

# Future directions for the International Criminal Court

By John Purnell SC

There will always be criticism of any court. The International Criminal Court (ICC) has had many critics – a common criticism, for example, is that the cases take too long to commence and when they do commence, they take too long to finish. There is a perceived selectivity of who is prosecuted as opposed to who is not prosecuted. Questions are asked as to why no prosecutions are brought against certain countries (for example, Israel) and why a preponderance of accused persons come from Africa.



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**C**learly, atrocities have been committed in many parts of the world. Many would say that Africa has suffered some of the worst. Germain Katanga and Mathieu Nguo Jolo Chui are currently on trial in the ICC in The Hague in relation to their activities in the Congo. They face charges of crimes against humanity (murder, sexual slavery and rape) together with war crimes involving the use of children under the age of 15 to take part in hostilities; deliberately attacking a civilian population; rape and pillage and sexual slavery. The armed conflict took place between August 2002 and May 2003. In this case, 363 victims are being represented.

Investigations of other war crimes and crimes against humanity are still ongoing in relation to this conflict. There are trials also in progress in relation to alleged crimes

committed in the Sudan, concerning the situation in Dafur.

The ICC was established by the Rome Statute that entered into force on 1 July 2002. As at November 2010, 113 countries are parties to it. There are currently 18 judges, who are elected for nine years by the Assembly of States Parties. The working languages are English and French. There are almost 700 staff from approximately 90 states.

Investigations of war crimes and crimes against humanity are carried out by the Office of the Prosecution. Currently, preliminary examinations are being carried out in Afghanistan, Colombia, Cote d'Ivoire, Georgia, Guinea and Palestine.

What is not commonly understood is that the ICC is an independent international organisation and is *not* part of the United Nations system. The ICC's expenses are funded

by the States Parties to the Rome Statute, and voluntary contributions from governments, international organisations, corporations and individuals.

After the Second World War, the Nuremberg and Tokyo trials addressed war crimes and crimes against humanity. There have been other international tribunals specifically set up to address certain situations – for example, the International Criminal Tribunals for the former Yugoslavia and Rwanda. These Tribunals were established to try crimes committed only within a specific timeframe during a specific conflict. There was, however, a felt need to establish a permanent International Criminal Court, and thus the ICC came into existence in 2002.

The jurisdiction of the ICC, however, is governed by certain operating principles: international crimes have been deemed to be committed *only* if they occur in the territory of a state party *or* by one of its nationals. These conditions, however, do *not* apply if a 'situation' is referred to the prosecutor of the United Nations Security Council, whose resolutions are binding on all UN member states or if a state makes a declaration accepting the jurisdiction of the ICC. The Court is intended to complement, *not* replace, national criminal justice systems. It can prosecute cases *only* if national justice systems do not carry out proceedings or when they claim to do so but in reality are unwilling or unable to carry out such proceedings genuinely. This is important in relation to the current charges being brought against Australians in Afghanistan, who will be prosecuted under Australian law, as those matters theoretically could come under the purview of the ICC.

The prosecutor has enormous powers, as would be expected in this set-up. The prosecutor can initiate an investigation or prosecution in three different ways:

1. State parties can refer situations to the prosecutor;
2. The UN Security Council can request the prosecutor to launch an investigation; and
3. The prosecutor may initiate investigations *proprio motu*. In this case, the prosecutor must seek prior authorisation from a pre-trial chamber, composed of three independent judges.

A head of state, members of government or public officers are not exempt from prosecution or criminal responsibility. Superiors or military commanders may be held responsible for criminal offences committed by persons under their effective command or control. Victims have a role in the ICC unknown in the common law. Victims have a *right* to participate in proceedings and to request reparation. Thus, victims can testify as witnesses and also involve themselves in the case proper through legal representation and legal aid.

The ICC itself has three divisions: the pre-trial division, the trial division and the appeals division. The pre-trial division is composed of judges with experience primarily in criminal trials, as have the judges in the trial division. The appeals division deals with appeals from convicted persons, the prosecutor, the victims or *bona fide* owners of property adversely affected by court decisions.

The Security Council, through resolution 1757 in 2007, established a Special Tribunal for Lebanon. This tribunal

has the power to try persons brought before it charged with crimes arising out of the attack on the Prime Minister Rafiq Hariri of Lebanon on 14 February 2005.

The Special Tribunal is governed by an accompanying statute. It has the prosecutor, the registry and the defence office. There is a pre-trial judge, a trial chamber and an appeals chamber. A Lebanese judge is one of three in the trial chamber, and two of the five appeal judges are Lebanese judges. What is fascinating about this Special Tribunal is that the applicable criminal law will be a combination of the statute and the Lebanese Criminal Code. The Special Tribunal and the national courts of Lebanon have concurrent jurisdiction; however, the Special Tribunal shall have primacy over the national courts of Lebanon, and no person shall be tried before the national courts for acts for which that person has already been tried before the Special Tribunal. Victims are entitled to be represented and to participate in the proceedings. Also, there is provision for trials in *absentia*. No one has been charged or indicted yet, so how this Special Tribunal proceeds will be watched with interest by many members of the international community. Finally, whether this Special Tribunal is to be the way of addressing future conflicts, attacks or acts of terrorism remains to be seen. ■

**F J Purnell SC** recently completed a four-day course for List Counsel in The Hague.



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