

AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT

The International Criminal Court ushered in a new era in the protection of human rights. The Court prosecutes genocide, crimes against humanity, war crimes and the crime of aggression when national justice systems are either unwilling or unable to do so themselves. This sixth edition of the seminal text describes a Court currently examining situations that involve more than twenty countries in every continent of the planet. This book considers the difficulties in the Court's troubled relationship with Africa, the vagaries of the position of the United States and the challenges the Court may face as it confronts conflicts around the world. It also reviews the history of international criminal prosecution and the Rome Statute. Written by a leading commentator, it is an authoritative and up-to-date introduction to the legal issues involved in the creation and operation of the Court.

WILLIAM A. SCHABAS is Professor of International Law at Middlesex University London and Professor of International Criminal Law and Human Rights at Leiden University. His numerous publications include *Genocide in International Law* (second edition, 2009), *The Abolition of the Death Penalty in International Law* (third edition, 2002), *The United Nations International Criminal Tribunals, the Former Yugoslavia, Rwanda, Sierra Leone* (2006), *The International Criminal Court: A Commentary on the Rome Statute* (second edition, 2016), *Unimaginable Atrocities* (2012), *The Universal Declaration of Human Rights: The Travaux préparatoires* (2013), *The European Convention on Human Rights: A Commentary* (2015), *The Cambridge Companion to International Criminal Law* (2016) and *The Trial of the Kaiser* (2018).

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WILLIAM A. SCHABAS

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PREFACE

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 mid-2019, the number of States Parties stood at 122.¹ The Court was then a thriving, dynamic international institution, with an annual budget well in the range of €150 million and a staff of more than five hundred, located in iconic purpose-built premises in The Hague. Several trials had been completed, and others were underway or in preparation. The Court had nine active situations under investigation or prosecution, one of them in the Caucasus and the others in Africa. An equal number of situations was under preliminary examination, in some cases involving the activities of foreign troops from major military powers that are not States Parties to the Statute.

The Rome Statute provides for the creation of an international criminal court with the authority 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 seventy years, to the adoption on 10 December 1948 of the Universal Declaration of Human Rights at 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 as was foreseen in Article VI of the Genocide Convention.⁴

¹ A list of States Parties to the Statute appears in Appendix 2 to this volume.

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

³ Study by the International Law Commission of the Question of an International Criminal Jurisdiction, UN Doc. A/RES/216 B (III).

⁴ Convention on the Prevention and Punishment of the Crime of Genocide, (1951) 78 UNTS 277.

Establishing this international criminal court took considerably longer than many at the time might have hoped. In the early years of the Cold War, 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 General Assembly did not resume its consideration of the proposed international criminal court until the end of 1989, as the short twentieth century was coming to a close.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 first decades of the 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 organizations 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's opposition to the institution abated in the final years of the Bush administration and during the Obama presidency, only to resume with new ferocity under the reign of Donald Trump and his National Security Advisor, John Bolton, whose hatred of the institution is pathological. African States were initially the most enthusiastic about the project but their relationship with the Court can now only be described as complex and equivocal.

The new International Criminal Court sits in The Hague, a neighbour of 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

⁵ UN Doc. A/RES/897 (X).

⁶ UN Doc. A/RES/44/89.

⁷ Statute of the International Criminal Tribunal for the former Yugoslavia, UN Doc. S/RES/827, Annex.

⁸ Robert C. Johansen, 'A Turning Point in International Relations? Establishing a Permanent International Criminal Court', (1997) 13 Report No. 1, 1 (Joan B. Kroc Institute for International Peace Studies, 1997).

International Court of Justice is marginal at best. By contrast, as will be seen, not only does the International Criminal Court provide for prosecution and punishment of individuals, it also recognizes a legitimate participation for the individual as victim. In a more general sense, the International Criminal Court is concerned, essentially, with matters 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 also finds itself increasingly involved in human rights matters.⁹ Moreover, although the International Criminal Court does not formally adjudicate disputes between States, most of its cases concern leaders, present or former, of States, or the rebel groups that oppose them. In that sense, the interests of States are never very far from its field of action.

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 grew at a pace faster than even its most steadfast supporters ever predicted. For example, during the 1998 Rome Conference, human rights nongovernmental organizations (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 the countries in the world to join the Court seemed impossible. For this reason, prominent delegations insisted that the Court could only operate if it had universal jurisdiction, predicting that a compromise through which it was confined to prosecution of 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

⁹ For example, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, I.C.J. Reports 2005, p. 168, para. 219; *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits*, Judgment, I.C.J. Reports 2010, p. 639.

¹⁰ UN Doc. A/RES/44/89.

¹¹ Convention on the Prevention and Punishment of the Crime of Genocide, (1951) 78 UNTS 277, Art. VI.

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 number of countries in the North. Its field of operation, of course, was going to be the South.

And yet there are now in excess of 120 States Parties, a hundred 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 being confined essentially to the territory and to nationals of States Parties, the real Court now has plenty of meat on the bone: Palestine, Colombia, Venezuela and Guinea are all States Parties, to name a few of the possible candidates for Court activity. Innovative interpretations of the Statute have opened the door to prosecuting crimes occurring essentially in States that have not ratified the Statute, such as Myanmar. In other words, the lack of universal jurisdiction has not proven to be a significant obstacle to the operation of the institution.

