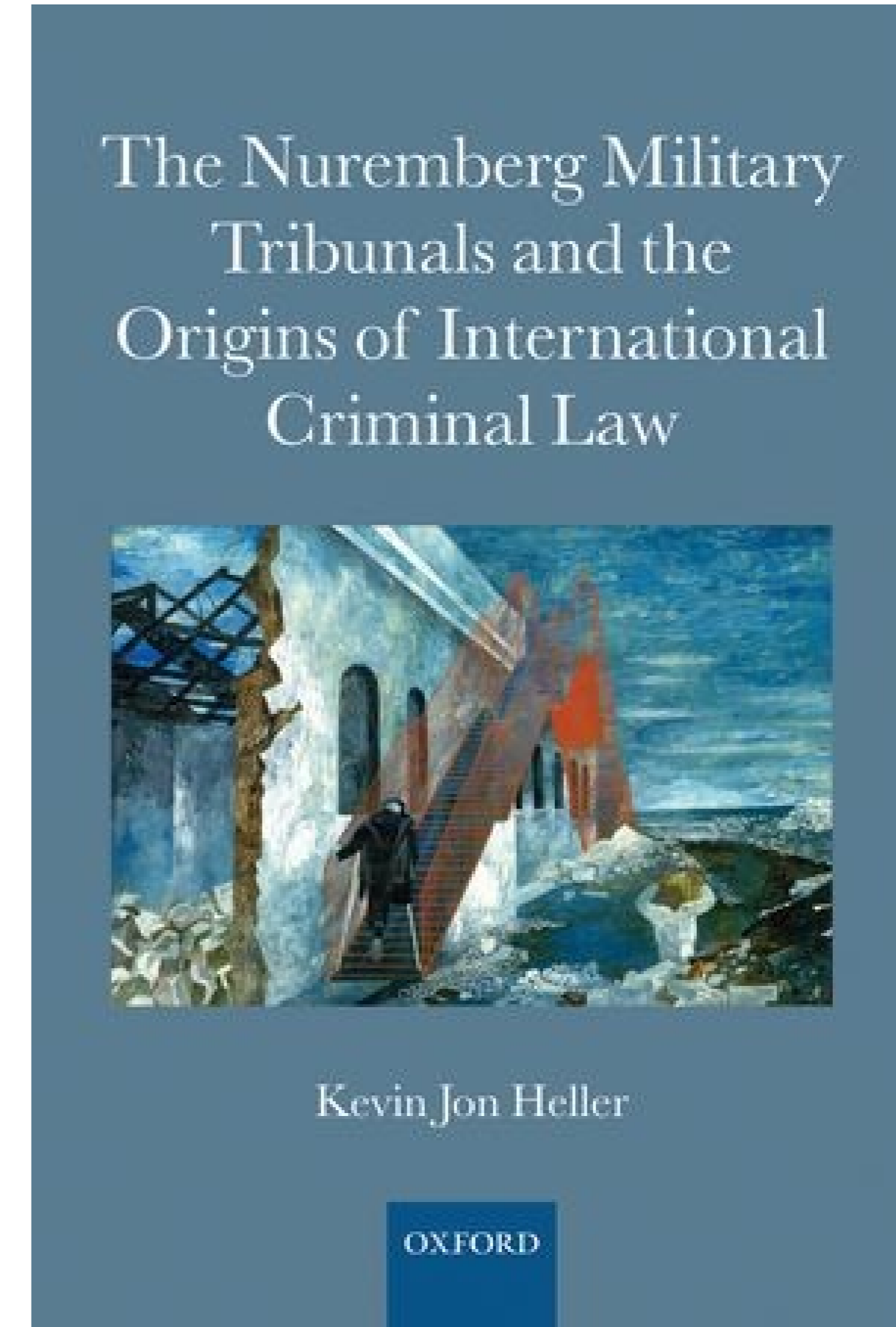


Recommendation

Kevin Jon Heller:

