

INTERNATIONAL CRIMINAL LAW & PRACTICE

TRAINING MATERIALS

INTERNATIONAL, HYBRID AND NATIONAL COURTS TRYING INTERNATIONAL CRIMES

*Supporting the Transfer of Knowledge and Materials
of War Crimes Cases from the ICTY to National
Jurisdictions, funded by the European Union*

Developed by International Criminal Law Services

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MODULE 4: INTERNATIONAL AND HYBRID CRIMINAL COURTS TRYING INTERNATIONAL CRIMES

Part of the OSCE-ODIHR/ICTY/UNICRI Project “Supporting the Transfer of Knowledge and Materials of War Crimes Cases from the ICTY to National Jurisdictions”

Developed by International Criminal Law Services

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4. INTERNATIONAL, HYBRID AND NATIONAL CRIMINAL COURTS TRYING INTERNATIONAL CRIMES

4.1. INTRODUCTION

These training materials have been developed by International Criminal Law Services (ICLS) as a part of the OSCE-ODIHR-ICTY-UNICRI “War Crimes Justice Project”, funded by the European Union. An introduction to how to use the materials can be found in Module 1, which also includes a case study and hypotheticals that can be used as training tools, and other useful annexes. The materials are intended to serve as primarily as training tool and resource for legal trainers in Bosnia and Herzegovina (BiH), Croatia and Serbia, but are also envisaged for adaptation and use in other jurisdictions of the region. Discussion questions, tips, and other useful notes for training have been included where appropriate. However, trainers are encouraged to adapt the materials to the needs of the participants and the particular circumstances of each training session. Trainers are also encouraged to update the materials as may be necessary, especially with regards to new jurisprudence or changes to the criminal codes in their relevant jurisdiction.

Each module provides a general overview of the international criminal law relevant to the Module’s topic before discussing the relevant law and jurisprudence for BiH, Croatia, and Serbia, respectively. The materials make use of the most relevant and available jurisprudence. It should be noted that where a first instance judgement has been cited, the drafters have taken special care to ensure that the part referred to was upheld on appeal. It may be useful for trainers to discuss additional cases that might also be relevant or illustrative for each topic, and to ask participants to discuss their own cases and experiences.

4.1.1. MODULE DESCRIPTION

This Module introduces the various international and hybrid courts that have undertaken prosecutions of international crimes. It starts with a brief introduction of the first international courts that were established following the Second World War (WW II). The Module thereafter describes the two ad hoc tribunals established by the United Nations Security Council: the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). The Module explains the establishment of “hybrid” tribunals, which are courts established by treaties or legislation that incorporate aspects of domestic and international law (sometimes referred to as “internationalised courts”). The establishment of the permanent International Criminal Court (ICC) is also considered. After introducing each of these courts, the Module provides an overview of the similarities and differences between these jurisdictions.

The focus of the case law discussed in the Modules that follow will be on the ICTY and the ICC. It is thus important for participants to have the basic background to these courts.

4.1.2. MODULE OUTCOMES

At the conclusion of this Module, participants should understand:

- The difference between treaty-based courts and the tribunals established by the UN Security Council under its Chapter VII power;
- The differences between the “international” and “hybrid” courts trying international crimes; and
- The differences and similarities between the different courts, including the applicable modes of liability and substantive crimes falling within their respective jurisdictions.

Notes for trainers:

- Trainers should explain the historical background and explanation of the establishment of the various international and hybrid courts to participants. It will provide them with an understanding of the emerging system of international criminal justice, a foundation from which they will be able to appreciate the diverse range of courts relevant to their work, the differences between these jurisdictions, and most importantly, the basis of the case law that they may wish to rely on in their national jurisdictions.
- This is also the Module in which participants can focus on the ICTY and ICC as the primary jurisdictions for the purposes of the training to follow. It is essential that participants are familiar with the manner in which these courts were established and the nature of the different jurisdictions. This will enable participants to advance arguments in their national jurisdictions about the applicability or usefulness of the law of these courts.

