



Building the International Criminal Court

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CAMBRIDGE

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*For June Goodwin, who taught me about truth;
and Naomi Schiff, a tireless fighter for justice;*

*and in memory of Hendrik (H. W.) van der Merwe,
for his selfless, iron-willed pursuit of justice and peace.*

Preface

I spent a year in The Netherlands conducting the research upon which this book is based. I commuted frequently from my home in Leiden to The Hague to interview officials of the International Criminal Court and the International Criminal Tribunal for the Former Yugoslavia, nongovernmental organization personnel, embassy officials, journalists, and academics.

I was honored and much assisted by an appointment as visiting professor at Leiden University's Grotius Centre for International Legal Studies and by the hospitality of the T. M. C. Asser Institute, both in The Hague. At the Grotius Centre, I especially thank John Dugard, Roelof Haveman, Machteld Boot, and Christine Tremblay. At the Asser Institute, I am grateful to Olivier Ribbelink, Avril McDonald, and Paula Kersbergen. For his general enthusiasm, help in making various arrangements, and for his wonderful family's kind hospitality, I thank Sam Muller. Susan Somers warmly included me and my family into her circle of friends, for which we are very grateful.

Isebill V. Gruhn of the University of California, Santa Cruz, provided me with invaluable comments while I was writing this book. Mistakes of fact or judgment herein, I'm sorry to say, are entirely my own.

In The Hague at the International Criminal Court, in embassies, and while visiting nongovernmental organizations, journalists, and academics, I was very fortunate to receive candid commentary on the monumental tasks facing the Court. With very few exceptions, because of the sensitivity of their comments and/or positions, my interlocutors did not want to be quoted or cited. I don't want to outweigh their views by citing the few people willing to go on record, so I do not cite my interviewees directly; and

to preserve their anonymity, I cannot thank them here. But I deeply appreciate their willingness to speak with me.

I am most grateful for the sabbatical leave and support I received from Oberlin College that made this project possible. I appreciate as well the kind encouragement I've received from my colleagues in the Department of Politics, particularly Ron Kahn's reading of the manuscript underway.

I believe that important human endeavors – such as the pursuit of international justice – deserve serious evaluation and analysis, not to demonstrate their futility, but to better understand their challenges and to assist in achieving their objectives. I hope that this book will help explain the International Criminal Court and bring wider support to it, and that my comments will be taken as those of a constructive ally in the fight against impunity.

Ben Schiff

Oberlin, Ohio
June 29, 2007

Acronyms

ACABQ	(UN) Advisory Committee on Administrative and Budgetary Questions
AI	Amnesty International
ASF	Advocats sans Frontières
ASP	(ICC) Assembly of States Parties
ASPA	American Servicemen's Protection Act or American Service Members Protection Act
BIA	bilateral immunity agreement
CAR	Central African Republic
CBF	(ICC ASP) Committee on Budget and Finance
CIA	U.S. Central Intelligence Agency
CICC	NGO Coalition for the International Criminal Court
Coco	coordinating committee
CPA	Comprehensive Peace Agreement (Sudan)
DRC	Democratic Republic of the Congo
ECOSOC	(UN) Economic and Social Council
EU	European Union
FIDH	International Federation of Human Rights Leagues
FPLC	Patriotic Front for the Liberation of the Congo
FRPI	Force de Résistance Patriotique en Ituri
GA	(UN) General Assembly
HRW	Human Rights Watch
HSM	Holy Spirit Movement (Uganda)
ICB	International Criminal Bar
ICC	International Criminal Court
ICJ	International Court of Justice

