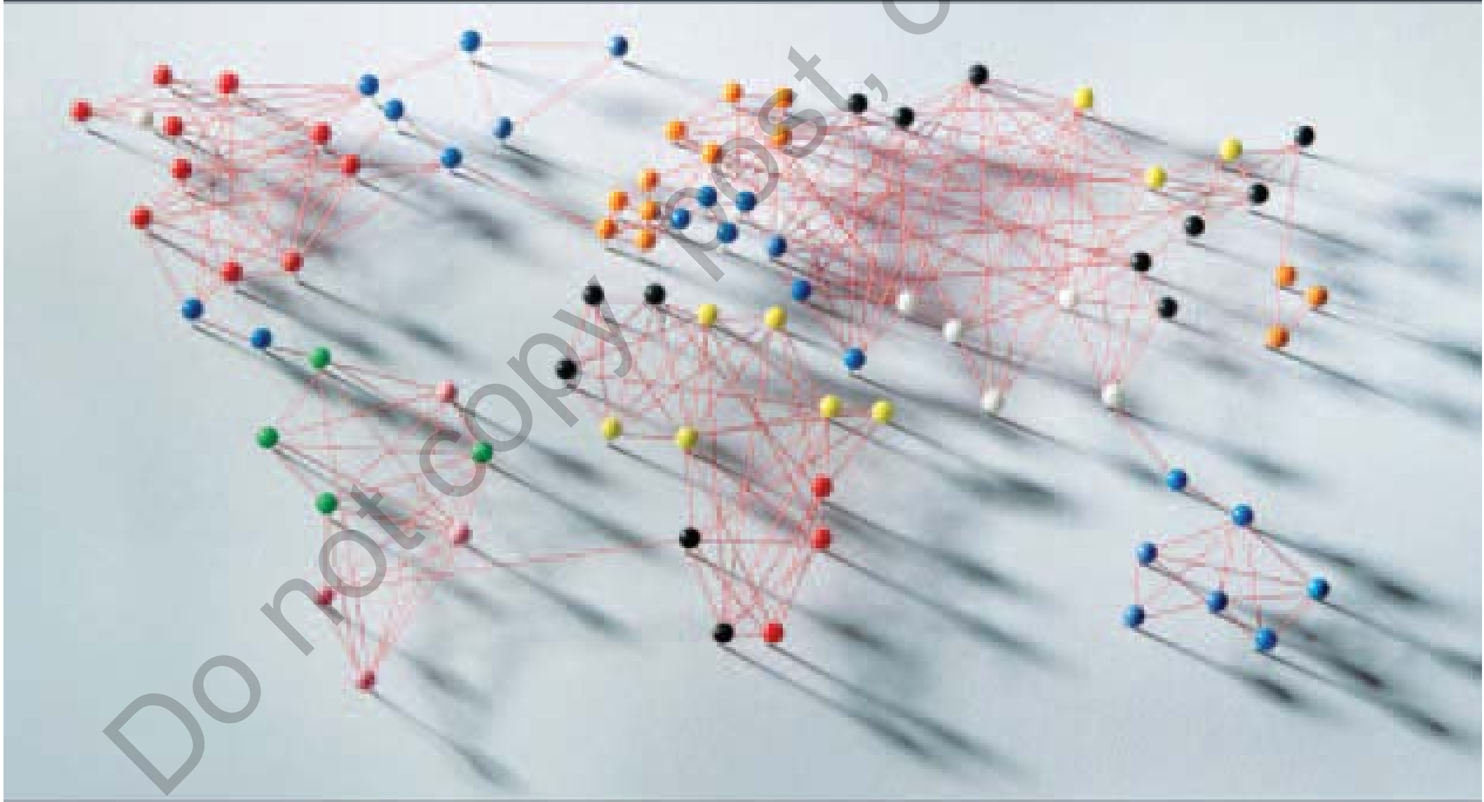
# Comparative, International, and Global Justice

## PERSPECTIVES FROM CRIMINOLOGY AND CRIMINAL JUSTICE



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# The International Criminal Court

The International Criminal Court (ICC), created in 1998, marks a significant step in the possible evolution of a worldwide criminal justice system and in the continued international protection of human rights. This chapter begins with a discussion of international criminal law to provide the context within which the ICC operates. This provides the context for how international criminal law has developed and how important the jurisprudence of the international criminal tribunals for the former Yugoslavia and for Rwanda is within that development.

How did the ICC come into being, and what was the process that led to the finalization of the Statute of the ICC setting out its powers and function? This process is explored and a detailed explanation provided of how the Court operates and the complexities associated with the exercise of its jurisdiction. The limits of the Court are highlighted as well as how it functions in association with the sovereignty of states and the United Nations Security Council.

Although the United States and some other major world powers (e.g., Russia and China) have refused to become parties to the Statute establishing the ICC, more than one hundred states have become parties. Among the questions addressed in this chapter are the following: What were the arguments deployed by the United States and others against the Court, and what steps has the United States taken to ensure that its nationals are protected in relation to states that are parties to the ICC Statute? Are U.S. objections warranted, or is the U.S. stance based on American exceptionalism and the United States' desire not to weaken the role of the UN Security Council in controlling world events?

Another question asks how the ICC has functioned since its establishment and what constraints it has encountered. The Prosecutor has a key role in the operations of the ICC, and the functions and powers of the Office of the Prosecutor (OTP) are explored here. For the first time, an international criminal tribunal has been tasked with safeguarding the rights of victims. We examine how victims participate in the proceedings of the Court, what the future of the ICC is, and how it might be improved. These and associated issues are addressed in a critical review of the effectiveness of the ICC.

This chapter should be read together with Chapter 8: Transitional Justice, especially in relation to amnesties and the International Criminal



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Tribunal for Rwanda, and Chapter 13: Violence Against Women, in relation to violence against women in armed conflicts, where there are discussions of international humanitarian law and of the international tribunals for the former Yugoslavia and for Rwanda.

## International Criminal Law

The ICC exercises criminal jurisdiction in international law. Understanding the role of the ICC requires an awareness of the nature and content of international criminal law. Like the domestic criminal law of states, international criminal law identifies specific international crimes and requires states to prosecute and punish at least some of those crimes (Cassese 2003, 721). It also prescribes procedures to be followed in processing international crimes.

### International Crimes

The list of international crimes is not lengthy. Initially, in the late nineteenth century and for some time after, only war crimes were categorized as international crimes. After World War II, however, new crimes were formulated, namely, crimes against humanity and crimes against peace. These were developed through the instrumentality of the International Military Tribunal at Nuremberg (IMT) for crimes committed by German forces in Europe, and the International Military Tribunal for the Far East (IMTFE) for crimes committed by Japanese forces in that region.

In 1948, a Convention covering the crime of genocide was agreed to, and in the 1980s torture became another specific international crime, again under a Convention (Cassese 2003, 722). More recently, international terrorism has been criminalized internationally through several treaties (see Chapter 12). While international criminal law now specifies a number of international crimes, it is still in the development stage. International criminal law does not deal at all with the penalties for such crimes (p. 723).

While international law had criminalized certain acts, until the creation of the ICC, it was left to states to prosecute such crimes in their national courts. This means that states enacted offenses in their laws based on the content of an international crime and applied their own rules to prosecuting those crimes. States have also refined concepts and crimes that were defined rather broadly in international law.

When international tribunals like the IMT, IMTFE, and, more recently, the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) were set up, these tribunals operated under statutes that specified which crimes the tribunal was to exercise jurisdiction over. The process of establishing tribunals and fixing their jurisdiction has been ad hoc in nature, and they have been created as a response to specific international events, for example, the ICTR in relation to the 1994 genocide in Rwanda. This was necessary because no international criminal code exists that specifies all international crimes, defines them comprehensively, and identifies which tribunals can automatically apply. Accordingly, deciding on the jurisdiction of each international tribunal has always been a one-off process (Cassese 2003, 723).