4.2. INTERNATIONAL CRIMINAL TRIBUNALS

4.2.1. OVERVIEW

International criminal courts are a relatively recent development. The modern history of international criminal law began after the First World War (WW I).¹ After the war, the Allies established a commission to determine who was responsible for starting the war and committing various violations of the laws of war. The commission recommended that a special tribunal be established to try persons for violations of the laws of war and humanity.² Although the Treaty of Versailles includes provisions for prosecutions, none of these provisions were ultimately utilised.³

After the Second World War (WW II), the Allies established the Nuremberg International Military Tribunal (Nuremberg IMT) and the International Military Tribunal for the Far East (Tokyo IMT) to try persons for crimes against peace, war crimes and crimes against humanity committed during the war. Although both tribunals have been subjected to heavy criticism, including the charge that they merely represent “victor’s justice”,⁴ the judgement of the Nuremberg IMT has made a significant contribution to ICL, in particular in its holding on individual criminal liability for crimes under international law:

[C]rimes under international law are committed by men, not abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced [...] individuals have international duties which transcend the national obligations of obedience imposed by the individual state.⁵

These tribunals laid the foundation for the establishment of the ICTY and the ICTR, and later, other hybrid international courts and a permanent institution, the International Criminal Court. These modern institutions will be discussed in the sections below.

4.2.2. COURTS CREATED BY THE UN SECURITY COUNCIL

In the early 1990s, conflicts in two parts of the world, Europe and Africa, prompted the United Nations (UN) to reconsider the concept of international criminal tribunals. The UN Security Council, under its Chapter VII powers,⁶ created the International Criminal Tribunal for the former Yugoslavia in 1993 and the International Criminal Tribunal for Rwanda in 1994. As these tribunals were established pursuant to Chapter VII of the UN Charter, all Member States of the

¹ ROBERT CRYER, *ET AL.*, AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 109 (2010).

² Report of the Commission to the Preliminary Peace Conference, reprinted in (1920) 14 AJIL 95; *See also* CRYER, *supra* note 1, at 110.

³ CRYER, *supra* note 1, at 110.

⁴ *See ibid.* at 113.

⁵ Nuremberg IMT, Judgement and Sentence, (1947) 41 AM. J. INT’L. L. 172.

⁶ The UN Charter sets out in Chapter VII the UN’s power to ensure the “maintenance of international peace and security”. To ensure the “maintenance of international peace and security”, after securing Security Council approval, the UN may take military and/or non-military action.

UN are obliged to cooperate with the tribunals. This includes cooperation in relation to the arrest and transfer of accused persons, as the tribunals have no police force of their own.

4.2.2.1. INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

In response to numerous violations of international criminal law committed during conflicts related to the breakup of the Socialist Federal Republic of Yugoslavia, the UN Security Council began to investigate the alleged crimes (through a UN Commission of Experts) and to consider how to prosecute those crimes.⁷ The Security Council established the ICTY in Resolution 827 (1993), with the goals of putting “an end to such crimes and tak[ing] effective measures to bring to justice the persons who are responsible for them” and “contribut[ing] to the restoration and maintenance of peace”.⁸

The ICTY has jurisdiction over war crimes, crimes against humanity and genocide committed in the territory of the former Yugoslavia after 1 January 1991.⁹ The ICTY has jurisdiction over crimes committed both during both international armed conflicts¹⁰ and non-international armed conflicts pursuant to Article 3 of the Statute.¹¹

The ICTY has jurisdiction over war crimes, crimes against humanity and genocide committed in the territory of the former Yugoslavia after 1 January 1991.

The ICTY is comprised of three organs: the Registry, the Office of the Prosecutor, and Chambers. The Registry manages administrative aspects of the Tribunal, including witness and victim protection and participation, detention, outreach, defence issues, court management and public affairs. The Office of the Prosecutor is responsible for investigating and prosecuting crimes under the jurisdiction of the Tribunal. The Office of the Prosecutor is headed by an independent prosecutor who is responsible for initiating all investigations, selecting cases, preparing indictments, and, once an indictment is confirmed by a Judge of the ICTY, prosecuting those cases. Chambers comprise both trial chambers and the appeals chamber. Each trial chamber is constituted by three judges and the appeals chamber is made up of seven judges, who sit on cases in panels of five. The appeals chamber is headed by the President of the Tribunal, and the appeals chamber is the final authority on legal matters before the ICTY.