ICL	International Criminal Law
ICRC	International Committees of the Red Cross
ICTJ	International Center for Transitional Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IDP	internally displaced persons
IFOR	International Force (in the Former Yugoslavia)
IHL	International Humanitarian Law
ILC	International Law Commission
IMET	(U.S.) International Military Education and Training
IMT	International Military Tribunal (Nuremberg)
JCCD	(ICC OTP) Jurisdiction, Complementarity, and Cooperation Division
JEM	Justice and Equality Movement (Sudan)
LMS	like-minded states
LRA	Lord's Resistance Army (Uganda)
MERCOSUR	South American Common Market
MINURCA	UN Mission in the Central African Republic
MLC	Movement for the Liberation of the Congo
MONUC	UN Mission in the Democratic Republic of the Congo
NATO	North Atlantic Treaty Organization
NGO	non-governmental organization
NPWJ	No Peace Without Justice
NRM/A	National Resistance Movement/Army (Uganda)
OIOS	(UN) Office of Internal Oversight Services
ONUB	UN Operation in Burundi
OTP	Office of the Prosecutor
PIU	Public Information Unit
PrepCom	Preparatory Committee
PTC	(ICC) Pre-Trial Chamber
RENAMO	Mozambique National Resistance
RPE	Rules of Procedure and Evidence
RPF	Rwandan Patriotic Front
SATRC	South Africa's Truth and Reconciliation Commission
SFOR	Stabilization Force (in the Former Yugoslavia)
SLM/A	Sudan Liberation Movement/Army
SOAT	Sudan Organization Against Torture
SPLA	Sudan People's Liberation Army
SWGCA	Special Working Group on the Crime of Aggression

U.K.	United Kingdom
U.S.	United States
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNESCO	United Nations Educational, Scientific, and Cultural Organization
UNHCHR	United Nations High Commissioner for Human Rights
UNSC	United Nations Security Council
UPC	Union of Congolese Patriots
UPDF	Ugandan People's Defense Forces
VPRS	(ICC Registry) Victims Participation and Reparations Section
VTF	(ICC) Victims' Trust Fund
VWU	(ICC Registry) Victims and Witnesses Unit
WFM	World Federalists Movement

Building the International Criminal Court

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Introduction

The International Criminal Court (ICC) soars with the loftiest of ideals as it grapples with the basest of human acts. This first and only permanent international criminal court intends to counter impunity by prosecuting perpetrators of genocide, crimes against humanity, and war crimes. It seeks to deter depredations against citizens in violent conflicts and to contribute to justice, peace, political transition, and reconstruction.

Ideally, domestic societies use legitimate political processes to devise and promulgate their laws. Then the laws are fairly implemented by legal systems that remove the politics from justice. This ideal is often compromised by extralegal influences, by biased legal structures, and by maladministration; nonetheless, the ideal is a widely accepted model of an objective, dispassionate, truth-based mechanism for upholding society's rules.

If this model represents a goal toward which societies strive with only partial success, international law is even more tenuous. International law is based on an ephemeral society that lacks a legislative structure, and it seeks to constrain sovereign states that recognize no consolidated authority for enforcement. International organizations operate at the sufferance of states, subject to their desires, dependent upon their generosity, and victims of their ploys. Moreover, international organizations are subject to the same weaknesses as domestic ones – outside influences, bias, and maladministration. Nonetheless, since the beginnings of the modern state system, advocates of law have tried to extend to the international level the logic and structures familiar in the domestic context. International law has proliferated. This quest for the “legalization” of international politics has added arbitration and judicial decision making

to diplomacy and the naked exercise of power as means of settling conflict between sovereign states.¹ Legalization has arrived as well at the doorstep of individual responsibility.

Since all human action is in the end individual, crimes committed on behalf of states have perpetrators just as do domestic crimes. For approximately 150 years, from at least the origins of the International Red Cross movement in the mid-nineteenth century, international lawyers, diplomats, and advocates contemplated the creation of an international criminal court to hold individuals responsible for criminal acts carried out in the name of the state. Finally, in Rome in July 1998, the Statute for the International Criminal Court opened for signature and ratification. The Court emerged on July 1, 2002, much sooner than most observers had believed possible.

The Court began with a five-member transition team in 2002, and mushroomed past 700 employees in 2007. It is built upon a range of national legal systems and incorporates structural elements common to other international organizations. Its structure, rules, and operations reflect experiences of the ad hoc international criminal tribunals for Yugoslavia and Rwanda but differ significantly from them. The ICC's objectives include the prosecution of transgressors and rehabilitation of victims, its mechanisms combine traditions of civil law with common-law precepts, and it seeks to incorporate lessons from the tribunals in order to improve the effectiveness and efficiency of international criminal trials.

