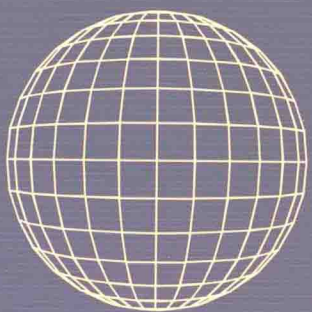
An Introduction to the International Criminal Court

Third Edition



William A. Schabas

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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.

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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 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

[4] Convention on the Prevention and Punishment of the Crime of Genocide, (1951) 78 UNTS 277. [5] GA Res. 897 (X) (1954). [6] GA 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).

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.

[11] Convention for the Prevention and Punishment of the Crime of Genocide, (1951) 78 UNTS 277, Art. 6.

[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.

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.[13] 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

[13] Roy Lee, ed., *The International Criminal Court, The Making of the Rome Statute, Issues, Negotiations, Results*, The Hague: Kluwer Law International, 1999; Otto Triffterer, ed., *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, Baden-Baden: Nomos, 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 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; 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; and Flavia Lattanzi and William A. Schabas, eds., *Essays on the Rome Statute of the International Criminal Court*, vol. II, Rome: Editrice il Sirente, 2004. There are also two significant monographs: Leila Nadya Sadat, *The International Criminal Court and the Transformation of International Law: Justice for the New Millennium*, Ardsley, NY: Transnational Publishers, 2002; and Bruce Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law*, Oxford: Oxford University Press, 2003.

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.

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Oughterard, County Galway
31 January 2007

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	*Law Reports of the Trials of the War Criminals*
SC	Security Council
SCSL	Special Court for Sierra Leone
TWC	*Trials of the War Criminals*

CONTENTS

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Creation of the Court

War criminals have been prosecuted at least since the time of the ancient Greeks, and probably well before that. The idea that there is some common denominator of behaviour, even in the most extreme circumstances of brutal armed conflict, confirms beliefs drawn from philosophy and religion about some of the fundamental values of the human spirit. The early laws and customs of war can be found in the writings of classical authors and historians. Those who breached them were subject to trial and punishment. Modern codifications of this law, such as the detailed text prepared by Columbia University professor Francis Lieber that was applied by Abraham Lincoln to the Union army during the American Civil War, proscribed inhumane conduct, and set out sanctions, including the death penalty, for pillage, raping civilians, abuse of prisoners and similar atrocities.[1] Prosecution for war crimes, however, was only conducted by national courts, and these were and remain ineffective when those responsible for the crimes are still in power and their victims remain subjugated. Historically, the prosecution of war crimes was generally restricted to the vanquished or to isolated cases of rogue combatants in the victor's army. National justice systems have often proven themselves to be incapable of being balanced and impartial in such cases.

The first genuinely international trial for the perpetration of atrocities was probably that of Peter von Hagenbach, who was tried in 1474 for atrocities committed during the occupation of Breisach. When the town was retaken, von Hagenbach was charged with war crimes, convicted and beheaded.[2] But what was surely no more than a curious experiment in medieval international justice was soon overtaken by the sanctity of State

[1] Instructions for the Government of Armies of the United States in the Field, General Orders No. 100, 24 April 1863.

[2] Georg Schwarzenberger, *International Law as Applied by International Courts and Tribunals: The Law of Armed Conflict*, vol. II, London: Stevens & Sons Limited, 1968, p. 463; M. Cherif Bassiouni, 'From Versailles to Rwanda in 75 Years: The Need to Establish a Permanent International Court', (1997) 10 *Harvard Human Rights Journal* 11.

sovereignty resulting from the Peace of Westphalia of 1648. With the development of the law of armed conflict in the mid-nineteenth century, concepts of international prosecution for humanitarian abuses slowly began to emerge. One of the founders of the Red Cross movement, which grew up in Geneva in the 1860s, urged a draft statute for an international criminal court. Its task would be to prosecute breaches of the Geneva Convention of 1864 and other humanitarian norms. But Gustav Monnier's innovative proposal was much too radical for its time.[3]

The Hague Conventions of 1899 and 1907 represent the first significant codification of the laws of war in an international treaty. They include an important series of provisions dealing with the protection of civilian populations. Article 46 of the Regulations that are annexed to the Hague Convention IV of 1907 enshrines the respect of '[f]amily honour and rights, the lives of persons, and private property, as well as religious convictions and practice'.[4] Other provisions of the Regulations protect cultural objects and the private property of civilians. The preamble to the Conventions recognises that they are incomplete, but promises that, until a more complete code of the laws of war is issued, 'the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience'. This provision is known as the Martens clause, after the Russian diplomat who drafted it.[5]

The Hague Conventions, as international treaties, were meant to impose obligations and duties upon States, and were not intended to create criminal liability for individuals. They declared certain acts to be illegal, but not criminal, as can be seen from the absence of any suggestion that there is a sanction for their violation. Yet, within only a few years, the Hague Conventions were being presented as a source of the law of war crimes. In 1913, a commission of inquiry sent by the Carnegie Foundation to investigate atrocities committed during the Balkan Wars used the provisions of the Hague Convention IV as a basis for its description of war

[3] Christopher Keith Hall, 'The First Proposal for a Permanent International Criminal Court', (1998) 322 *International Review of the Red Cross* 57.

