



**American
Red Cross**

International Criminal Court (ICC)

INTERNATIONAL HUMANITARIAN LAW

APRIL 2011

Background

During the half century since the establishment of the Nuremberg Tribunal after World War II, a number of methods for investigating and prosecuting individuals for violations of international humanitarian law (IHL) have been adopted, including military tribunals, military commissions and ad hoc war crimes tribunals. The International Criminal Court (ICC) is one of the most recent attempts by the world community to hold individuals responsible for serious violations of international law.

Overview

The ICC is the first permanent international court that has the right to investigate and bring to justice individuals who commit the most serious violations of IHL, war crimes, as well as genocide, crimes against humanity and the crime of aggression. Unlike the International Court of Justice (the World Court) in The Hague, Netherlands, which hears only cases between States (countries) or provides advisory opinions, the ICC tries individuals. The ICC is also located in The Hague.

The ICC was created based on the Rome Statute, a treaty adopted in Rome, Italy, on July 17, 1998. On April 11, 2002, the Rome Statute received its 60th ratification and entered into force on July 1, 2002. The inaugural session of the ICC took place on March 11, 2003. As of February 2011, 114 countries are party to the Rome Statute.

All the members of the European Union and the North Atlantic Treaty Organization (NATO), except for the United States and Turkey, are party to this treaty.

As of February 2011, three States party to the Rome Statute have referred situations (occurring on their respective territories) to the Office of the Prosecutor (OTP). The OTP has opened investigations into all three situations: the Central African Republic, Democratic Republic of Congo and Uganda. On March 31, 2005, the United Nations Security Council referred the situation in Darfur, Sudan, to the ICC. Further, on March 31, 2010, the Pre-Trial Chamber granted the OTP's request to commence an investigation regarding Kenya. The OTP, as of November 2009, is conducting preliminary examinations in a number of countries including Colombia, Côte d'Ivoire, Afghanistan, Georgia, Palestine, Guinea, Honduras, Nigeria and the Republic of Korea. On January 26, 2009, the ICC began its first trial in the case of Thomas Lubanga Dyilo (Congo situation). The trial continued into 2011.

For more information, please see:
<http://www.icc-cpi.int>

Summary of Treaty Provisions

The ICC is an independent, treaty-based institution that is not specifically part of the United Nations (U.N.) system of international organizations or answerable to the U.N. Aside from

The Red Cross and International Humanitarian Law

The Red Cross and the Geneva Conventions were born when Henry Dunant witnessed the devastating consequences of war at a battlefield in Italy. In the aftermath of that battle, Dunant argued successfully for the creation of a civilian relief corps to respond to human suffering during conflict, and for rules to set limits on how war is waged.

Inspired in part by her work in the Civil War, Clara Barton would later found the American Red Cross and also advocate for the U.S. ratification of the first Geneva Convention.



Nick Danziger

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a referral by the U.N. Security Council or by a State party, the ICC will only act when a State party is genuinely unable or unwilling to investigate or prosecute alleged criminals in its jurisdiction. States bear the primary responsibility to ensure respect for IHL and punish its violators. The ICC is intended to complement national jurisdictions in accordance with the principle of 'complementarity'. The following points represent a summary of the key provisions of the Rome Statute:

Accountability: The ICC is accountable to the Assembly of States Parties (ASP), which is composed of the States that have ratified or acceded to the Rome Statute. Those States that have not ratified the treaty will not be involved in decisions such as the nomination and selection of judges or the Prosecutor, determining the budget of the court or voting to dismiss judges or the Prosecutor. Non-State parties are not responsible for funding the court.

Composition: The ICC is composed of 18 judges, and includes the Office of the Prosecutor (OTP), the Office of Public Counsel for Victims (OPCV), the Office of Public Counsel for Defense (OPCD) and the Registry. The judges are divided among the Pre-Trial Division, the Trial Division and the Appeals Division of the court. The OTP is independent of the court. The OPVC and the OPCD are semi-autonomous and fall under the Registry for administrative purposes, but otherwise function as wholly independent offices.

Definition of crimes: The Rome Statute and its subsidiary document, The Elements of Crimes, give detailed definitions of genocide, war crimes

and crimes against humanity. On June 11, 2010, the ASP adopted a resolution at the Review Conference in Kampala, Uganda, regarding the crime of aggression, including the definition of the crime. However, under the resolution, the ICC will not have jurisdiction over the crime of aggression until certain conditions are met. These conditions include ratification or acceptance by 30 States of the proposed amendments to the Rome Statute, and jurisdiction cannot take place until after January 1, 2017.