⁷ See, e.g., Establishing a Commission of Experts to Examine and Analyze Information Submitted Pursuant to Resolution 771, S.C. Res. 780, U.N. Doc. S/RES/780 (1992); M. Cherif Bassiouni, *The United Nations Commission of Experts Established Pursuant to Security Council Resolution 780*, 88 AM. J. INT’L L. 784 (1994).

⁸ S.C. Res. 827, Preamble, U.N. Doc. S/RES/827 (Oct. 6, 1993).

⁹ Statute of the International Tribunal for the Former Yugoslavia, Arts. 4, 5 (1993).

¹⁰ *Ibid.*, Art. 2 (providing jurisdiction over grave breaches of the Geneva Conventions).

¹¹ *Ibid.*, Art. 3 (providing jurisdiction over violations of certain laws or customs of war, and interpreted in the Tadić decision to apply to non-international conflicts); *Duško Tadić*, Case No. IT-94-I-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 Oct. 1995, ¶¶ 79 – 80.

The seat of the ICTY is The Hague, the Netherlands. The ICTY prosecutor has indicted 161 persons and the Chambers have sentenced 64 persons and acquitted 13. As of June 2011, there were 34 persons on trial at the ICTY in 14 different cases.¹²

In 2003 the ICTY adopted a “completion strategy”, aimed at ensuring a timely completion of its mandate and the coordination of future trials with jurisdictions in the former Yugoslavia.¹³ All ICTY investigations were concluded by 31 December 2004. It is estimated that all trials, including appeals, will conclude by 2013. In order to meet its completion strategy, the ICTY has generally focused its work on “the most senior persons suspected of being most responsible for crimes” within its jurisdiction.¹⁴ Lower level offenders can be tried in national jurisdictions.¹⁵ The completion strategy has led to a number of innovative changes to the RPE, discussed further in Module 12.

The completion of the tribunal’s mandate is also ensured by UN Security Council (UNSC) Resolution 1966. UNSC Resolution 1966, under Chapter VII of the UN Charter, ensures that the tribunal’s mandate will be completed through the creation of the International Residual Mechanism for Criminal Tribunals (“IRMCT”), an ad hoc mechanism whose purpose is to carry out residual essential functions of both the ICTY and ICTR.¹⁶ Among the essential functions of the IRMCT will be conducting the trials of individuals suspected of being most responsible for crimes after the tribunals’ mandate ends.¹⁷ The IRMCT has a four-year mandate, with the possibility for extensions.¹⁸

The law and practice of the ICTY have a major influence on the development of international criminal law. Other international, hybrid and national legal systems often reflect aspects of ICTY law and practice. This is especially true for BiH, Croatia and Serbia.

The ICTY prosecutor has indicted 161 persons and the Chambers have convicted 64 persons and acquitted 13. As of June 2011, there were 34 persons on trial at the ICTY in 14 different cases.

4.2.2.1.1. DEFERRAL AND TRANSFER OF CASES

The ICTY has primacy over national courts, which means that the Tribunal can require states to accede to its jurisdiction.¹⁹ Thus, if a state were planning to try a person for crimes under the ICTY’s jurisdiction, it would have to concede jurisdiction to the ICTY, upon the ICTY’s request. Rule 9 of the ICTY Rules of Procedure and Evidence (ICTY RPE) states that the ICTY can request deferral when:

¹² ICTY website, available at: <http://www.icty.org/sections/AbouttheICTY>, and <http://www.icty.org/action/cases/4> (accessed July 1, 2011).

¹³ S.C. Res. 1503, U.N. Doc. S/RES/1503 (Aug. 28, 2003), and S.C. Res. 1534, U.N. Doc. S/RES/827 (March 26, 2004).

¹⁴ S.C. Res. 1534, U.N. Doc. S/RES/1534 (March 26, 2004).

¹⁵ Annual Report of ICTY 2002, S/2002/985, ¶¶ 7, 218.