### Sources of International Criminal Law

Where is international criminal law to be found? The chief sources are the numerous treaties and conventions concerning international human rights law and international humanitarian law. Many declarations and conventions have impacted international criminal law, for example, by setting out minimum standards for a fair trial, the rights of suspects, and the rights of victims. As well, elements of states' national laws have migrated into international criminal law in the form of concepts such as *mens rea*, categories of criminal liability (joint responsibility rules for criminal conduct, accessories, and aiding and abetting) because tribunals have canvassed domestic laws for appropriate concepts and models. (An example of this appears in that part of Chapter 13 dealing with violence against women in armed conflict where the definition of rape was considered by both the ICTY and the ICTR, and both drew on definitions found in states' domestic laws.)

This means that international criminal law draws on both international and state practice and laws, making it a hybrid branch of law. In this sense, its development resembles that of the common law where judicial precedent and

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statutes collectively develop legal rules and principles. Antonio Cassese (2003, 724) suggests that through the instrumentality of the ICC, it will be possible to begin to standardize and codify international criminal law.

### Liability of States and Individuals for Criminal Acts

International criminal law is concerned with both states and individuals who are nationals of states. States regard most international crimes as violations of international law. Accordingly, when a war crime or genocide, for example, is committed by an individual, two forms of liability arise: that of the individual for his or her criminal conduct that falls within international criminal law, and that of the state and its responsibility. That both legal avenues arise is evidenced by the events in the former Yugoslavia when Bosnia brought proceedings in the International Court of Justice (ICJ; the forum for claims by states against other states) against Yugoslavia for genocide, while at the same time the ICTY conducted criminal trials of individuals (Cassese 2003, 725).

### International Criminal Tribunals

With the end of the Cold War and the breakup of the former Soviet Union, there was a rise in nationalism and an increase in ethnic tensions in some parts of the former Soviet bloc. These ethnic tensions had previously been held in check under the old international order of the two superpowers. The fundamental changes that swept across Europe included the creation of new democracies and recognition of the importance of the rule of law and of human rights. Change took various forms in the new order in Europe, but in what was then known as Yugoslavia, it resulted in armed conflict between ethnic groups, atrocities, death, and gross violations of international humanitarian law. In response to world outrage, the UN Security Council established the ICTY. When an internal conflict in Rwanda indicated genocide and killings and rape on a mass scale, the UN Security Council established the ICTR. Each tribunal had its jurisdiction, powers, and procedures determined by its own Statute.

Considerable resources had to be applied to establish the ICTY and the ICTR, and the time and the attention they required from the UN Security Council militated against setting up further similar tribunals. However, similar situations in Sierra Leone, Timor, and Kosovo required attention.[1] The approach adopted in those cases was to establish hybrid or mixed courts made up of international and national judges and with aspects of national and international jurisdiction. Accordingly, for example, the Special Court for Sierra Leone was created with its own Statute in 2002 (Cassese 2003, 734).[2]

Within this context concerning how international criminal law is constituted and how it has been developed, especially through the various international criminal tribunals, we now turn to the establishment of the ICC. As the first permanent international criminal court with global jurisdiction, the ICC marks a departure from the practice of establishing ad hoc tribunals as instruments to ensure accountability for war crimes and atrocities committed anywhere in the world. (See also Chapters 13 and 8 on the ICTY and the ICTR.)

## Creation of the International Criminal Court

The concept of a single international criminal court dates back to the aftermath of World War I. The eventual realization of this notion in the form of the ICC went through the following stages:

- Early attempts that proved abortive in the period 1919–1945
- The Nuremberg and Tokyo Tribunals established after World War II
- The creation of ad hoc tribunals for the former Yugoslavia and Rwanda in 1993–1994
- The drafting of the Statute of the ICC in 1994–1998 (Cassese 2003, 726)

### Drafting of the Statute of the International Criminal Court, 1994–1998

In 1989, the UN General Assembly, in a session on drugs, agreed to a proposal that an international criminal court be set up to deal

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with drug trafficking and asked the International Law Commission (ILC)[3] to look at the issue. The ILC submitted a report in 1990 and then a draft text of a Statute in 1993, which was further refined in 1994. The creation of the ICTY and the ICTR gave impetus to a possible ICC which, unlike the two tribunals, would exercise jurisdiction globally.

In 1996, the UN General Assembly established a Preparatory Committee on the Establishment of an International Criminal Court (PrepCom). At a diplomatic conference in Rome from June to July in 1998, the PrepCom submitted a Draft Statute and Draft Final Act for consideration leaving a number of issues still to be addressed (Cassese 2003, 730). The Rome conference also agreed on the formation of an additional Preparatory Commission that would arrange the operational details of the Court, develop rules on procedure and evidence, and specify the elements of crimes the Court could prosecute (Bosco 2014, 59). During subsequent discussions on the Statute and Final Act, three major groups of states were formed:

- First, the *Like-Minded Group* of sixty-three states was led by Canada and Australia. This global grouping wanted a strong court with automatic jurisdiction, an independent prosecutor with the power to initiate proceedings, and a broad definition of war crimes to include all crimes committed in the course of armed conflicts.
- A second group comprising the *permanent members of the UN Security Council* (except for the United Kingdom and France, which aligned themselves with the Like-Minded Group) all of whom were opposed to automatic jurisdiction and to the prosecutorial power to initiate proceedings, wanted no jurisdiction over the use of nuclear weapons, and were opposed to jurisdiction over the crime of aggression.
- A third group, comprising *members of the Non-Aligned Movement (NAM),* wanted the ICC to have jurisdiction over aggression, while some wanted jurisdiction over drug trafficking and terrorism. They opposed any role for the Court over war crimes committed in internal armed conflicts and wanted the Court to be able to impose the death penalty. They also opposed the Security Council having any role in the operation of the Court.

In addition to the 161 states attending the conference, there were also 235 accredited nongovernmental organizations (NGOs) under one organizational umbrella: the Coalition for the International Criminal Court (CICC). The CICC constantly lobbied delegates for the most independent ICC. Included in the Coalition were the American Bar Association, Amnesty International, Human Rights Watch, and the Lawyers Committee for Human Rights. The CICC was said to have monitored all the working committees and "helped to strengthen the resolve of the 'like-minded' countries to resist the pressure applied by the United States" (quoted in Ball 2009, 499).

As a result of discussions in committee, the various positions taken by the groups of states were reconciled, and the Conference adopted the ICC Statute by 120 votes to 7, with 20 abstentions (Cassese 2003, 730). The United States and China voted against adopting the Statute. The ICC Statute entered into force on July 1, 2002, and in February 2003 the first judges of the ICC were elected.

As of September 2014, the number of countries who have ratified the Statute stands at 122 (Russia and the United States[4] have not ratified but did sign, and China did not sign or ratify; Cassese 2003, 731). The ICC comprises eighteen judges who will approve prosecutions, conduct trials, and hear appeals; a prosecutor and one or more deputy prosecutors; and administrative staff under a Court Registrar. An Assembly of States Parties, with one vote for each delegation, elects the judges and prosecutors and may remove them for misconduct (Mayerfeld 2003, 98).

The first prosecutor, Argentine Luis Moreno Ocampo, was elected unopposed on April 21, 2003, and sworn in for a nine-year term. On June 15, 2012, Fatou Bensouda, from the Gambia, took office as the Prosecutor for a term of nine years. The nine-year, nonrenewable term means that the Prosecutor need not be preoccupied with questions about being reelected (Bosco 2014, 54).

The ICC comprises an Appeals Chamber, Trial Chamber, and a Pre-Trial Chamber (Greenawalt 2007, 586). In the short time in which the ICC has been in operation, staff has grown to more than one thousand employees spread across its constituent organs. In 2011, its budget exceeded 100 million Euros and it has established six African field offices[5] and a liaison office in New York to handle contacts with the United Nations (Shany 2014, 247).