The Court's most profound effects may be invisible and tangential to the cases it pursues directly. If it deters criminality or leads states to tighten their domestic laws and enforce international humanitarian norms, it could be considered successful. On the other hand, it may be deemed irrelevant if potential perpetrators don't recognize it as a threat, if its efforts are thwarted by noncooperation or lack of resources, or if victims regard it as useless in their search for justice. The Court could become an unprecedented, sterling achievement, or it may be a great idea whose time has not arrived. This book is intended to explain where the Court comes from and what it's for, what its challenges are, and how it is managing them in its first years of operation.

¹ Goldstein et al., "Introduction: Legalization and World Politics" (2000), evaluate the degree of legalization implemented in interstate arrangements along three dimensions: the nature of the *obligation* that states accept, from nonlegal at one end of a spectrum to binding rules of behavior at the other; the *precision* of the rules under adjudication, from vague principles to highly elaborated rules; and the degree of *delegation* of decision-making authority to the forum, from an arena of discussion or diplomacy to a definitive judicial process and/or incorporation into domestic law.

THE COURT

The Court consists of three “organs” – the Presidency and Chambers (the judges),² the Office of the Prosecutor, and the Registry. The Rome Statute details the legal framework for Court operations, empowering the Court to investigate cases, issue warrants, take custody of arrested suspects, and carry out trials, and enjoins it to protect witnesses and victims involved with its proceedings and to aid the victims of the crimes under its jurisdiction.

The Statute establishes the Assembly of States Parties (ASP) to the Treaty as the legislative organ responsible to elect (and remove) ICC judges and chief and deputy prosecutors, approve and allocate the organization’s budget, approve official cooperative arrangements with other organizations (such as the United Nations), and adopt the Court’s Rules of Procedure and Evidence, its Elements of Crimes, and the rules of the separate organs. The ASP can also create subsidiary bodies and establish their rules for implementing the Statute (for instance, the Trust Fund for Victims), and it can amend the Statute.

The ICC and especially its founding document, the Rome Statute, are the subjects of an enormous literature. A relentlessly expanding list of books and a torrent of legal journal articles examine the sources, structure, intricacies, ambiguities, and implications of the Statute. The Court itself has so far been rather less analyzed because it has only recently begun operating, but there are useful introductions to its structure and law, and some books illuminate particular aspects of its founding, implications, early operation and possible effects.

The Court is a work-in-progress, an amalgam of normative commitments,³ legal understandings, political interests, diplomatic bargains, and organization dynamics. It embodies idealistic, largely legalistic conceptions of international norms that were pursued doggedly by international legal experts from the end of World War II onward, shaped by diplomatic bargains and pushed by nongovernmental organizations. Embarked on a course fraught with contradictions stemming from its broad set of objectives, the

² Sometimes the Presidency and the Chambers are cited in Court documents as separate “organs,” so that the ICC is said to be composed of four organs; sometimes it is described as tripartite. The President and Vice Presidents are elected from among the judges, which appears to make the combination of Presidency and Chambers a reasonable classification. However, the Presidency has administrative duties disconnected from its members’ roles as judges, so in that sense they are two separate organs that share some personnel.

³ By “normative commitment,” I mean dedication to behavior bounded by a conception of appropriate behavior based on some nonmaterial value, such as the value of human dignity or fairness.

Court faces the requirements of all organizations – leadership, internal coordination, resource acquisition and deployment, efficiency, seeking to demonstrate success and relevance to major interlocutors. The decisions it makes in its early years about its role, focus, and operations will be crucial to how it survives, thrives, or withers.

THEORETICAL PERSPECTIVE

My choice of topics and the language I use come from the study of international organizations, international relations, and theories about both. This is not primarily a theoretical book; however, international relations and international organization theories help elucidate my topic and so I think it is useful here to present the general theoretical context in which I am working.