¹⁶ S.C. Res. 1966, U.N. Doc. S/RES/1966 (Dec. 22, 2010).

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ ICTY Statute, Art. 9(1).

Rule 9 of the ICTY Rules of Procedure and Evidence

- (i) the act being investigated or which is the subject of national proceedings is characterized as an ordinary crime;
- (ii) there is a lack of impartiality or independence, or the investigations or proceedings are designed to shield the accused from international criminal responsibility, or the case is not diligently prosecuted; or
- (iii) what is in issue is closely related to, or otherwise involves, significant factual or legal questions which may have implications for investigations or prosecutions before the Tribunal.

However, as the Tribunal has begun to conclude its work, it has shifted from requesting cases from the region to transferring cases to the region under Rule 11*bis* of the ICTY RPE (see Module 15).²⁰

Through the Rule 11bis mechanism, the ICTY is able to transfer cases from the tribunal to the jurisdiction of a state in which the crimes were committed, where the accused was arrested or a state that has jurisdiction and is able and willing to prosecute the case.

Through the Rule 11*bis* mechanism, the ICTY is able to transfer cases from the tribunal to the jurisdiction of a state in which the crimes were committed, where the accused was arrested or a state that has jurisdiction and is able and willing to prosecute the case.²¹ The ICTY referral bench is the sole authority in determining whether the transfer is appropriate. After weighing the gravity of the crimes committed, the bench will allow the transfer if it is certain that the case will be conducted in a fair manner and that the accused will not face the death penalty.²² If considered necessary, a monitor may be sent to

observe the proceedings on the prosecutor's behalf, and if sufficient concerns of justice are raised, the prosecutor may make a formal request to have the case deferred back to the ICTY.²³

Cases began to be transferred under Rule 11*bis* in 2005, with the majority of Rule 11*bis* transfer cases being sent to BiH. The cases which have been the subject of requests for referral are: *Prosecutor v. Radovan Stankovic* (to BiH); *Prosecutor v. Mitar Rasevic and Savo Todovic* (to BiH); *Prosecutor v. Zeljko Mejakic et al.* (to BiH); *Prosecutor v. Mile Mrksic et al.* (to Serbia and Montenegro or Croatia); *Prosecutor v. Rahim Ademi and Mirko Norac* (to Croatia); *Prosecutor v. Ivica Rajic* (to BiH); *Prosecutor v. Dragomir Milosevic* (to BiH); *Prosecutor v. Gojko Jankovic* (to BiH); *Prosecutor v. Pasko Ljubicic* (to BiH); *Prosecutor v. Milan Lukic and Sredoje Lukic* (to BiH);

²⁰ See, e.g., Radovan Karadžić, Case No. IT-95-5-D, In the Matter of a Proposal for a Formal Request for Deferral to the Competence of the Tribunal Addressed to the Republic of Bosnia and Herzegovina in Respect of Radovan Karadžić, Ratko Mladić and Mico Stanišić, Trial Chamber, 16 May 1995.

²¹ ICTY R. P. & EVID. Rule 11*bis*(A).

²² *Ibid.*, Rule 11*bis*(B).

²³ *Ibid.*, Rule 11*bis*(D).

Prosecutor v. Vladimir Kovacevic (to Serbia and Montenegro); *Prosecutor v. Dragan Zelenovic* (to BiH); and *Prosecutor v. Milorad Trbic* (to BiH).²⁴ Radovan Stanković, the first defendant to be transferred to BiH,²⁵ was one of 13 defendants who were referred to national courts. Currently, the referral bench is not considering any further cases.²⁶

4.2.2.2. INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

The International Criminal Tribunal for Rwanda was established by the UN Security Council under its Chapter VII powers following the genocide that occurred in Rwanda in 1994. Adopting similar procedures as with the establishment of the ICTY, an investigative commission was established,²⁷ followed by the creation of the Tribunal.²⁸ The Statute of the ICTR closely resembles the ICTY Statute, and the Tribunals share a similar structure. The ICTR shares its appeals chamber with the ICTY, which is based in The Hague, to ensure consistent jurisprudence between the two tribunals.²⁹ From its creation until 2003, the ICTR shared its prosecutor with the ICTY. In 2003, pursuant to Security Council resolution 1503, the ICTR appointed its own prosecutor.