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## Statute of the International Criminal Court

The Statute contains the powers and functions of the Court and its associated organs.

### Jurisdiction of the International Criminal Court

The Preamble to the ICC Statute (para. 4) states that the ICC is to have jurisdiction only over "the most serious crimes of concern to the international community as a whole" and that such crimes "must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation."

Typically, international crimes go unpunished in states' national justice systems because they are tolerated by the state or by an armed force in charge of events in a state. For that reason, the tenor of the ICC Statute is to eliminate impunity (Mayerfeld 2003, 98). According to Article 5, these "serious crimes of concern" are the following:

- *Genocide.* This crime is defined by the Genocide Convention, 1948[6] and requires an intention to destroy, wholly or partly, a national, ethnic, racial, or religious group by committing acts such as killing or causing serious bodily or mental harm to group members; inflicting conditions on the group calculated to bring about its physical destruction, wholly or partly; imposing measures to prevent births in the group; or forcibly transferring children of the group to another group.
- *Crimes against humanity.* These are defined under general international law and require a number of elements: they constitute a serious attack on human dignity or a grave humiliation or degradation, they are part of a government policy or a systematic or widespread strategy or policy of committing atrocities, they can be committed in time of war or peace, and the victims may be civilians or persons who did not participate in armed conflicts (Cassese 2003, 741).
- *War crimes.* These are serious violations of customary international law or of treaties concerning international humanitarian law. The armed conflict may be international or internal, and the crimes can be perpetrated by armed forces against other armed forces or against civilians, or by civilians against armed forces. If criminal conduct is to amount to a war crime, it must be linked to an international or internal armed conflict (Cassese 2003, 739–40).
- *The crime of aggression.* At the time of finalization of the Statute, this had yet to be defined. It is the most "political" of the enumerated crimes because it asks questions about why a conflict was waged and not about how it was conducted (Bosco 2014, 54). In May 2010, a conference was held in Kampala to review the work of the ICC to that date. At the Kampala Review Conference, agreement was reached on the meaning of this term and a regimen that will determine how jurisdiction will be exercised on claims of aggression. It will become an operative part of the ICC jurisdiction in 2017. Scholars argue that aggression is recognized in customary international law as the planning, organization, preparation, or participation in the first use of armed force by a state against another state where the acts of aggression have large-scale and serious consequences (Cassese 2003, 747). An example would be the Iraq attack on Kuwait in 1990. The Review Conference agreed that the individual crime of aggression is constituted by the planning, preparation, initiation, or execution by a person in a leadership position of an act of aggression. Importantly, the act of aggression must constitute a manifest violation of the Charter of the United Nations. An *act of aggression* is defined as the use of armed force by one state against another state without the justification of self-defense or authorization by the UN Security Council. When the Security Council refers a situation alleging aggression to the Prosecutor, the Prosecutor may investigate. In all other cases, the Prosecutor has the discretion to investigate but only in situations when a state makes a referral after first ascertaining whether the Security Council has made a determination of the existence of an act of aggression (under Article 39 of the UN Charter) and after waiting for a period of six months; and when that situation concerns an act of aggression committed between States Parties; and after the Pre-Trial Division of the Court has authorized the commencement of the investigation (Coalition for the International Criminal Court, n.d.).

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Attempts to include terrorism and drug trafficking in the Court's jurisdiction failed because these crimes lacked a clear international definition (Bosco 2014, 52). Nevertheless, over time, the extent of ICC jurisdiction can be expanded with the consent of the parties. It has been suggested that while not normally regarded as "core crimes," that is, outside the category that comprises the most heinous crimes of genocide, namely, war crimes and crimes against humanity, the crimes of torture and terrorism should be entrusted to an international judicial body (Cassese 2003, 745).

## Preconditions for Exercise of Jurisdiction

### *When can the ICC act on a criminal case?*

Article 12 states that the ICC can only act where (a) an alleged crime has been committed in the territory of a state party or (b) a person accused of a crime is a national of a state party. Article 12 also allows non-state parties to give jurisdiction to the Court in relation to a crime committed within its territory, basically on an ad hoc basis.

The Court's territorial and personal jurisdiction arises because states ratifying the Statute delegate jurisdiction to the Court over their nationals and over the crimes committed within their territory. This means that states that ratify the Statute agree they will prosecute any of their citizens who commit war crimes or will surrender those citizens to the ICC if they fail to prosecute. The fact that jurisdiction is derived from state party consent ought to facilitate state cooperation in the operations of the Court; however, experience has shown this is not always the case (Dutton 2013, 1; Shany 2014, 238).

Reading together Article 12(a) and 12(b) means that when an accused is a national of a state which is not a party to the ICC Statute, the ICC can exercise jurisdiction if the act took place on the territory of a state party. For example, an American national can be brought before the Court if he or she is accused of committing a crime in Australia (the United States is not a state party, but Australia is a party).

However, this provision also means that under the "traveling dictator exception," leaders of non-ratifying states can commit crimes in their own territories with no fear of prosecution. Consequently, Jack Goldsmith (2003, 91) argues that impunity for international crimes is granted for those human rights violators who abuse their own citizens within their own borders; this is perhaps the largest category of violators over the past century. The only exception to this would be a referral by the Security Council where sovereignty can be overridden even when a non-ratifying state is involved (p. 92).

## Principle of Complementarity

A key feature of the ICC jurisdiction is that it is intended to complement national criminal law jurisdictions: it is not intended to supplant national jurisdiction over international crimes. In fact, domestic courts have priority over the ICC. Accordingly, under Article 17, when a case is being investigated or prosecuted (or has been investigated) by national authorities, unless the state is "unable or unwilling" to carry out the investigation of the case, the case must be declared inadmissible before the ICC and the ICC cannot deal with it. This principle reflects that of state sovereignty (Cassese 2003, 732). Consequently, the principal responsibility for enforcement of international humanitarian law rests with national governments with the ICC exercising its jurisdiction only when states fail to act (Mayerfeld 2003, 98). In deciding "unwillingness" in a particular "case," the Court must consider three matters:

- Were or are the proceedings being taken to shield a person from criminal responsibility for crimes over which the Court has jurisdiction?
- Has there been an unjustified delay in the proceedings inconsistent with intent to bring the person to justice?
- Were or are the proceedings being conducted impartially or independently, and are they or were they being conducted in a way that is inconsistent with intent to bring the person to justice?

The ICC is the judge of the adequacy and legitimacy of the domestic proceedings, not the concerned state. When the Court determines, for example, that the proceedings are a sham, it can declare a case to be admissible and proceed with prosecution. The Court would be expected, therefore, to give close scrutiny to a state's domestic

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laws and proceedings before declaring a case inadmissible under this principle. Inability considerations would include "whether, due to a total or substantial collapse or unavailability of the national judicial system, the state is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings" (ICC Article 17[2][d]).

Here, critics of the Court argue that there is potential for political bias by the Court (Funk 2010, 56–57) in that this judgment could be made on political rather than legal grounds. As explained by Tom Ginsburg (2008, 501), a state is able to avoid having its nationals prosecuted by the ICC by bringing a credible investigation or prosecution. It follows that the only states liable to have their nationals prosecuted are

- those who desire an ICC prosecution and wish the costs to be met by the international community through the ICC, or
- those that lack the capacity to conduct a credible investigation or prosecution.

## Trigger Mechanisms

### *How does the ICC become involved in a situation; in other words, what triggers ICC involvement?*

Referrals to, and investigations conducted by, the Prosecutor are termed *situations*, referring to conflict situations rather than to specific cases.[7] Here, there was a fundamental dispute between the United States and other states about the role of the UN Security Council. The United States wanted the Security Council, and only the Security Council, to be the trigger that referred situations to the ICC, but other states disagreed because they believed the Court should not be subject to political control by the Security Council or by states if it was to be a credible institution (Cassese 2003, 733).