Jurisdiction: The court only has jurisdiction over events that occur after its entry into force and thus cannot take up any events that occurred before July 1, 2002, the date when the Rome Statute entered into force. If a State becomes party to the Rome Statute after July 1, 2002, the court may only exercise jurisdiction with respect to crimes committed after the entry into force of the Rome Statute for that particular State, unless the State makes a declaration otherwise. Furthermore, the ICC only has jurisdiction if an applicable crime is committed by a national of a State party, if a crime has been committed in the territory of a State party or if the U.N. Security Council refers a specific case in the interest of maintaining or restoring international peace and security.

Rights of suspects: The ICC and the Rome Statute provide almost all the same due process protections as the U.S. Constitution, with the exception of trial by jury. Trial by jury is not the legal standard in many nations. In a number of foreign legal systems, far fewer due process protections are guaranteed to American citizens accused of crimes and who may be subject to trials abroad.

The Position of the United States

The U.S. signed the Rome Statute on December 31, 2000, but has not ratified it. On May 6, 2002, the U.S. formally notified the U.N. (the depository of the Rome Statute) that it did not intend to become a party to the Rome Statute.

In August 2002, the U.S. Congress passed the American Servicemembers' Protection Act (ASPA), which amongst other things prohibits any agency or entity of the U.S. government or of any state or local government, including any court, from providing support to the ICC. The U.S. has also concluded agreements with more than 95 States to protect against the possibility of transfer or surrender of U.S. citizens to the ICC (i.e., pursuant to Article 98 of the Rome Statute). Although the U.S. did not oppose the U.N. Security Council referral of the situation in Sudan to the ICC, it maintained its objections regarding the ICC, including stating that the Rome Statute is flawed and does not have sufficient protections from the possibility of politicized prosecutions.

Recently, the U.S. government has taken a different approach to the ICC. On March 4, 2009, the U.S. supported the decision of the ICC to issue an arrest warrant for the president of Sudan. In November 2009, the U.S. participated in meetings of the ASP as an observer. The U.S. has stated that it will continue to be supportive of the ICC's prosecution of cases regarding crimes against humanity to the extent consistent with U.S. domestic law. The U.S. State Department has stated that attending the ASP meeting as

an observer would not violate the ASPA or any other applicable law. In February 2011, the U.N. Security Council unanimously, including the U.S., adopted a resolution referring Libya to the prosecutor of the ICC for an investigation of possible crimes against humanity.

The U.S. government is concerned about the assertion of ICC jurisdiction over nationals of a non-party State (e.g., possibility of a U.S. citizen being arrested in the territory of a State party).

For more information, please see:

<http://www.state.gov/s/wci/index.htm>

Position of the International Committee of the Red Cross (ICRC)

The ICRC sees the ICC as essential to the international legal order and a necessary complement to national courts in their efforts to bring people suspected of committing wide-scale atrocities, including war crimes, genocide and crimes against humanity, to justice. The ICRC firmly believes that the international community must ensure that those responsible for such crimes are held account-able. The

ICRC acknowledges that although States already have a duty to prosecute and punish perpetrators of war crimes, in reality this duty is not always carried out.

Notwithstanding the above, the ICRC has a clear and long-established practice of not becoming involved in judicial proceedings and of not disclosing what it discovers during its work. This practice is grounded in extensive experience in the field and in the organization's utmost respect for confidentiality. Maintaining confidentiality permits the ICRC the widest access within conflict areas and to affected individuals. The ICRC only shares its information and findings on alleged violations of IHL with the party responsible. The information that the ICRC collects is not shared with other parties, including the ICC. The ICC Rules of Procedure and Evidence recognize that the confidential information in the possession of the ICRC, including testimony of ICRC employees, is privileged and consequently not subject to disclosure.

For more information, please see:

<http://www.icrc.org/eng>

The Position of the American Red Cross

The American Red Cross believes the international community must ensure that those responsible for the commission of serious violations of IHL, war crimes, as well as genocide and crimes against humanity, are held accountable for their actions. While it does not otherwise have an official position, the American Red Cross presents the different perspectives of the U.S. government and the ICRC in its programs of public education.