The ICTR has jurisdiction over war crimes, crimes against humanity and genocide. However, the ICTR defines crimes against humanity differently from the ICTY.

The ICTR, located in Arusha, Tanzania, has jurisdiction over war crimes, crimes against humanity, and genocide.³⁰ However, as will be discussed in Module 7 (Crimes against humanity), the ICTR defines crimes against humanity differently from the ICTY. Moreover, the ICTR only has jurisdiction over war crimes in non-international conflicts, and is further limited to crimes committed in Rwanda or by Rwandans in neighbouring states between 1 January and 31 December 1994.³¹

The ICTR has primary jurisdiction over national courts, but has also begun transferring cases to domestic courts.³² It adopted a completion strategy in 2003, along similar lines to the ICTY.³³ Under its completion strategy, it is considering applications to transfer least fifty-five cases over

²⁴ See Organization for Security and Cooperation in Europe, *The Processing of ICTY Rule 11bis cases in Bosnia and Herzegovina: Reflections on findings from five years of OSCE monitoring*, Organization for Security and Cooperation in Europe, Jan. 2010, at p. 8.

²⁵ See *ibid.*, at 9.

²⁶ See ICTY website, *Transfer of Cases*, available at <http://www.icty.org/sid/103> (accessed June 2, 2011).

²⁷ S.C. Res. 935, U.N. Doc. S/RES/935 (March 26, 1994).

²⁸ S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994).

²⁹ ICTR Statute, Art. 12(2).

³⁰ *Ibid.*, Arts. 2-4.

³¹ ICTR Statute, Art. 1.

³² See, e.g., Laurent Bucyibaruta, Case No. ICTR-2005-85-I, Decision on Prosecutor's Requests for Referral of Laurent Bucyibaruta's indictment to France Rule 11bis of the Rule of Procedure & Evidence; Michel Bagaragaza, Case No. ICTR-05-86-AR11bis, Decision on Rule 11bis Appeal, 30 Aug. 2006; Ildephonse Hategekimana, Case No. ICTR-00-55B-R11bis, Decision on the Prosecution's Appeal Against Decision on Referral under Rule 11bis, 4 Dec. 2008; Yussuf Muniyazi, Case No. ICTR-97-36-R11bis, Decision on the Prosecution's Appeal against Decision on Referral under Rule 11bis, AC, 8 Oct. 2008.

³³ S.C. Res. 1503, U.N. Doc. S/RES/1503 (Aug. 28, 2003).

to Rwanda, and expects to conclude its own cases by the end of 2013.³⁴ As with the ICTY, UNSC Resolution 1966 will also serve to ensure the ICTR's essential functions are realised at the termination of the ICTR's mandate.³⁵

The ICTR has indicted 92 individuals, convicted 38, acquitted 8, and currently 10 individuals are on trial and 19 cases pending appeal.³⁶

³⁴ Report on the completion strategy of the International Criminal Tribunal for Rwanda, 25 May 2010, S/2010/259; Statement by Justice Hassan B. Jallow, Prosecutor of the ICTR, to the United National Security Council, 18 June 2010, *available at* <http://www.unict.org/Portals/0/.ictr.un.org/tabid/155/Default.aspx?id=1144> (accessed June 16, 2011).

³⁵ S.C. Res. 1966, U.N. Doc. S/RES/1966 (Dec. 22, 2010).

³⁶ ICTR website, *available at* <http://www.unict.org/Cases/StatusofCases/tabid/204/Default.aspx> (accessed July 1, 2011).

4.3. INTERNATIONAL HYBRID COURTS

After the ICTY and ICTR were established, a need was recognised for other tribunals to address serious crimes committed in other parts of the world. The ICTY and ICTR were located far from the countries they served. Treaty-

The SCSL and the ECCC are examples of hybrid courts.

based, hybrid courts with national and international elements were thus proposed to help create efficient, locally based courts to address serious international crimes. Generally, both international and national judges and practitioners are employed in the administration of hybrid courts. The Special Court for Sierra Leone (SCSL) and the Extraordinary Chambers in the Courts of Cambodia (ECCC), are examples of hybrid courts. The Court of BiH and the War Crimes Division of the High Court of Uganda are examples of national courts that have been created to try international crimes; the former court includes international staff, while the latter does not.