[4] Convention Concerning the Laws and Customs of War on Land (Hague IV), 3 *Martens Nouveau Recueil* (3d) 461. For the 1899 treaty, see Convention (II) with Respect to the Laws and Customs of War on Land, 32 Stat. 1803, 1 Bevans 247, 91 British Foreign and State Treaties 988.

[5] Theodor Meron, 'The Martens Clause, Principles of Humanity, and Dictates of Public Conscience', (2000) 94 *American Journal of International Law* 78.

crimes.[6] Immediately following World War I, the Commission on Responsibilities of the Authors of War and on Enforcement of Penalties, established to examine allegations of war crimes committed by the Central Powers, did the same.[7] But actual prosecution for violations of the Hague Conventions would have to wait until Nuremberg. Offences against the laws and customs of war, known as 'Hague Law' because of their roots in the 1899 and 1907 Conventions, are codified in the 1993 Statute of the International Criminal Tribunal for the former Yugoslavia[8] and in Article 8(2)(b), (e) and (f) of the Statute of the International Criminal Court.

As World War I wound to a close, public opinion, particularly in England, was increasingly keen on criminal prosecution of those generally considered to be responsible for the war. There was much pressure to go beyond violations of the laws and customs of war and to prosecute, in addition, the waging of war itself in violation of international treaties. At the Paris Peace Conference, the Allies debated the wisdom of such trials as well as their legal basis. The United States was generally hostile to the idea, arguing that this would be *ex post facto* justice. Responsibility for breach of international conventions, and above all for crimes against the 'laws of humanity' – a reference to civilian atrocities within a State's own borders – was a question of morality, not law, said the United States delegation. But this was a minority position. The resulting compromise dropped the concept of 'laws of humanity' but promised the prosecution of Kaiser Wilhelm II 'for a supreme offence against international morality and the sanctity of treaties'. The Versailles Treaty formally arraigned the defeated German emperor and pledged the creation of a 'special tribunal' for his trial.[9] Wilhelm of Hohenzollern had fled to neutral Holland which refused his extradition, the Dutch Government considering that the charges consisted of retroactive criminal law. He lived out his life there and died, ironically, in 1941, when his country of refuge was falling under German occupation in the early years of World War II.

[6] Report of the International Commission to Inquire into the Causes and Conduct of the Balkan Wars, Washington DC: Carnegie Endowment for International Peace, 1914.

[7] *Violations of the Laws and Customs of War, Reports of Majority and Dissenting Reports of American and Japanese Members of the Commission of Responsibilities, Conference of Paris, 1919*, Oxford: Clarendon Press, 1919.

[8] Statute of the International Criminal Tribunal for the former Yugoslavia, UN Doc. S/RES/827 (1993), Annex.

[9] Treaty of Peace between the Allied and Associated Powers and Germany ('Treaty of Versailles'), (1919) TS 4, Art. 227.

The Versailles Treaty also recognised the right of the Allies to set up military tribunals to try German soldiers accused of war crimes.[10] Germany never accepted the provisions, and subsequently a compromise was reached whereby the Allies would prepare lists of German suspects, but the trials would be held before the German courts. An initial roster of nearly 900 was quickly whittled down to about forty-five, and in the end only a dozen were actually tried. Several were acquitted; those found guilty were sentenced to modest terms of imprisonment, often nothing more than time already served in custody prior to conviction. The trials looked rather more like disciplinary proceedings of the German army than any international reckoning. Known as the 'Leipzig Trials', the perceived failure of this early attempt at international justice haunted efforts in the inter-war years to develop a permanent international tribunal and were grist to the mill of those who opposed war crimes trials for the Nazi leaders. But two of the judgments of the Leipzig court involving the sinking of the hospital ships *Dover Castle* and *Llandovery Castle*, and the murder of the survivors, mainly Canadian wounded and medical personnel, are cited to this day as precedents on the scope of the defence of superior orders.[11]

The Treaty of Sèvres of 1920, which governed the peace with Turkey, also provided for war crimes trials.[12] The proposed prosecutions against the Turks were even more radical, going beyond the trial of suspects whose victims were either Allied soldiers or civilians in occupied territories to include subjects of the Ottoman Empire, notably victims of the genocide of the Armenian people. This was the embryo of what would later be called crimes against humanity. However, the Treaty of Sèvres was never ratified by Turkey, and no international trials were undertaken. The Treaty of Sèvres was replaced by the Treaty of Lausanne of 1923 which contained a 'Declaration of Amnesty' for all offences committed between 1 August 1914 and 20 November 1922.[13]

Although these initial efforts to create an international criminal court were unsuccessful, they stimulated many international lawyers to devote

[10] *Ibid.*, Arts. 228–230.

[11] *German War Trials, Report of Proceedings Before the Supreme Court in Leipzig*, London: His Majesty's Stationery Office, 1921. See also James F. Willis, *Prologue to Nuremberg: The Politics and Diplomacy of Punishing War Criminals of the First World War*, Westport, CT: Greenwood Press, 1982; Gerd Hankel, *Die Leipziger Prozesse*, Hamburg: Hamburger Edition, 2003.

[12] (1920) UKTS 11; (1929) 99 (3rd Series), DeMartens, *Recueil général des traités*, No. 12, p. 720 (French version).

[13] Treaty of Lausanne Between Principal Allied and Associated Powers and Turkey, (1923) 28 LNTS 11.