



ICRC

## ADVISORY SERVICE

### ON INTERNATIONAL HUMANITARIAN LAW

# International criminal justice: The institutions

Although the idea dates back to the aftermath of the First World War, it was only in 1945 that the first successful international organs of criminal justice, the Nuremberg and Tokyo International Military Tribunals, were established, to address war crimes, crimes against peace and crimes against humanity committed during the Second World War. Talks about the establishment of an international criminal court resurfaced half a century later with the end of the Cold War; in the meantime, the large-scale atrocities committed in the former Yugoslavia and Rwanda had prompted the United Nations to set up two ad hoc tribunals, in 1993 and 1994, respectively. A series of negotiations to establish a permanent international criminal court that would have jurisdiction over serious international crimes regardless of where they were committed subsequently led to the adoption of the **Statute of the International Criminal Court (ICC)** in July 1998 in Rome. The Statute entered into force on 1 July 2002 after 60 countries had become parties to it. It embodies the international community's resolve to ensure that those who commit serious crimes do not go unpunished. The ICC is the first treaty-based, permanent international criminal court established to help end impunity for the perpetrators of the most serious crimes of international concern. In the years that followed, two mixed tribunals, comprising elements of both international and domestic jurisdiction, and special chambers within national courts were established to try those responsible for crimes committed in specific contexts.

#### The ad hoc tribunals

**The International Criminal Tribunal for the former Yugoslavia (ICTY)**, based in The Hague (Netherlands), was established in February 1993 by Security Council resolution 808. Its jurisdiction is limited to acts committed in the former Yugoslavia since 1991 and covers four categories of crimes as defined in the Tribunal's Statute, namely, grave breaches of the 1949 Geneva Conventions, violations of the laws and customs of war, genocide and crimes against humanity.

**The International Criminal Tribunal for Rwanda (ICTR)**, based in Arusha (United Republic of Tanzania), was established in November 1994 by Security Council resolution 955. Its jurisdiction is limited to acts committed in Rwanda or by Rwandan nationals in neighbouring States during 1994 and covers three categories of crimes, namely, genocide, crimes against humanity and violations of Article 3 common to the 1949 Geneva Conventions and Additional Protocol II, which set out rules applicable to non-international armed conflicts.

The **jurisdictions** of the ICTY and the ICTR are not exclusive but concurrent with national courts, over which they nevertheless have primacy.

Pursuant to Security Council resolution 1666 of 22 December 2010, the ICTY and the ICTR are expected to complete their respective mandates by 31 December 2014, and the **United Nations Mechanism for**

**International Criminal Tribunals (MICT)** was created to carry out a number of essential functions of both tribunals as part of their completion strategy. The MICT has jurisdiction to supervise the enforcement of sentences, designate the State in which convicted persons will serve their sentences and decide on requests for pardon or commutation of sentence. In addition, the MICT will be responsible for the protection of victims and witnesses in the cases before it and in cases completed by the tribunals, while the ICRT and the ICTY will remain in charge of this task for cases remaining before them. The MICT will also retain jurisdiction over three of the remaining fugitives still wanted by the ICTR. The MICT branches in Arusha and The Hague started functioning on 1 July 2012 and 1 July 2013, respectively, and will work concomitantly with the ICTY and the ICTR while the two latter tribunals wind up pending proceedings.

#### Mixed tribunals and special chambers

Established in 2000 pursuant to Security Council resolution 1315, the **Special Court for Sierra Leone (SCSL)** has jurisdiction over all violations of Sierra Leonean law and international humanitarian law (IHL) committed since 30 November 1996 and enjoys primacy over the national courts of Sierra Leone. The SCSL has offices in Freetown, The Hague and New York City. Under an agreement signed in February 2012, the

**Residual Special Court for Sierra Leone** will take over the SCSL's functions after the latter closes.

Inaugurated in March 2009 pursuant to Security Council resolution 1664, the **Special Tribunal for Lebanon (STL)** has jurisdiction over the crimes committed under Lebanese criminal law in the attack on the former Prime Minister carried out on 14 February 2005. It is the first international tribunal to try crimes under domestic law and to deal with terrorism as a distinct crime. The tribunal sits in The Hague and has an office in Beirut.

Special Chambers were established in the courts of East Timor (**Special Panel for Serious Crimes**), Cambodia (**Extraordinary Chambers**), Serbia (**War Crimes Chamber**) and Bosnia-Herzegovina (**War Crimes Chamber**) in 2000, 2001, 2003 and 2005, respectively. In Kosovo<sup>1</sup>, a hybrid entity known as the "**Regulation 64 panels**", established in 2000 by the United Nations Interim Administration Mission in Kosovo (UNMIK), allows international judges to serve alongside domestic judges to try war criminals.