4.3.1. SPECIAL COURT FOR SIERRA LEONE

In an attempt to promote justice and end impunity for the atrocities committed by warring factions in Sierra Leone during its 11 year civil war, the UN and the Sierra Leone government jointly established the Special Court for Sierra Leone in 2002.³⁷ Its mandate was to try “persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law” committed in the territory of Sierra Leone since 30 November 1996.³⁸ The SCSL represents an early example of a “hybrid” tribunal. The SCSL is not a part of the Sierra Leonean judiciary, but does include some aspects of Sierra Leonean law (although none of these laws have been used by the SCSL). The SCSL also employs Sierra Leoneans as staff members and has its permanent seat in Freetown, Sierra Leone. At the same time, while it is not a UN body, it has jurisdiction over international crimes, and employs international staff, including a majority of international judges.³⁹

The structure of the SCSL is similar to the structure of the ICTY and ICTR, with the exception that it was the first tribunal for international crimes to include a Defence Office as part of the Registry. The Defence Office is an independent body providing assistance to defence counsel and ensuring the protection of the rights to a fair trial of accused persons.

The SCSL is not part of the Sierra Leonean judiciary, but does include some aspects of Sierra Leonean law.

The SCSL has jurisdiction over crimes against humanity,⁴⁰ violations of Article 3 common to the Geneva Conventions and of Additional Protocol II,⁴¹ other serious violations of

³⁷ S.C. Res. 1315, U.N. Doc. S/RES/1315 (Aug. 14, 2000).

³⁸ Statute of the Special Court for Sierra Leone, Art. 1 (2000).

³⁹ It should be noted that the SCSL Statute does not require that a majority of judges be international, only that some be appointed by the Government of Sierra Leone and others by the UN Secretary-General. SCSL, *supra* note 38, at Art. 2.

⁴⁰ *Ibid.* at Art. 2.

⁴¹ *Ibid.* at Art. 3.

international humanitarian law,⁴² and certain crimes under Sierra Leonean law.⁴³ Its jurisdiction is limited to prosecuting only those persons who bear the “greatest responsibility” for the crimes, a phrase which, rather than having formal effects, guided the prosecution policy of investigating and prosecuting a limited number of individuals.

The SCSL has completed three trials of nine individuals representing all warring factions from its civil war.⁴⁴ Eight persons were convicted (one accused died before the conclusion of his trial).⁴⁵ The final trial, of ex-Liberian President Charles Taylor, is concluding its trial phase. The *Taylor* trial is being held in The Hague. It is expected that the SCSL will close its doors in 2012.⁴⁶

4.3.2. EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

Another example of a hybrid court is the Extraordinary Chambers in the Courts of Cambodia (ECCC), established to try persons responsible for crimes committed under the Khmer Rouge regime from 1975 to 1979.⁴⁷ Cambodia requested assistance from the UN in bringing perpetrators to justice, and the ECCC was established after lengthy negotiations by an international agreement between the UN and Cambodia in 2004.⁴⁸

The ECCC is distinct from the SCSL in many ways. It forms part of the Cambodian judiciary—although as an independent entity⁴⁹—and applies national and international law. There are co-prosecutors, one national and one international. There is a majority of national judges in all of the chambers. It also applies a structure more related to civil law systems than other international or hybrid tribunals, reflecting Cambodia’s legal system. Thus at the ECCC, investigating judges are responsible for investigations, not the prosecutor. Notably, at the ECCC, victims have a right to participate in proceedings.

The ECCC forms part of the Cambodian judiciary, and applies national and international law.

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ Moinina Fofana et al., Case No. SCSL-04-14-T, Trial Judgement, 2 Aug. 2007; Alex T. Brima et al., Trial Judgement, Case No. SCSL-04-16-T, 20 June 2007; Issa Hassan Sesay et al., Trial Judgement, Case No. SCSL-04-15-T, 25 Feb. 2009.