The trigger mechanism in Article 13 provides that a situation can come before the ICC in three ways, where

- a situation has been referred to the Prosecutor by a state party, in which case it must be investigated if the Prosecutor believes there is a reasonable basis to proceed;
- a situation has been referred by the Security Council under Chapter VII of the UN Charter; in this case any person anywhere is subject to potential prosecution and the case must be investigated if the Prosecutor believes there is a reasonable basis to proceed; or
- the Prosecutor initiates an investigation on his own authority *(proprio motu)* and examines information received and, where she considers there is a reasonable basis to initiate an investigation, requests authorization from the Pre-Trial Chamber. Where authorization is given, the Prosecutor conducts an investigation.

In each case, the Prosecutor commences with an informal investigation, called a "preliminary investigation," to collect evidence, examine witnesses, and determine if crimes within the jurisdiction of the Court have occurred. The power of the Prosecutor to initiate an investigation proved highly contentious in the negotiations over the ICC Statute, and a number of safeguards have been included in the Statute to guard against an overzealous exercise of this power by a Prosecutor. The safeguards provide the following:

- The Prosecutor must examine "information" on alleged crimes and must ask for the authorization of the Pre-Trial Chamber of the ICC if there is to be a more thorough, formal "investigation" (ICC Article 15).
- The Security Council under Article 16 has the power to pass a resolution under Chapter VII to block the commencement or continuance of investigations for periods of up to twelve months at a time (ICC Article 16).
- The Prosecutor's decision to proceed with an investigation or prosecution is subject to judicial review by the Pre-Trial Chamber.
- When the Prosecutor wishes to obtain an arrest warrant or a summons, she must apply for it to the Pre-Trial Chamber.
- When a suspect is arrested or voluntarily appears, the Pre-Trial Chamber must hold a hearing to confirm the charges.

The role of the Prosecutor is discussed in the section "The Prosecutor and the Office of the Prosecutor," later in this chapter.

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### Punishment

The Court is empowered to impose a sentence of imprisonment "for a specified number of years, which may not exceed a maximum of 30 years" (ICC Article 77[1][a]) and a term of life imprisonment where this is justified by the extreme gravity of the crime and the individual circumstances of the person convicted (ICC Article 77[1][b]).

The Court can grant/order release after part of a sentence has been served, but this should not be seen as a form of conditional release or parole because, once granted, the decision cannot be reversed. Reductions in sentence can be given if a person has been convicted of more than one crime or a set of specified criteria are satisfied, namely, willingness to cooperate with the Court on a range of matters, including in the enforcement of judgments and orders, in investigations and prosecutions, and in locating assets that could form part of reparations; and where other factors are present that establish a change of circumstances justifying a reduction in sentence.

Fines may also be imposed in addition to imprisonment, and the Court can order the forfeiture of assets derived directly or indirectly from crime (Schabas 2011, 336–37).

## U.S. Opposition to the International Criminal Court

In the past, there was some support in the United States for an international court that could deal with transnational crimes such as violence against diplomats and hijacking,[8] and in 1988 the U.S. House of Representatives passed a resolution that the United States "should pursue the establishment of an International Criminal Court to assist the international community in dealing more effectively with those acts of terrorism, drug trafficking, genocide and torture" (quoted in Feinstein and Lindberg 2009, 30). Again in 1990, Congress recommended that the President explore the creation of an international criminal court to combat transnational crimes (p. 31).

While the Clinton administration opposed the Statute, it nevertheless signed it on the last possible day, but at the same time Clinton advised President Bush not to send it to the U.S. Senate for ratification, arguing that there were "significant flaws in the treaty" (quoted in Feinstein and Lindberg 2009, 39). This, despite the fact that the Clinton administration originally supported the creation of the ICC, actively participated in the drafting process, "expressed satisfaction with most elements of the resulting Statute," and was a strong supporter of the ICTY and the ICTR (Mayerfeld 2003, 95; Orentlicher 2004, 416).

The concern expressed by President Clinton at the time of signing was that the Court would "not only exercise authority over personnel of states that have ratified the treaty, but also claim jurisdiction over personnel of states that have not" (quoted in Feinstein and Lindberg 2009, 39).

When the George W. Bush administration took office in 2001, it, and the U.S. Congress, took a number of deliberate steps to try and limit the effectiveness of the ICC and to exempt the United States as far as possible from the ambit of the Court's powers (Bosco 2014, 71). Despite having signed the Statute early in 2002, the United States advised the United Nations that "the United States does not intend to become a party to the treaty" and that "accordingly, the United States has no legal obligations arising from its signature on December 31, 2000" (quoted in Goldsmith 2003, 97).

Since this act of repudiation, the United States has continued its opposition to the ICC and has taken steps to mitigate its possible impact on the United States. Significantly, this action has been taken despite U.S. support for the cause of human rights. Generally, U.S. opposition to the ICC "is widely seen as a manifestation of America's deeper . . . antipathy toward multilateral institutions" (Orentlicher 2004, 415).

It is now helpful to consider the principal objections raised by the United States to the ICC, many of which continue to hold sway within the U.S. government and Congress. These objections center on the independence of the ICC from the Security Council, the perceived lack of accountability of the Court, the perceived independence of the Prosecutor, the potential for the Court to bring U.S. citizens before it, and its potential to conduct political, anti-American cases against the United States.

### Prosecutions

The United States argued generally and fundamentally that ICC prosecutions should be

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limited to cases referred to it by the Security Council and therefore the Prosecutor should have no independent power to commence a prosecution. Other states considered that having the Security Council as the gatekeeper of the ICC would undermine the very concept of the ICC and that the veto-holding permanent members of the Security Council would effectively render the permanent five members (United States, Russia, China, France, and the United Kingdom) immune from prosecution (Goldsmith 2003, 90).

The United States continues to maintain its opposition to the independent power of the Prosecutor despite the safeguards against the arbitrary or capricious exercise of the power. These safeguards are that

- investigations by the Prosecutor must first be approved by the Pre-Trial Chamber of three judges,
- the Prosecutor can be removed for misconduct by a simple majority of state parties,
- there are generous procedural protections for defendants, and
- the complementarity principle "virtually assures that the ICC will not hear cases against major international military actors such as the U.S." (Ginsburg 2008, 500)

## Accountability

The United States continues to assert that the ICC lacks accountability and, in particular, is not placed under the supervision of national governments. The key objection continues to be the capacity to act without the approval of the Security Council and therefore evade the veto that the United States has the right to exercise as one of the five permanent members (Mayerfeld 2003, 105).

The United States claims that its objections are not peculiar to the United States but are instead matters of universal concern. While continuing to advocate the primacy of human rights, the United States believes that the ICC is not an appropriate means of enforcing those rights. Instead, the United States has asserted that human rights are best protected by promoting democracy at the national level and not through creating international enforcement instruments (Mayerfeld 2003, 106, 118).

It is argued that, given its position favoring the Security Council on the instigation of prosecutions, the United States is in effect declaring that the Security Council is a better instrument for enforcement of rights than the ICC. The problems with this position include the fact that there are checks and balances affecting the ICC that the Security Council is not subject to, and that the ICC is accountable to member states that have the right to remove judges and the Prosecutor. The same cannot be said of the five permanent members of the Security Council (Mayerfeld 2003, 125).

## UN Security Council and the International Criminal Court

One scholar believes that U.S. policy in relation to the ICC is fundamentally grounded in the relationship between the ICC and the Security Council. While other technical reasons are advanced for its opposition to the Court, the independence that the ICC enjoys from the Security Council is seen as the key basis for U.S. "hostility" to the ICC; its other objections merely flow from the fact that under the Statute, the Security Council does not control the Court (Schabas 2004, 701). In concurring with this argument in terms of U.S. control of an international entity, Allison Danner (2003, 516) argues, "Some states, such as the United States, refuse to trust an entity whose jurisdiction they cannot directly control."

