



# ICRC

## ADVISORY SERVICE ON INTERNATIONAL HUMANITARIAN LAW

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# Statute of the International Criminal Court

The United Nations had considered the idea of establishing a permanent international criminal court at various times since the end of the Second World War. In 1993 and 1994, it set up two ad hoc tribunals to punish serious violations of international humanitarian law committed, respectively, in the former Yugoslavia and Rwanda. 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 began in 1994 and led to the adoption of the **Statute of the International Criminal Court (ICC)** in July 1998 in Rome. This accomplishment was the culmination of years of effort and showed the resolve of the international community to ensure that those who commit grave crimes do not go unpunished.

### Crimes within the ICC's jurisdiction

#### *War crimes*

Under Article 8 of the Statute, the ICC has jurisdiction in respect of war crimes. These include most of the serious violations of international humanitarian law mentioned in the 1949 Geneva Conventions and their 1977 Additional Protocols, whether committed during international or non-international armed conflicts.

A number of offences are specifically identified as war crimes in the Statute, including:

- 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.

Certain other serious violations of international humanitarian law, namely unjustifiable delay in the repatriation of prisoners and launching an attack against works or installations containing dangerous forces, which are defined as grave breaches in the Additional Protocol I, are not specifically referred to in the Statute.

The Statute contains a number of provisions concerning certain weapons whose use 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 in 2010 and applies to States that have ratified the amendment.

#### *Genocide*

The ICC has jurisdiction over the crime of genocide under Article 6 of the Statute, which reiterates the terms used in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.

This crime is defined in the Statute as any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group:

- killing members of the group
- causing serious bodily or mental harm to members of the group
- deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part
- imposing measures intended to prevent births within the group

- forcibly transferring children of the group to another group.

#### *Crimes against humanity*

The ICC also has jurisdiction over crimes against humanity.

Under Article 7 of the Statute, these crimes comprise any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population:

- murder
- extermination
- enslavement
- deportation or forcible transfer of the population
- imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law
- torture
- rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity
- persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible

under international law, in connection with any act referred to in Article 7 of the Statute or any crime within the jurisdiction of the Court

- enforced disappearance of persons
- the crime of apartheid
- other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

### Aggression

The ICC's jurisdiction over the crime of aggression took effect on 17 July 2018, after provisions defining this crime and setting out the conditions for the exercise of jurisdiction were inserted as amendments to the Statute.

The crime of aggression is defined as the planning, preparation, initiation or execution of an act of aggression which constitutes a manifest violation of the UN Charter (Article 8 *bis*(1)).<sup>1</sup> It must be committed by a person in a position to exercise control over or to direct the political or military action of a State.

### When can the ICC exercise its jurisdiction?

As soon as a State becomes a party to the Statute, it accepts the jurisdiction of the ICC in respect of the above crimes. Under Article 25 of the Statute, the Court has jurisdiction over individuals and not States.

The ICC may exercise its jurisdiction at the instigation of the Prosecutor or a State Party, providing one of the following States is bound by the Statute:

- the State on whose territory the crime was committed
- the State of which the person accused of the crime is a national
- a State that is not party to the Statute that makes a declaration to the effect that it accepts the Court's jurisdiction.

The ICC has jurisdiction over crimes of aggression committed in the territory, or by a national, of States Parties one year after they have ratified or accepted the relevant amendments – *except* where committed by the nationals or on the territory of a State that is not party to

the Statute or has declared that it does not accept the Court's jurisdiction.

Under the collective security framework of Chapter VII of the UN Charter, the Security Council may refer a situation to the Prosecutor for investigation. This includes all crimes of aggression, regardless of where or by whom they were committed (Articles 13(b) and 15 *ter*). The Security Council may also request that no investigation or prosecution commence or proceed for a renewable period of 12 months.

The exercise of jurisdiction by the ICC over war crimes may be limited under Article 124 of the Statute.<sup>2</sup> This provision allows a State, on becoming a party to the Statute, to declare that it does not accept the jurisdiction of the Court for a period of seven years with respect to war crimes that have allegedly been committed by its own nationals or on its own territory.

### National enforcement systems and the ICC

Under the 1949 Geneva Conventions and 1977 Additional Protocol I, States must prosecute persons accused of war crimes before their own national courts or extradite them for trial elsewhere. Nothing in the ICC Statute releases States from their obligations under existing instruments of international humanitarian law or under customary international law.

By virtue of the **principle of complementarity**, the jurisdiction of the ICC is intended to come into play **only** when a State is genuinely unable or unwilling to prosecute alleged war criminals over whom it has jurisdiction. To benefit from this principle, States need to have adequate legislation enabling them to prosecute such criminals.

Furthermore, States party to other instruments of international humanitarian law are still required to enact implementing legislation giving effect to their obligations under those instruments.

### 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 refrain from making use of the opt-out clause (Article 124).
- States should carry out a thorough review of their national legislation to ensure that they can take advantage of the complementarity principle on which the ICC is founded and try individuals under their own legal systems for offences that fall within the Court's jurisdiction.
- States should assist each other and the ICC in connection with proceedings relating to crimes that come within the Court's jurisdiction. This requires the enactment or amendment of legislation to ensure any necessary transfer of those accused of such crimes.

### Towards a comprehensive enforcement system

National courts will continue to play an important and primary role in the prosecution of alleged war criminals. Moreover, the establishment of the ICC does not in any way prejudice the work undertaken by special courts and tribunals, such as the Sierra Leone Special Court or the above-mentioned ad hoc tribunals, namely the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda (both now closed), which were set up to punish crimes relating to specific situations (in the first instance, those committed in the former Yugoslavia since 1991, and in the second instance, those committed in Rwanda or by Rwandan nationals in neighbouring States in 1994).

The establishment of the ICC is a further step towards the **effective punishment** of persons responsible for having committed the world's gravest crimes. States are urged to ratify the Court's Statute so that these persons cease to enjoy impunity.

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<sup>1</sup> "Act of aggression" is defined in Art. 8 *bis*(2).

<sup>2</sup> An amendment deleting this provision was adopted in 2010 and will enter into force for all States Parties one year after seven-eighths of the States Parties deposit instruments of ratification or acceptance.