⁴⁵ Moinina Fofana et al., Case No. SCSL-04-14-A, Appeal Judgement, 28 May 2008; Alex T. Brima et al., Case No. SCSL-2004-16-A, Appeal Judgement, 22 Feb. 2008; Issa Hassan Sesay et al., Case No. SCSL-04-15-A, Appeal Judgement, 29 Oct. 2009.

⁴⁶ Seventh Annual Report of the President of the Special Court for Sierra Leone (June 2009 – May 2010) p. 35.

⁴⁷ When the Cambodian civil war ended in 1998, the Cambodian government asked the UN for assistance in establishing a trial to prosecute the Khmer Rouge’s senior leaders. Because of the Cambodian weak legal system, the international nature of the crimes, and the necessary assistance in meeting international standards of justice, the Cambodian government and the UN reached an agreement in June 2003 outlining the logistics of the new hybrid tribunal. Extraordinary Chambers in the Courts of Cambodia, Introduction to the ECCC, available at <http://www.eccc.gov.kh/en/about-eccc/introduction> (accessed 20 June 2011); See also Kaing Guek Eav, Case No. 001/18-07-2007/ECCC/TC, Trial Judgement, 26 July 2010, ¶¶ 413-415 (holding that the conflict in Cambodia was an international conflict).

⁴⁸ UN-Cambodia, for the Establishment of the Extraordinary Chamber in the Courts of Cambodia, attached to GA Res. 57/228B of 13.5.2003; See also CRYER, *supra* note 1, at p. 185.

⁴⁹ *Eav*, TJ ¶¶ 17 – 20.

The ECCC has jurisdiction to try “senior leaders of [the Khmer Rouge] and those most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognised by Cambodia”.⁵⁰ This includes genocide under the 1948 Genocide Convention, crimes against humanity as defined by the Rome Statute, grave breaches of the Geneva Conventions, and crimes under Cambodian law committed between 17 April 1975 and 6 January 1979.⁵¹ There is no jurisdiction over war crimes in non-international conflicts.⁵² The ECCC has recently completed its first trial of one accused⁵³ and four other persons will be tried together for crimes against humanity and war crimes.

⁵⁰ UN-Cambodia Agreement, *supra* note 48, Art. 1.

⁵¹ *Ibid.*, Art. 9.

⁵² See CRYER, *supra* note 1, at p. 186.

⁵³ See generally Eav, TJ.

4.4. INTERNATIONAL CRIMINAL COURT

The International Criminal Court is a permanent institution which was created by a treaty, the Rome Statute, in 1998. The Rome Statute came into force on 1 July 2002, after 66 states ratified it. Many features of the ICC are distinct from the ICTY and ICTR, including its role as a complementary, as opposed to the primary, judicial institution with regards to national courts.

The ICC is a court of “last resort” and is based on the principle of complementarity.

The ICC is a court of “last resort” and is based on the principle of complementarity—that the primary responsibility for exercising jurisdiction over international crimes rests with domestic jurisdictions and that the ICC cannot act unless the country with jurisdiction over the case is not investigating and prosecuting or is “unwilling or

unable genuinely” to do so.⁵⁴

The ICC has a structure similar to the ICTY and ICTR but includes some important differences. The Judicial Division includes pre-trial chambers in addition to trial and appeals chambers; the ICTY, ICTR and SCSL do not have pre-trial chambers. In addition to the Registry, Office of the Prosecutor and Judicial Division, it also includes the semi-autonomous Office of Public Counsel for the Defence and the Office of Public Counsel for Victims, which both fall under the Registry. The court is also subject to administrative oversight by the Assembly of States Parties (ASP). Another notable difference between the ICC and other tribunals is that victims have the right to participate in proceedings, as they do at the ECCC.

The ICC has jurisdiction over “the most serious crimes of international concern”, namely, genocide, crimes against humanity, war crimes and aggression committed after the Statute entered into force (1 July 2002).⁵⁵ In order to provide certainty and avoid issues with the principle of legality, the ICC Statute defines the crimes within its jurisdiction in great detail. The ICC Elements of Crimes, which can be used by the court in interpreting and applying the law, provides further definition of crimes.⁵⁶ Currently, the crime of aggression forms part of the basis for the jurisdiction of the ICC, but the court is currently unable to exercise jurisdiction over this crime.