The original International Law Commission draft of the ICC Statute was acceptable to the United States because it provided for an international criminal court that was subordinate to the Security Council and fundamentally constituted a permanent version of the ICTY established by the Council a year before. In particular, as the head of the U.S. delegation to the negotiations stated,

> Though not identical to U.S. positions, the ILC draft recognized that the Security Council should determine whether cases that pertain to its function under Chapter VII of the UN Charter should be considered by the ICC, that the Security Council must act before any alleged crime of aggression could be prosecuted against an individual, and that the prosecutor should act only in

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> cases referred either by a State party to the treaty or by the Council. (Quoted in Schabas 2004, 712–13)

As William Schabas (2004, 713–14) notes, this U.S. focus on the role of the Security Council vis-à-vis the ICC appears in other subsequent major policy declarations including, the following statement: "Unlike other war crimes tribunals, such as for Rwanda and the former Yugoslavia, the ICC does not operate under the functional supervision of the UN Security Council, and is thus further removed from the will of sovereign states."

There is no doubt that the nexus between the ICC and the Security Council was a major issue in the negotiation of the Statute. The Like-Minded Group was determined that the ICC would possess judicial independence and be free from political control, including especially that of the Security Council. It is argued then, that all other U.S. objections to the ICC flow from this issue, and as Schabas (2004, 716) summarizes the issue, "If a permanent member of the Security Council can effectively block prosecutions, then the United States is in control.… It can only do it with difficulty, and without legal certainty, under the Statute as it now stands."

### U.S. Nationals

The notion that U.S. military and other personnel might be deployed in states which are parties to the ICC Statute and therefore could, in theory, be targeted for war crimes trials before the Court caused the U.S. military to mount a substantial lobby against the ICC. The lobby included briefings to more than one hundred foreign military attachés in Washington about the "potential menace" posed to their troops by the Court, dissemination of a statement that the United States wanted to avoid "the wrong kind of Court" and warning other states about the threat posed by "independent prosecutors with unbridled discretion," and the dispatching of a team of senior Pentagon officers to European capitals to convey the U.S. arguments against the Court (Ball 2009, 495). These concerns were subsequently reflected in the American Servicemembers' Protection Act (ASPA) discussed in the following section.

## Countering the International Criminal Court: U.S. Responses

The United States early on adopted a number of measures to counter the possible actions of the ICC in the belief that it might become "a runaway court" and because of its potential to exercise jurisdiction over nationals of non-state parties (Orentlicher 2004, 418). These measures are discussed in this section.

### American Servicemembers' Protection Act (ASPA)

In August 2002, a month after the Statute of the ICC came into effect, the U.S. Congress showed its rejection of the ICC in the enactment of this law. It authorizes the President to use all means necessary and appropriate to bring about the release from captivity U.S. or Allied personnel detained or imprisoned on behalf of the ICC and prohibits any cooperation with, or financial support to, the ICC. It further prohibits military aid to nations supporting the ICC (except for NATO states and other allies) and requires the President to certify that U.S. forces that participate in peacekeeping will not be subject to ICC prosecutions. It also prohibits U.S. participation in peacekeeping forces to states that are parties to the ICC Statute (Mayerfeld 2003, 95). The President has a waiver power in the national interest of the United States.

By the mid-2000s, the Bush administration's position on the cessation of military aid had begun to soften as U.S. officials began to believe it was adversely affecting U.S. national security because aid to states seeking to combat terrorism was being denied to them. In addition, by October 2006, ASPA had been amended to remove restrictions on providing military training to all nations. By January 2008, all prohibitions on forms of military assistance had been repealed (Dutton 2013, 56).

### Nethercutt Amendment

In December 2004, Congress adopted the Nethercutt Amendment as part of the U.S. Foreign Appropriations Bill. This legislation is far more

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wide-reaching than ASPA and authorizes the loss of Economic Support Funds (ESF) to all countries, including many key U.S. allies that have ratified the ICC treaty but have not signed a bilateral immunity agreement with the United States (ICCnow.org). The President has the authority to waive the provisions of the Amendment, and in March 2009 the Amendment was not included in the annual Omnibus Appropriation Act. On November 28, 2006, President Bush waived funding restrictions under the Nethercutt Amendment for fourteen countries whose ESF aid had previously been cut (ICCnow.org). However, three countries—Ireland, Brazil, and Venezuela—still have a total of approximately $15 million in ESF aid threatened (ICCnow.org).

### Article 98 Immunity Bilateral Agreements

Formulated as part of its campaign against the ICC, these Immunity Bilateral Agreements commit states that enter into them with the United States to send a U.S. national requested by the ICC back to the United States instead of surrendering him or her to the ICC. No European Union states[9] have signed these agreements, and Canada and Australia have also refused to sign.[10] The United States approached almost all countries to enter into the agreement regardless of whether it had ratified the ICC Statute (Kelley 2007, 575).

### Peacekeeping

The United States maintains that the power of states and of the Prosecutor to refer a case to the ICC renders members of the U.S. Armed Forces participating in peacemaking operations worldwide open to prosecution by the ICC and that such prosecutions could be motivated by political hostility to the United States (Cassese 2003, 733). As the only superpower and provider of the bulk of finance and military forces for peacekeeping operations, the United States considers it essential that its personnel be protected from politically inspired legal action in the ICC (Ball 2009, 501).

In mid-2000 the United States succeeded in having the Security Council give UN peacekeepers whose governments had not ratified the ICC Statute immunity from ICC investigation for twelve months with yearly renewals of this immunity permitted "for as long as may be necessary" (Goldsmith 2003, 97). The United States had threatened to veto all future peacekeeping operations if permanent immunity was not granted. However, pushback from other states resulted in the United States accepting one-year periods of immunity with the possibility of renewals (Mayerfeld 2003, 95). On June 23, 2004, the United States formally withdrew its request to the Security Council to renew the resolution that granted this immunity, and the resolution expired on June 30, 2004. It seems therefore that this element of policy toward the ICC is no longer to be employed (Stahn 2005, 699).

## Changes in U.S. Attitude Toward the International Criminal Court

Generally, the U.S. attitude toward the ICC softened with the change in the U.S. administration in the 2008 election. "In effect the great tide of Bush's anti-ICC legislation had receded by the time President Obama took office" (Feinstein and Lindberg 2009, 53). Nevertheless, the United States has not been convinced that it should delegate its sovereignty to the Court, and it remains wary of the power of the Court to punish noncompliance (Dutton 2013, 56).

A major influence on the U.S. attitude was the humanitarian crisis and conflict in Darfur, Sudan, where the United States stated that genocide had taken place (Bosco 2014, 113). In March 2005, the United States did not veto but abstained on a resolution before the Security Council to refer the Darfur situation to the ICC, thereby giving tacit approval to the ICC having jurisdiction (Feinstein and Lindberg 2009, 53–54). The United States has also enacted laws—the Genocide Accountability Act and the Child Soldiers Protection and Accountability Act—that give the United States a clear basis to prosecute war crimes, indicating that the United States has enhanced its legal regime to prosecute U.S. nationals who commit such crimes. This action avoids any potential ICC claim to jurisdiction and gives concrete effect to the complementarity principle (p. 57). Similarly, the United States agreed with the UN Security Council to refer the situation in Libya to the ICC

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for investigation. However, in the cases of both Darfur and Libya, the United States insisted that a special provision be inserted in the resolution exempting from ICC jurisdiction any alleged crimes committed by non-parties to the Statute arising out of the operations authorized by the Council (Dutton 2013, 57).