The Nuremberg Military Tribunals

and the Origins of International Criminal Law



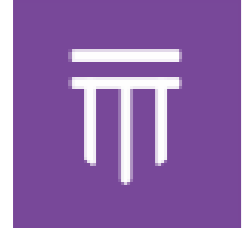


ICC – Biggest cases

Lubanga

- First charged to stand before the ICC
- War crime of hiring child soldiers

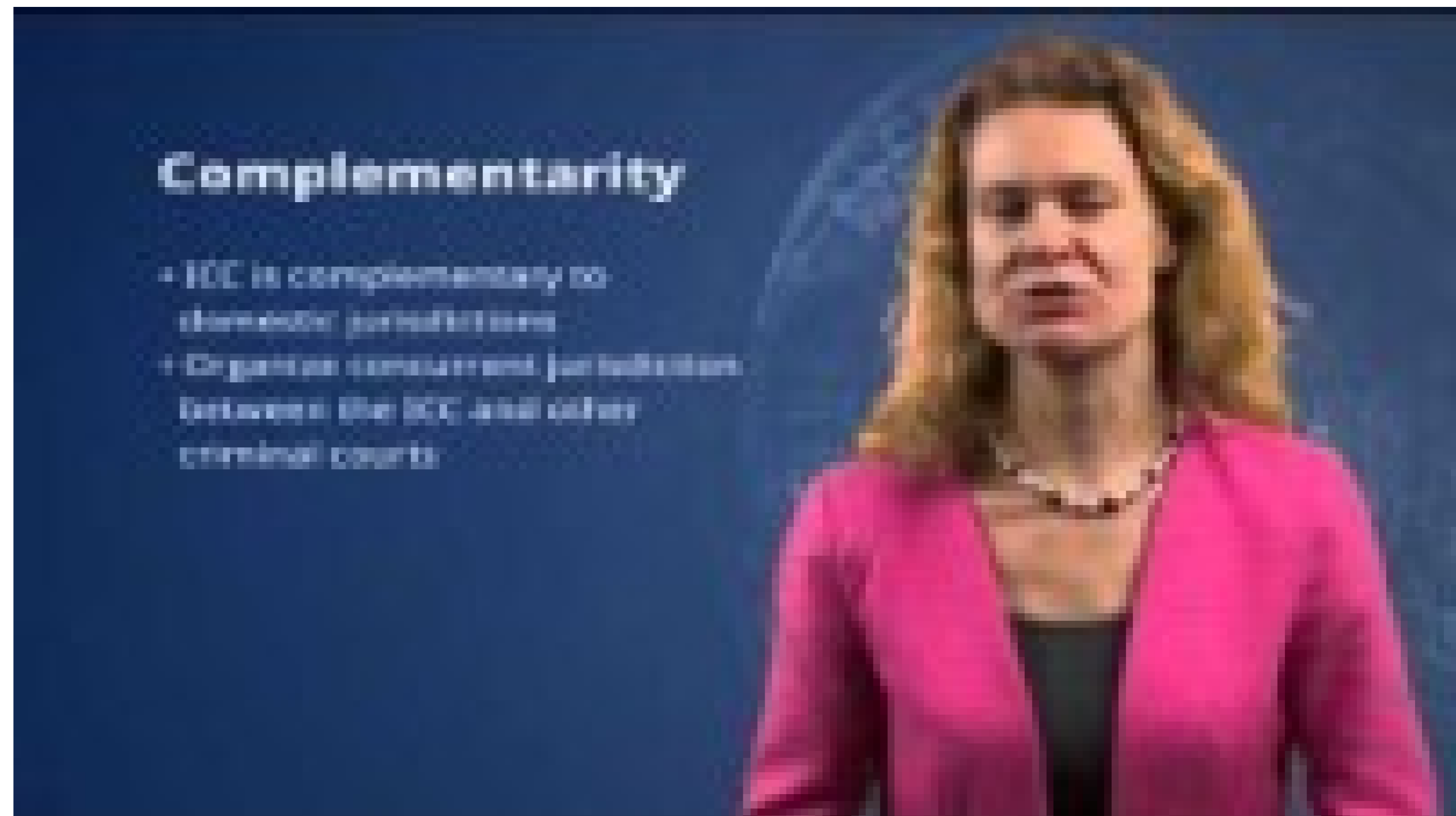




ICC – Interesting lectures and readings

Larissa van den Herik, Leiden

- https://www.youtube.com/watch?v=0RbKE4thMQk&ab_channel=CentreforInnovation-LeidenUniversity

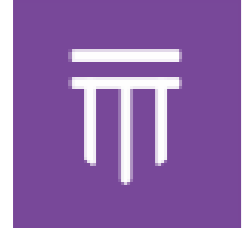




ICC – Interesting lectures and readings

Eric Posner on ICC

- Eric Posner on ICC <https://www.law.uchicago.edu/news/eric-posner-international-criminal-court>
- The Absurd International Criminal Court
<https://www.wsj.com/articles/SB10001424052702303753904577452122153205162>



ICC – Interesting lectures and readings

Blogs on ICC

- Opinio Juris
 - <http://opiniojuris.org/?s=ICC>
- *EJILTalk!*
 - for example: <https://www.ejiltalk.org/category/international-criminal-court/>

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Thank you for your
attention