AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT

The International Criminal Court ushers in a new era in the protection of human rights. The Court will prosecute genocide, crimes against humanity and war crimes when national justice systems are either unwilling or unable to do so themselves. Schabas reviews the history of international criminal prosecution, the drafting of the Rome Statute of the International Criminal Court and the principles of its operation, including the scope of its jurisdiction and the procedural regime.

This third revised edition considers the initial rulings by the Pre-Trial Chambers and the Appeals Chamber, and the situations it is prosecuting, namely, the Democratic Republic of Congo, northern Uganda, Darfur, as well as those where it had decided not to proceed, such as Iraq. The law of the Court up to and including its ruling on a confirmation hearing, committing Thomas Lubanga Dyilo for trial on child soldiers offences, is covered. It also addresses the difficulties created by US opposition, analysing the ineffectiveness of measures taken by Washington to obstruct the Court, and its increasing recognition of the inevitability of the institution.

AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT

Third Edition

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On 17 July 1998, at the headquarters of the Food and Agriculture Organization of the United Nations in Rome, 120 States voted to adopt the Rome Statute of the International Criminal Court. Less than four years later – far sooner than even the most optimistic observers had imagined – the Statute had obtained the requisite sixty ratifications for its entry into force, which took place on 1 July 2002. By the beginning of 2007, the number of States Parties stood at 104.1 By then, the Court was a thriving, dynamic, international institution, with an annual budget approaching €100 million and a staff of nearly 500. One of its Pre-Trial Chambers had just completed the Court’s first confirmation hearing, at which charges are confirmed and trial authorised to proceed.

The Rome Statute provides for the creation of an international criminal court with power to try and punish for the most serious violations of human rights in cases when national justice systems fail at the task. It constitutes a benchmark in the progressive development of international human rights, whose beginning dates back more than fifty years, to the adoption on 10 December 1948 of the Universal Declaration of Human Rights by the third session of the United Nations General Assembly.2 The previous day, on 9 December 1948, the Assembly had adopted a resolution mandating the International Law Commission to begin work on the draft statute of an international criminal court,3 in accordance with Article VI of the Genocide Convention.4

1 A list of States Parties to the Statute appears in Appendix 2 to this volume. More than thirty States are reported to be making the necessary political, judicial or legislative preparations for ratification, including Angola, Armenia, Azerbaijan, Bahamas, Bangladesh, Belarus, Cameroon, Cape Verde, Chile, Côte d’Ivoire, Georgia, Grenada, Haiti, Jamaica, Japan, Kazakhstan, Madagascar, Monaco, Russian Federation, Saint Lucia, São Tomé and Príncipe, Seychelles, Thailand, Tuvalu and Zimbabwe.

2 GA Res. 217 A (III), UN Doc. A/810.

3 Study by the International Law Commission of the Question of an International Criminal Jurisdiction, GA Res. 216 B (III).
Establishing this international criminal court took considerably longer than many at the time might have hoped. In the early years of the Cold War, in 1954, the General Assembly essentially suspended work on the project.\(^5\) Tensions between the two blocs made progress impossible, both sides being afraid they might create a tool that could advantage the other. The United Nations did not resume its consideration of the proposed international criminal court until 1989.\(^6\) The end of the Cold War gave the concept the breathing space it needed. The turmoil created in the former Yugoslavia by the end of the Cold War provided the laboratory for international justice that propelled the agenda forward.\(^7\)

The final version of the Rome Statute is not without serious flaws, and yet it ‘could well be the most important institutional innovation since the founding of the United Nations’.\(^8\) The astounding progress of the project itself during the 1990s and into the early twenty-first century indicates a profound and in some ways mysterious enthusiasm from a great number of States. Perhaps they are frustrated at the weaknesses of the United Nations and regional organisations in the promotion of international peace and security. To a great extent, the success of the Court parallels the growth of the international human rights movement, much of whose fundamental philosophy and outlook it shares. Of course, the Court has also attracted the venom of the world’s superpower, the United States of America. Washington is isolated yet determined in its opposition to the institution, although increasingly it appears to be accepting the inevitability of the Court.