Other action taken by the United States suggests that in recent times, the relationship between the United States and the ICC has become much less hostile and much more cooperative (Dutton 2013, 55). For example, in 2010, the United States issued a public statement disapproving Kenya's decision to invite Omar Al-Bashir, the President of Sudan, to attend a celebration of its new constitution (see Box 9.1 on Sudan). It also supported an investigation by the Prosecutor into postelection violence in Kenya and urged leaders there to cooperate with the ICC (p. 58). Nevertheless, the negotiation of exemption provisions for non-parties and its unease about ICC jurisdiction over the crime of aggression signify that the United States "remains uncomfortable with an independent court and prosecutor with broad jurisdictional reach" (p. 59).

## The International Criminal Court in Action

To date, all international criminal tribunals have conducted lengthy procedures and faced complaints about the slow pace of justice. The ICC has proved to be the slowest since the Nuremberg trials. Comparing the ICC with the ICTY reveals that the first ICTY trial began slightly more than one year after the first appearance of the accused. At the ICTR the period was seven months, and at the Special Court for Sierra Leone the period was fifteen months.

### Inquiries, Arrests, Prosecutions, and Trials Since Inception

According to the Prosecutor, as of September 2014, the OTP was investigating nine "situations": Uganda, Democratic Republic of Congo (DRC), Sudan, two situations in Central African Republic (CAR), Kenya, Libya, Côte d'Ivoire, and Mali. Of these, Uganda, DRC, CAR, and Mali were referred by the states themselves; Sudan (Darfur) and Libya were referred by the Security Council; and Kenya and Cote d'Ivoire were begun by the Prosecutor (ICC, Situations and Cases). On September 24, 2014, the Prosecutor announced that she was intending to inquire into atrocities in the CAR arising during months of fighting that left about five thousand people dead. The OTP is also conducting preliminary examinations into alleged crimes committed in Honduras, Afghanistan, Korea, CAR, Comoros, Ukraine, and Iraq and is assessing if "genuine national proceedings" were being carried out in Georgia, Colombia, and Nigeria (ICC Situations and Cases).

We consider two countries where the Prosecutor has brought cases before the ICC, namely, Sudan and the Democratic Republic of the Congo (DRC). In relation to Sudan, the decision to issue an arrest warrant for the President of that country was controversial. The prosecution record in relation to the DRC is mixed. The pace of proceedings has been described as "glacial" and a source of disappointment and anxiety to civil society and victims there (Glasius 2009, 512).

### BOX 9.1 Sudan and the International Criminal Court

The Darfur conflict began in 2003 when local groups accused Khartoum of neglecting the region and favoring some ethnic groups over others. There were disputes over land and access to natural resources, and the situation became violent. Rebel groups attacked police and military units (Feinstein and Lindberg 2009, 70). Responding to the events in Darfur, the government bombed villages and supported Janjaweed militias comprising members of Arabic-speaking tribes providing them with arms and weapons. The resulting violence killed more than 200,000 civilians and displaced 1.6 million persons. Hundreds of thousands fled across the border into Chad seeking refuge (p. 70). In May 2004, Human Rights Watch accused the government of massive ethnic cleansing, and the UN Security Council declared that those responsible must be held accountable.

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In July 2004, the U.S. Congress passed a resolution declaring the crisis to be genocide and on December 9, 2004, the U.S. Secretary of State testified before the U.S. Senate Committee on Foreign Relations that genocide was occurring in the western region of Darfur (Schiff 2008, 175). President Bush called for a full UN investigation, and the following month the UN Security Council authorized a commission of experts to examine reports of atrocities and identify those responsible (Bosco 2014, 105). While the commission did not find genocide because of lack of appropriate evidence, it did find that grave crimes had been committed (Schiff 2008, 175).

The issue of arrest warrants against Omar al-Bashir, the President of Sudan, by the ICC focused attention on the conflict and, it is argued, led to a period of intense diplomacy seeking a peaceful settlement (Feinstein and Lindberg 2009, 74).

On March 31, 2005, the UN Security Council, by Resolution 1593, acting under Chapter VII of the UN Charter, after considering a report from the International Commission of Inquiry on Darfur, Sudan, agreed (with the United States and three other states abstaining) to refer the situation in the Darfur region of Sudan to the ICC. This was the first time the UN Security Council had referred a situation to the ICC. While the Sudan is not a state party to the ICC Statute, the Security Council is nevertheless given power by the ICC Statute to take such action.

In June 2005, the ICC Prosecutor officially announced his office would open an investigation into the situation in Darfur, Sudan.

In April 2007, the ICC issued a warrant of arrest for Ahmad Haroun, formerly Minister of the Interior and Minister of State for Humanitarian Affairs of Sudan. He was charged with twenty counts of crimes against humanity (murder, persecution, forcible transfer of population, rape, inhumane acts, imprisonment or severe deprivation of liberty, and torture) and twenty-two counts of war crimes (murder, attacks against the civilian population, destruction of property, rape, pillaging, and outrage upon personal dignity). On one occasion Haroun flew by helicopter to Darfur and urged the Janjaweed militia to treat Darfur villagers as "booty." Following his visit, several villages were set on fire and many civilians were found dead (Bosco 2014, 128). He remains at large.

Also in April 2007, an arrest warrant was issued for Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb"), alleged to be the leader of the Militia/Janjaweed. He was charged with twenty-two counts of crimes against humanity (murder, deportation or forcible transfer of population, imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, torture, persecution, and inhumane acts of inflicting serious bodily injury and suffering) and twenty-eight counts of war crimes (violence to life and person, outrage upon personal dignity [in particular humiliating and degrading treatment], intentionally directing an attack against a civilian population, pillaging, rape, and destroying or seizing property). Information against him included evidence that he had personally inspected a group of naked women before they were raped by men wearing military uniforms (Bosco 2014, 128).

In responding to the charges against these two men, President Bashir promoted them within the government and began a campaign to discredit the Court, claiming it was anti-Sudan and anti-African (Feinstein and Lindberg 2009, 55). The government declared it would not surrender the two accused or any other Sudanese to the ICC and that the charges were politically motivated.

In July 2008, the ICC Prosecutor asked the ICC to issue an arrest warrant for the Head of State of Sudan, Omar al-Bashir, on charges of war crimes, crimes against humanity, and genocide. Bashir had been President since 1993. The proposed prosecution related to events occurring in the Darfur region of Sudan. It was feared that launching a prosecution in the ICC against the President of Sudan would adversely affect peace arrangements then being negotiated, and NGOs active in the region expressed concern this would make their task much more problematic (Ralph 2011, 76). In addition, every permanent member of the UN Security Council communicated concern about this action (Bosco 2014, 144).

In March 2009, the Chamber agreed to the issue of an arrest warrant on an indictment that, while dropping the allegation of genocide, included five counts of crimes against humanity and two counts of war crimes. A second arrest warrant was issued in July 2010. The charges

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(Continued)

assert that mobilizing the state apparatus is evidence of a plan by the President to destroy ethnic groups. The Prosecutor estimates that thirty-five thousand persons have been killed through use of the government apparatus and another one hundred thousand have died from starvation in displacement camps in the desert. Rape is alleged to have been integral to the plan (Ginsburg 2008, 503).

In reaction to the charges, the Sudan government expelled more than a dozen aid agencies working in Darfur. Diplomats agreed that they should avoid meeting with the President when he was under indictment. In July 2009, the African Union declared that its member states were not obliged to honor the arrest warrants and warned of the impact of the indictment on the peace process in Sudan (Bosco 2014, 155, 157). Al-Bashir remains at large despite having traveled outside the Sudan to numerous countries, a number of which, including Chad and Kenya, as state parties, were required to cooperate with the Court and arrest him. Some states refused to accept him (Egypt), warned that he would be arrested if he visited (Denmark), or discouraged him visiting (Turkey; Bosco 2014, 157).