⁵⁴ Rome Statute, Preamble. *See also* Rome Statute, Art. 17 (stating “the Court shall find a case is inadmissible where: (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution; (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute; (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under Article 20, paragraph 3; (d) The case is not of sufficient gravity to justify further action by the Court”).

⁵⁵ Rome Statute, Arts. 5(1), 11(1)-(2). States that become parties to the Rome Statute after it entered into force, the Court has jurisdiction over crimes committed after the Rome Statute entered into force for that state, unless the state declares otherwise.

⁵⁶ *Ibid.*, Arts. 9, 21.

The ICC can only exercise its jurisdiction in three circumstances:

- 1) A situation is referred to it by a State Party to the Rome Statute;*
- 2) A situation is referred to it by the UN Security Council under its Chapter VII powers;*
- 3) The prosecutor initiates an investigation on his or her own initiative, with the authorization of the Pre-Trial Chamber.*

The ICC's personal and territorial jurisdictions are also limited. A case can be heard if the crime is committed on the territory of a State Party to the Rome Statute, if the accused is a national of a State Party or if a non-State Party has accepted the jurisdiction of the ICC with respect to the crime at issue.⁵⁷ However, if the UN Security Council refers the case to the ICC, these limitations do not apply and the ICC can hear cases about crimes originating in or committed by nationals of states that are not parties to the Rome Statute. The UN Security Council, under its Chapter VII powers (which apply only when there is a threat to peace, a breach of the peace or an act of aggression), can also ask the ICC to defer an investigation or prosecution for renewable periods of up to twelve months.⁵⁸

⁵⁷ *Ibid.*, Art. 12(2). See also Rome Statute, Art. 124 (stating "notwithstanding Article 12, paragraphs 1 and 2, a State, on becoming a party to this Statute, may declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in Article 8 when a crime is alleged to have been committed by its nationals or on its territory. A declaration under this Article may be withdrawn at any time. The provisions of this Article shall be reviewed at the Review Conference convened in accordance with Article 123, paragraph 1").

⁵⁸ *Ibid.*, Art. 16.

4.5. SIMILARITIES AND DIFFERENCES BETWEEN THESE JURISDICTIONS

All of the courts discussed above have different jurisdictions, and to varying degrees apply different substantive, procedural and evidentiary laws. They are obviously different with regards to the particular conflicts they were established to address, which limit their personal, territorial and temporal jurisdiction. There are also differences with regards to the crimes they have jurisdiction over. With regards to war crimes, the ICTY and the ICC have jurisdiction over crimes committed during both international and non-international armed conflicts, whereas the ICTR and SCSL only have jurisdiction over crimes from non-international conflicts and the ECCC has only has jurisdiction over crimes committed during international conflicts. All of the tribunals discussed have jurisdiction over genocide, except the SCSL. The SCSL was the first court to convict persons for the use of child soldiers; the ICC is also prosecuting this crime in the *Lubanga* trial.

Many of the courts define the crimes under their jurisdiction differently, in particular genocide and crimes against humanity (this will be discussed in detail below in Module 6 (Genocide) and Module 7 (Crimes against humanity). Moreover, courts have increasingly been limiting their jurisdiction to only those persons considered “most responsible” for the crimes within their jurisdictions, in part due to a response to the considerable time and resources these proceedings require.

It is important that practitioners understand the statutory definitions of the different crimes for each international criminal jurisdiction before citing any jurisprudence from those jurisdictions.

It is most important that practitioners understand the statutory definitions of the different crimes for each international criminal jurisdiction before citing any jurisprudence from those jurisdictions. The differences in the statutory requirements may well lead to differing approaches in the case law. Practitioners must be aware of these variations before seeking to rely on any of the case law from the international criminal courts.

4.6. FURTHER READING

4.6.1. BOOKS

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4.6.4. INTERNATIONAL CRIMINAL COURT

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4.6.5. INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

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