The new International Criminal Court sits in The Hague, capital of the Netherlands, alongside its long-established cousin, the International Court of Justice. The International Court of Justice is the court where States litigate matters relating to their disputes as States. The role of individuals before the International Court of Justice is marginal, at best. As will be seen, not only does the International Criminal Court provide for prosecution and punishment of individuals, it also recognises a legitimate participation for the individual as victim. In a more general sense, the International Criminal Court is concerned, essentially, with matters

\(^5\) GA Res. 897 (X) (1954).  
\(^6\) GA Res. 44/89.  
that might generally be described as serious human rights violations. The International Court of Justice, on the other hand, spends much of its judicial time on delimiting international boundaries and fishing zones, and similar matters. Yet, because it is exposed to the same trends and developments that sparked the creation of the International Criminal Court, the International Court of Justice finds itself increasingly involved in human rights matters.9

Whether or not one is supportive of the International Criminal Court, any knowledgeable specialist has to admit that in the history of public international law it is a truly extraordinary phenomenon. From an exceedingly modest proposal in the General Assembly in 1989,10 derived from an atrophied provision of the 1948 Genocide Convention,11 the idea has grown at a pace faster than even its most steadfast supporters have ever predicted. At every stage, the vast majority of participants in the process of creating the Court have underestimated developments. For example, during the 1998 Rome Conference, human rights NGOs argued that the proposed threshold for entry into force of sixty ratifications was an American plot to ensure that the Court would never be created. Convincing one-third of States to join the Court seemed impossible. Prominent delegations insisted that the Court could only operate if it had universal jurisdiction, predicting that a compromise by which it could only prosecute crimes committed on the territory of a State Party or by a national of a State Party would condemn it to obscurity and irrelevance. Countries in conflict or in a post-conflict peace process, where the Court might actually be of some practical use, would never ratify the Rome Statute, they argued.12 Their perspective viewed the future court as an institution that would be established and operated by a relatively small

9 Recent cases have involved violations of human rights law and international humanitarian law in the Democratic Republic of Congo and the Occupied Palestinian Territories, genocide in the former Yugoslavia, the use of nuclear weapons, self-determination in East Timor, the immunity of international human rights investigators, prosecution of government ministers for crimes against humanity, and imposition of the death penalty in the United States. In 2005, for the first time in its history, it ruled that important human rights conventions, such as the International Covenant on Civil and Political Rights, the African Charter of Human and Peoples’ Rights and the Convention on the Rights of the Child, had been breached by a State: Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), 19 December 2005, para. 219.
10 GA Res. 44/89.
number of countries in the North. Its field of operation, of course, was going to be the South.

And yet, less than a decade after the adoption of the Rome Statute, there are more than 100 States Parties, eighty more than the safe threshold that human rights NGOs and many national delegations thought was necessary to ensure entry into force within a foreseeable future. As for the fabled universal jurisdiction, despite exercising jurisdiction only over the territory and over nationals of States Parties, the real Court now has plenty of meat on the bone: Sierra Leone, Colombia, Uganda, the Democratic Republic of Congo, Afghanistan, Cambodia, Macedonia and Burundi are all States Parties, to name a few of the likely candidates for Court activity. In other words, the lack of universal jurisdiction has proven to be no obstacle whatsoever to the operation of the institution. And, on 20 March 2006, the first suspect, Thomas Lubanga Dyilo, appeared in The Hague before a Pre-Trial Chamber of the International Criminal Court, charged with war crimes committed on the territory of a State Party to the Rome Statute subsequent to 1 July 2002.

The literature on the International Criminal Court is already abundant, and several sophisticated collections of essays addressed essentially to specialists have already been published. The goal of this work is both more modest and more ambitious: to provide a succinct and coherent introduction to the legal issues involved in the creation and operation of

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the International Criminal Court, and one that is accessible to non-specialists. References within the text signpost the way to rather more detailed sources when readers want additional analysis. As with all international treaties and similar documents, students of the subject are also encouraged to consult the official records of the 1998 Diplomatic Conference and the meetings that preceded it. But the volume of these materials is awesome, and it is a challenging task to distil meaningful analysis and conclusions from them.

In the earlier editions, I have thanked many friends and colleagues, and beg their indulgence for not doing so again here. I want to give special thanks to my students at the Irish Centre for Human Rights of the National University of Ireland, Galway, many of whom have contributed to my ongoing study of the Court with original ideas and analyses. Several of them have published journal articles and monographs on specific issues concerning the Court and, more generally, international criminal law, and without exception these works have been cited somewhere in this text. Special thanks are due to Mohamed Elewa, Mohamed El Zeidy and Dr Nadia Bernaz, who reviewed some or all of the text for me, and who made many constructive suggestions that have improved it. The enthusiasm and encouragement of Sinead Moloney and Finola O’Sullivan of Cambridge University Press is greatly appreciated. Finally, of course, thanks are mainly due to Penelope, for her mythical patience.

WILLIAM A. SCHABAS O.C
Oughterard, County Galway
31 January 2007
ABBREVIATIONS

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<tr>
<td>ASP</td>
<td>Assembly of States Parties</td>
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<td>GA</td>
<td>General Assembly</td>
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<td>International Criminal Court</td>
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<td>International Court of Justice</td>
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<td>International Criminal Tribunal for the former Yugoslavia</td>
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