The United States suggested the Prosecutor should proceed and made it clear it would veto any Security Council resolution deferring the prosecution under Article 16 (Ralph 2011, 77). The Prosecutor was also criticized for not seeking a sealed warrant that would be made public only when Bashir traveled outside the Sudan. Pressure was exerted on European governments to have the UN Security Council postpone the investigation under Article 16 of the Statute in order to give Bashir an opportunity to pursue peace. The British were heavily criticized in the media for supporting what was described as a “shocking moral abdication” (Bosco 2014, 146). France came out against this proposal, but President Bashir lobbied hard for it and persuaded the African Union and the Arab League to support him. China indicated it might support postponement. The United States did not support a deferral, arguing that it would send the wrong signal to the President and undermine efforts to ensure accountability. The UN Security Council, with the United States abstaining, voted to extend the mandate of the African Union–UN Mission in Darfur and rejected the postponement option (Bosco 2014, 146; Feinstein and Lindberg 2009, 57).

On March 1, 2012, an arrest warrant was issued for Abdel Raheem Muhammad Hussein, Minister for National Defence, former Minister of Interior, and former Special Representative of the Sudanese President in Darfur. He was charged with seven counts of crimes against humanity (persecution, murder, forcible transfer, rape, inhumane acts, imprisonment or severe deprivation of liberty, and torture) and with six counts of war crimes (murder, attacks against a civilian population, destruction of property, rape, pillaging, and outrage upon personal dignity). He remains at large.

## BOX 9.2 Democratic Republic of Congo (DRC) and the International Criminal Court (ICC)

The conflict in the DRC is long-standing involving ethnic tensions and fighting between militias. Between January 2002 and December 2003, the growth of violent militias was exacerbated by fighting between DRC militias and forces from Rwanda and Uganda. Tensions between ethnic groups resulted and more than eight thousand civilians were killed and half a million people displaced. Sexual violence and use of child soldiers characterized the conflict (Feinstein and Lindberg 2009, 65). Thomas Lubanga had been the leader of a militia group since 2001 in the Ituri region of the northeast of the country, one of the most violent regions. The Lubanga group (Union of Congolese Patriots) drew on the Hema ethnic group but also had links to Uganda and Rwanda

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militaries. Lubanga was involved in an attack on UN peacekeepers in February 2005 that killed nine Bangladesh military. He was arrested following a UN crackdown against the main militia groups. Lubanga had been a target of the ICC Prosecutor since the start of his investigation into events in the DRC, and there was solid information on his use of child soldiers but inadequate evidence that showed him ordering violent crimes. The Prosecutor was concerned he might be released by the Congolese authorities (Bosco 2014, 124).

Human Rights Watch reported that soon after the ICC announced an investigation into events in the DRC government and insurgent leaders warned their followers against committing war crimes or attacking civilians (Feinstein and Lindberg 2009, 75).

- July 2003: One month after being sworn in as Prosecutor, the Prosecutor announced that he had selected the situation in Ituri Province in the DRC as "the most urgent situation to be followed" (Glasius 2009, 498). In April 2004 the DRC government, led by Joseph Kabila, after having been urged to do so by the Prosecutor, referred "crimes within the jurisdiction of the Court allegedly committed anywhere in the territory of the DRC" to the Prosecutor (Glasius 2009, 498; Schiff 2008, 212). Also, in 2004 the Prosecutor announced that he had been discussing cooperation with the DRC: "We would contribute by prosecuting the leaders who bear the greatest responsibility for crimes committed on or after July 1, 2002. National authorities, with the assistance of the international community, could implement appropriate mechanisms to address other responsible individuals" (quoted in Schabas 2008, 752).
- March 2005: Thomas Lubanga Dyilo, leader of the Ituri-based Union of Congolese Patriots (UCP) was arrested by the DRC authorities on charges of genocide and crimes against humanity. In March 2006, after having secured an ICC arrest warrant, the Prosecutor arranged with the DRC for Lubanga to be transferred from Kinshasa prison to The Hague. He was charged with the conscription and use of child soldiers and not with genocide or crimes against humanity. While it might be argued that Lubanga was facing more serious charges in the DRC than before the ICC, it must be pointed out that the DRC had no adequate justice system to deal with the charges and there were concerns that he might be released there (Schabas 2008, 744).
- January 2007: The Pre-Trial Chamber of the ICC confirmed the charges against Lubanga, and the trial was expected to begin in begin in March 2008.
- March 2008: The Lubanga trial was postponed to June.
- June 2008: The trial was stayed *sine die* by the Chamber when the Prosecutor refused to disclose potentially exculpatory documents to the defense because of a confidentiality agreement with his sources, the UN, and others. The Chamber ordered Lubanga's release on the basis that a fair trial was impossible, but the order was successfully overturned and he was kept in custody while the Prosecutor appealed.
- November 2008: The confidentiality claim was waived by the UN and all documents made available. That month the trial of Lubanga commenced.
- March 2012: Lubanga was convicted of enlisting and conscripting child soldiers and using them to participate actively in hostilities and sentenced to fourteen years imprisonment (the Prosecutor had asked for a thirty-year sentence). According to Human Rights Watch, this trial has raised awareness among the people of the DRC about the consequences of recruiting and using child soldiers (Feinstein and Lindberg 2009, 75).
- October 2007: Germain Katanga was transferred to The Hague from DRC and charged with murder, inhumane acts, sexual slavery, using child soldiers, intentionally attacking civilians and pillage primarily relating to an attack to a village in February 2003 (Glasius 2009, 499).

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(Continued)

In November 2009 the trial commenced. In March 2014 he was convicted of one count of crimes against humanity (murder) and four counts of war crimes (murder, attacking a civilian population, destruction of property, and pillaging) committed on February 24, 2003, during the attack on the village of Bogoro, in the Ituri district of the DRC. In May 2014 he was sentenced to twelve years imprisonment.

- February 2008: Mathieu Ngudjolo Chui was arrested on similar charges to Katanga. In December 2009 the trial began. In December 2012 Mathieu Ngudjolo Chui was acquitted and released. The Trial Chamber found the evidence against him to be "too contradictory and too hazy." The Prosecutor has appealed the verdict.
- April 2008: An arrest warrant was unsealed for Bosco Ntaganda. A former associate of Lubanga, he was charged with conscription and use of child soldiers. He voluntarily surrendered to the ICC in March 2013. In June 2014 the charges against him confirmed. He is currently in custody awaiting trial on thirteen counts of war crimes (murder and attempted murder; attacking civilians; rape; sexual slavery of civilians; pillaging; displacement of civilians; attacking protected objects; destroying the enemy's property; and rape, sexual slavery, enlistment, and conscription of child soldiers under the age of fifteen years and using them to participate actively in hostilities) and five counts of crimes against humanity (murder and attempted murder, rape, sexual slavery, persecution, forcible transfer of population).
- October 2010: Callixte Mbarushimana was arrested by French authorities and transferred to The Hague following the issue of ICC warrant of arrest. He was charged with five counts of crimes against humanity (murder, torture, rape, inhumane acts, and persecution) and eight counts of war crimes (attacks against the civilian population, murder, mutilation, torture, rape, inhumane treatment, destruction of property, and pillaging). In December 2011, the Pre-Trial Chamber declined to confirm the charges against him and he was released from custody.

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## The Prosecutor and the Office of the Prosecutor

The ICC Prosecutor exercises a complex, challenging, and vital function in the scheme of international criminal justice created by the Statute of the ICC. Despite his apparent independence of action,[11] there are significant checks and balances on the Prosecutor's powers. This compares to prosecutors at Nuremberg, who chose the accused and drafted and issued indictments without any substantive judicial oversight, except that amendments to the indictment required judicial approval (Schabas 2008, 732).

In the case of the ICTY, the UN Security Council gave the Prosecutor an independent role and freedom to select the cases to be prosecuted, but later the judges of the ICTY threatened to intervene in relation to selection in a strategy designed to complete the work of the ICTY. They were able to justify this by relying on the UN Security Council Resolution that calls on the tribunal to ensure that indictments concentrate on the most senior leaders suspected of crimes (Schabas 2008, p. 733).