#### The International Criminal Court (ICC)

#### **National enforcement systems, State responsibility and the ICC**

The ICC is not intended to replace national criminal justice systems but

<sup>1</sup> UN Security Council resolution 1244.

rather to complement them. Nothing in the ICC Statute releases States from their obligations under customary international law and existing instruments of IHL to investigate and prosecute war crimes allegedly committed by their nationals or armed forces or on their territory, and they are thus still required to enact implementing legislation giving effect to these obligations.

By virtue of the **principle of complementarity**, the ICC's jurisdiction is intended to come into play **only** when a State is genuinely unable or unwilling to prosecute alleged war criminals over which it has jurisdiction. The ICC is thus intended to be a last resort in the event that a State fails or is unable to properly discharge its duty to prosecute with regard to these international crimes. This principle is merely intended to serve as a means of bringing about a more effective system of repression aimed at preventing, halting and punishing the most serious international crimes.

### Crimes under the ICC's jurisdiction

According to its Statute, the ICC has jurisdiction over aggression, genocide, crimes against humanity and war crimes. Article 8 of the Statute lists the war crimes over which the ICC has jurisdiction. These include most of the grave breaches listed in the 1949 Geneva Conventions and Additional Protocol I and a number of serious violations of IHL, some of which are considered war crimes irrespective of whether they were committed in international or non-international armed conflicts. Offences specifically identified as **war crimes** in the Statute include:

- § rape, sexual slavery, enforced prostitution, forced pregnancy or other forms of sexual violence;
- § use of children under the age of 15 to participate actively in hostilities.

The Statute also contains a number of provisions concerning certain weapons the use of which is prohibited under various existing treaties, such as poison or poisoned weapons, asphyxiating, poisonous or other gases and all analogous liquids, materials or devices and, more broadly, weapons and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering. An amendment to the Statute extending these provisions to non-international armed conflicts was adopted at the

2010 Review Conference in Kampala and will be applicable to States that ratify the amendment.

Other grave breaches of IHL, namely unjustifiable delay in the repatriation of prisoners or launching an attack against works or installations containing dangerous forces, which are defined as grave breaches in Additional Protocol I, are not specifically referred to in the Statute.

### When can the ICC exercise its jurisdiction?

States that become party to the Statute accept the jurisdiction of the ICC in respect of the above mentioned crimes. Under Article 25 of the Statute, the ICC has jurisdiction over individuals, not States, and, unlike the ICTY and ICTR, it does not have primacy over national courts.

The ICC may exercise its jurisdiction at the instigation of the Prosecutor or a State Party, providing that State is either the State on whose territory the crime was committed or the State from which the person accused of the crime is a national. A State that is not a party to the Statute may make a declaration to the effect that it accepts the Court's jurisdiction. Further, under the collective security framework of Chapter VII of the Charter of the United Nations, the Security Council may refer a situation to the Prosecutor for investigation. It may also request that no investigation or prosecution commence or proceed for a renewable period of 12 months.

### Procedure and evidence before the ICC

Some elements of the inquisitorial system were introduced in the ICC's rules of procedure and evidence in order to balance some of the major disadvantages of the adversarial model, the principal features of which were adopted by the ICC. For instance, the Prosecutor must investigate both incriminating and exonerating evidence equally in order to "establish the truth" as he is required to do under Article 54(1)(a) of the Statute. One particular feature of the ICC is that victims have the right to participate in proceedings and request reparations. They may also present their views and concerns at all stages of the proceedings.

### States and the ICC

States have clear **obligations to cooperate** with the ICC. These

include, where necessary, the enactment of legislation to ensure the collection of evidence and the arrest and transfer of those accused of crimes under the ICC's jurisdiction.

In addition, by virtue of the principle of **universal jurisdiction**, States are themselves obliged to bring persons accused of grave breaches of the 1949 Geneva Conventions and 1977 Additional Protocol I for trial before their national courts or to extradite them for trial elsewhere, regardless of their nationality and of the place of the offence. National courts will thus continue to play an important and primary role in the prosecution of war crimes.

### What is needed to ensure the ICC's effectiveness?

- § States should ratify the ICC Statute as soon as possible, since universal ratification is essential to allow the Court to exercise its jurisdiction effectively and whenever necessary.
- § States should carry out a thorough review of their domestic legislation to ensure that their laws and institutions are in compliance with their IHL obligations and that the ICC crimes are integrated into their domestic legislation and tried and repressed at domestic level.
- § States should assist each other and the ICC in connection with proceedings relating to crimes that come under the Court's jurisdiction. This will require the enactment or amendment of legislation to ensure any necessary transfer of those accused of such crimes and of required evidence and information.

### International courts and the ICRC

The ICRC supports all efforts to promote respect for IHL, including when it comes to preventing and repressing war crimes. In this connection, it strongly welcomed the establishment of the ad hoc tribunals and actively participated in the negotiations to establish the ICC, although it has not been involved in court proceedings. In order to protect its confidentiality, the ICRC enjoys testimonial immunity, notably under the ICC Rules of Procedure and Evidence, and therefore does not provide evidence to the ICC or other tribunals.