Especially since the end of the Cold War, international relations texts and journals have been contrasting the analytical perspectives of realists, neo-liberal institutionalists, and constructivists. Rather than apply these as fully deployed theories or complete rivals, I use them to explain different aspects of an extremely complicated world.⁴ Their alternative emphases sometimes place them and their enthusiasts at odds with one another, but I am by nature a synthesizer, so I prefer to use them together, the best to explain what I seek to understand. I introduce the three kinds of theory here in the order that they developed in post-World War II American political science.⁵

Realist Theorists

Realist theorists assume that humans are self-seeking, rational beings. Sovereign states are the international system's primary actors. Because there is no global government, realists assert that *anarchy* is the condition (or structure) of the existing international system.⁶ Real sovereignty – the state's

⁴ For an explanation of the virtues of analytical eclecticism, see Sil, "Problems Chasing Methods or Methods Chasing Problems? Research Communities, Constrained Pluralism, and the Role of Eclecticism" (2004), and Sil, "Analytic Eclecticism and Research Traditions in International Relations" (2007).

⁵ There are many and interesting variations of the three general theoretical approaches amongst which vigorous debates continue. I present and apply here the general thrust of the three viewpoints without delving into these variations.

⁶ I use the idea of *system* simply as a mechanistic or organic metaphor to denote the collectivity of states as they interact with each other. Kenneth Waltz, in *Theory of International Politics* (1979), is the foremost expositor of (mechanistic) realist system theory. For Waltz, states act according to rules prescribed by the condition of anarchy. Hedley Bull, in *The Anarchical Society*, 3rd ed. (2003), distinguishes between the idea of a mechanistic international system and a value-imbedded *society* of states (both under anarchy), and I use his distinction further in Chapter 1.

capacity to maintain domestic order and to protect itself from other states – resides in its military and economic capabilities. Formal sovereignty – the state's right to a monopoly on the domestic use of force to maintain order and its freedom to use force externally to protect itself – is an institution⁷ of the (post-1648, European) international system. States affect each other by using, or threatening to use, coercive power defined in material (military and economic) terms. The *relative* power of any state as against others is the key measure of its capacities for action, and thus independence. Balances of power emerge from confrontations among states, and realist theorists generally regard the balance of power as the primary ordering institution of the anarchic system.

For realists, two kinds of change are possible. Change *in* the international system means that the relative power of particular states, or the power hierarchy, varies due to war, differential economic growth, technological innovation, and so on; however, anarchy persists, and the institutions of sovereignty and balance survive. Change *of* the system, on the other hand, would mean transforming the conditions under which international politics takes place. If some international authority were to arise and terminate international anarchy, if new actors of a different sort appeared that could powerfully constrain states, or if states were to base their actions on some principle other than self-help, then the system would be transformed and the balance of power would give way to other institutions.

For realists, international organizations fit into the system as tools of states in their competition with each other, but they are not instruments of an escape from anarchy. It would make little sense for states to sacrifice sovereignty to enforce international laws against genocide, crimes against humanity, and war crimes, unless to do so would confer some relative advantage or to oppose it would entail some relative costs. Realists might

⁷ *Institutions*: The term “institution” appears in the international relations literature in at least four different ways. For some, an institution is an *organization*. For others, it is a *routinized pattern of behavior* (such as free trade, democracy, or domestic legal processes) that can be characterized by principles (antiprotectionism, majoritarianism, rule of law) and decision-making routines (global negotiations, voting, trials) that may or may not necessitate organizations. The term is also used to denote *an important general characteristic*; for example, sovereignty is considered by many to be an institution of the post-Westphalian international system and states within it. Lastly, an institution can be *a common, expected dynamic* within the system, such as war or the balance of power. When referring to a concrete organization – with a headquarters, officials, mandate, functions, and the like – I use the word “organization.” When referring to the broader idea of an accepted pattern of behavior, accepted characteristic (such as sovereignty), or common dynamic, I use “institution.”