The phenomenal support for the Court following entry into force of the Rome Statute, evidenced by the rapid pace of ratification and entry into force, has been followed by a period of rather lacklustre and somewhat disappointing performance. Initially, the Prosecutor projected that the Court would complete its first trial by late 2005.¹³ But, five years later, it was still struggling to finish a single case. Although trials have begun against more than a dozen suspects, most of them have floundered along the way or resulted in verdicts of acquittal. The *ad hoc* tribunals, for the former Yugoslavia, Rwanda and Sierra Leone, were far more productive at comparable periods in their lives. The explanation for the relative success of the temporary tribunals alongside the poor record of the International Criminal Court is complex and multifaceted. The Rome Statute adds some additional procedural hurdles to prosecution compared with the *ad hoc* tribunals, but this does not adequately explain the situation. For many years, supporters of the Court were reluctant to discuss this subject. For example, the agenda of the Review Conference, held eight years after the Statute's entry into force, included a 'stocktaking' that was focused on the role of States rather than on the performance of the institution. The Assembly of States Parties has been

¹² See, e.g., UN Doc. A/CONF.183/C.1/SR.7, paras. 48–51; UN Doc. A/CONF.183/C.1/SR.8, para. 7.

¹³ 'Draft Programme Budget for 2005', ASP/3/2, para. 159, p. 49.

loath to intervene for fear of compromising the independence of the Court, although patience is wearing thin.

The literature on the International Criminal Court is already abundant, as the bibliography in this book demonstrates. There are now several commentaries in at least three languages,¹⁴ a number of monographs,¹⁵ numerous collections of essays, all addressed essentially to specialists, and a huge number of academic articles.¹⁶ 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 the International Criminal Court, and one that is accessible to non-specialists. References within the text signpost the way to more

¹⁴ Antonio Cassese, Paola Gaeta and John R. W. D. Jones, eds., *The Rome Statute of the International Criminal Court: A Commentary*, Oxford: Oxford University Press, 2002; Julian Fernandez and Xavier Pacreau, eds., *Statut de Rome de la Cour pénale internationale, Commentaire article par articles*, Paris: Pedone, 2012; Paul De Hert, Jean Flamme, Mathias Holvoet and Olivia Struyven, eds., *Code of International Criminal Law and Procedure*, Brussels: Larcier, 2013; Otto Triffterer and Kai Ambos, eds., *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article*, 3rd edn, Munich: C. H. Beck; Baden-Baden: Nomos; Oxford: Hart, 2015; Sylvia Helena Steiner and Leonardo Nemer Caldeira Brandt, eds., *O Tribunal Penal Internacional – Comentários ao Estatuto de Roma*, Belo Horizonte: Del Rey Editora, 2016; William Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd edn, Oxford: Oxford University Press, 2016.

¹⁵ Leila Nadya Sadat, *The International Criminal Court and the Transformation of International Law: Justice for the New Millennium*, Ardsley, NY: Transnational Publishers, 2002; Bruce Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law*; Oxford: Oxford University Press, 2003; Benjamin N. Schiff, *Building the International Criminal Court*, New York: Cambridge University Press, 2008.

¹⁶ Roy S. Lee, ed., *The International Criminal Court, The Making of the Rome Statute, Issues, Negotiations, Results*, The Hague: Kluwer Law International, 1999; Herman von Hebel, Johan G. Lammers and Jolien Schukking, eds., *Reflections on the International Criminal Court: Essays in Honour of Adriaan Bos*, The Hague: T. M. C. Asser, 1999; Flavia Lattanzi and William A. Schabas, eds., *Essays on the Rome Statute of the International Criminal Court*, Rome: Editrice il Sirente, 2000; Dinah Shelton, ed., *International Crimes, Peace, and Human Rights: The Role of the International Criminal Court*, Ardsley, NY: Transnational Publishers, 2000; Roy S. Lee, ed., *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Ardsley, NY: Transnational Publishers, 2001; Mauro Politi and Giuseppe Nesi, eds., *The Rome Statute of the International Criminal Court: A Challenge to Impunity*, Aldershot: Ashgate, 2001; Carsten Stahn and Goran Sluiter, eds., *The Emerging Practice of the International Criminal Court*, Leiden: Brill, 2009; José Doria, Hans-Peter Gasser and M. Cherif Bassiouni, eds., *The Legal Regime of the International Criminal Court: Essays in Honour of Professor Igor Blishchenko*, Leiden and Boston: Martinus Nijhoff, 2009; Carsten Stahn, ed., *The Law and Practice of the International Criminal Court*, Oxford: Oxford University Press, 2015.

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 original records of the 1998 Diplomatic Conference and the meetings that preceded it, as well as those of the 2010 Review Conference and the annual sessions of the Assembly of States Parties. 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. When the first edition of this book appeared, I had only begun to supervise post-graduate research students. Today, I can say with some pride that many of my students over the past fifteen years have made their own contributions to academic commentary about the International Criminal Court, including a number of monographs with major publishers as well as countless book chapters and journal articles. My own understanding is much the richer thanks to them. The enthusiasm and encouragement of Finola O’Sullivan of Cambridge University Press, with whom I have worked for more than two decades, is greatly appreciated. Finally, of course, thanks are mainly due to Penelope, for her mythical patience.

WILLIAM A. SCHABAS OC MRIA
London and Paris
30 May 2019

ABBREVIATIONS

| | |
|-------|---|
| ASP | Assembly of States Parties |
| CHR | Commission on Human Rights |
| GA | General Assembly |
| ICC | International Criminal Court |
| ICJ | International Court of Justice |
| ICTR | International Criminal Tribunal for Rwanda |
| ICTY | International Criminal Tribunal for the former Yugoslavia |
| ILC | International Law Commission |
| LRTWC | <i>Law Reports of the Trials of the War Criminals</i> |
| SC | Security Council |
| SCSL | Special Court for Sierra Leone |
| TWC | <i>Trials of the War Criminals</i> |

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