### Discretion to Prosecute

The ICC Prosecutor has discretion in the sense that he is not obliged to initiate a prosecution once a situation has been referred to him: Article 53 permits him to decline to prosecute after a preliminary investigation. Generally, prosecutorial discretion in the case of international tribunals and courts recognizes the reality that there are potentially thousands of cases that could be prosecuted and that as a practical matter there needs to be a selection process so that the system is not overloaded. It is for this reason that prosecutors are commonly given the discretionary power to prosecute.

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In a 1997 statement to the ICC Preparatory Commission, Louise Arbour (now Justice Arbour of the Supreme Court of Canada), former ICTY Prosecutor, said that in the case of prosecutions before an international tribunal as opposed to domestic prosecutions, "the discretion to prosecute is considerably larger, and the criteria upon which such prosecutorial discretion is to be exercised are ill-defined and complex." In her view, the challenge for a Prosecutor is to "choose from many meritorious complaints the appropriate ones for international intervention, rather than to weed out weak or frivolous ones"[12] (quoted in Schabas 2008, 735). It is interesting to note, for example, that the IMT that followed World War II indicted only twenty-four persons out of the thousands who were candidates for prosecution, and only twenty-eight were indicted by the Tokyo Tribunal (Brubacher 2004, 75).

## Oversight of the Prosecutor

While Article 42 of the Rome Statute of the ICC declares that "the Office of the Prosecutor shall act independently as a separate organ of the Court," we have already alluded to the significant oversight exercised over the Prosecutor by both the ICC itself, and by the Security Council and the state parties. For example, the "trigger mechanisms" allow the Prosecutor to identify crimes that he proposes to investigate, but judicial authorization is first required, the Prosecutor is required to defer to national laws and jurisdictional claims, and the UN Security Council has the power under Article 16 to defer an investigation for twelve months, which can be renewed for the same period without limit.

However, the Prosecutor is tasked not simply to make decisions about complaints but to interact with states and sometimes with the UN Security Council to navigate the complex framework of safeguards and practical limitations imposed by the Statute. Consequently, it is necessary for the Prosecutor to "make decisions that are both compliant with the objective legal criteria but capable of being implemented in a manner that adapts to the prevailing political and social context" (Brubacher 2004, 74). In other words, the Prosecutor cannot function in a vacuum but must operate within a context that takes account of the need for the support of both states and the UN Security Council (Greenawalt 2007, 608).

## Prosecutorial Strategy, Regulations, Policy Papers

It is quite common for prosecutors in a national criminal justice system to issue guidelines or circulars about how the prosecution function is to be exercised, that is, how the prosecutor intends to exercise her considerable discretionary powers in a common law system and, to a lesser extent, in a civil law system. (The situation of domestic prosecutors is discussed more fully in Chapter 5.) Explaining how a discretion is to be exercised, and on what principles, assists in refuting claims that a Prosecutor is political in his or her decision making, in other words, lacking in impartiality. Accordingly, the Prosecutor should, as a matter of principle, treat like cases alike and apply a coherent and consistent set of criteria to each case and, as required by the Statute, investigate both incriminating and exonerating circumstances. For example, the draft Code of Conduct for the ICC Prosecutor, issued by the International Association of Prosecutors, states that prosecutors should "be, and appear to be, consistent, objective, impartial and independent" (Danner 2003, 537).

The Office of the ICC Prosecutor (OTP) has published a number of documents, including a *Prosecutorial Strategy* (ICC 2010) and a set of *Regulations of the Office of the Prosecutor* (OTP 2009) as well as explanatory policy papers (ICC Policy Papers) that collectively explain how the OTC will conduct its functions and exercise the prosecutorial discretion. In addition, *Reports on Preliminary Examination Activities* (OTP 2013a) are published for each year of operation. These publications will be referred to in the following discussion, as appropriate, in explaining how the OTC functions within the complex framework of the Statute.

## Admissibility and Jurisdiction

The Prosecutor must first consider whether "a situation meets the legal criteria established by the Statute to warrant investigation by the Court" (OTP 2013a, 3).

The first stage is for the OTP to *conduct a preliminary examination* of all situations that are submitted to the OTP. Here, the Prosecutor will make an initial assessment as to whether there exists a *prima facie* case; he must "evaluate the information" (Article 53)[13] and advise those who

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provided it of the outcome of his evaluation. This creates a formal channel of communication with referring states and NGOs (Brubacher 2004, 77–78). The OTP may seek additional information and even take testimony at the Court (OTP 2013a, 4). The framework of the preliminary examination is that in order to decide if there is a reasonable basis to proceed with an investigation into a situation, he must consider *jurisdiction, admissibility (issues of complementarity and gravity)*, and the *interests of justice*.

The Prosecutor must ask: Does the case come within the *jurisdiction* of the ICC? Was it committed in the territory of a state party or by a national of a state party? Is it a crime against humanity, a war crime, or the crime of genocide, and did the crime occur after July 1, 2002, when the Statute came into force? (If it occurred before that date, it is not admissible.)

On *admissibility*, the OTC must also give attention to the *complementarity principle.* As noted earlier, the OTC is required to defer to the national legal system concerned and must give notice to the state that would normally exercise jurisdiction so that state may challenge the validity of the case on the ground that it is not admissible.[14] It will therefore examine the existence of relevant national proceedings, bearing in mind the need to investigate and prosecute "those most responsible" for the most serious crime (OTP 2013b). It will also assess the "genuineness" of domestic investigations or prosecutions (OTP 2013a, 4). When the Prosecutor believes that a state is "unable or unwilling" to carry out the investigation of the case, she essentially has to prove that a state's criminal justice system lacks capacity or competence to act or that it is being controlled by the executive authority of the state. This will likely be an area of great contention (Danner 2003, 517).

It is intended that cases that lack *gravity* are dealt with by the national legal system and not the ICC (Brubacher 2004, 78). The Prosecutorial Strategy provides that "in appropriate cases the OTP will expand its general prosecutorial strategy to encompass mid- or high-level perpetrators, or even particularly notorious low-level perpetrators, with a view to building cases up to reach those most responsible for the most serious crimes" (OTP 2013a, 3, ftn. 4). According to the OTC Report for 2013, gravity "includes an assessment of the scale, nature, manner of commission of the crimes, and their impact, bearing in mind the potential cases that would likely arise from an investigation of the situation" (OTC 2013a, 4).

In considering the *interests of justice,* the OTC says that it must assess whether there are substantial reasons to believe that an investigation would not serve those interests (OTC 2013a, 4). This is a familiar expression in legal systems and also appears in international human rights instruments. In making this assessment the OTC is required to take account of all the circumstances, including "the gravity of the crime, the interests of victims, the age or infirmity of the alleged perpetrators, and his or her role in the alleged crime" (Article 53[2]). The OTP (2007) published a substantial policy paper titled *The Interests of Justice,* which sets out the understanding of the Prosecutor of the concept. The points noted include the following:

- There is a presumption in favor of investigation or prosecution and it would be exceptional to decline to investigate or prosecute in the interests of justice. A decision not to proceed on the basis of the interests of justice "should be understood as a course of last resort," and other options, including not opening an investigation or ceasing proceedings, may be available. (p. 1)
- In assessing the interests of victims, the Prosecutor will conduct a dialogue with victims and with representatives of local communities and will seek the views of others involved in the situation, including local leaders, other states, and local and international organizations. (p. 6)
- The objects and purpose of the Statute, namely, "the prevention of serious crimes of concern to the international community through ending impunity," will guide the OTP in its decision making concerning this issue. (p. 1)
- The Prosecutor is required to inform the Pre-Trial Chamber of a decision not to investigate or prosecute, and the Chamber may review that decision and confirm or reject it. (p. 1)

In one case, the Pre-Trial Chamber in its ruling on admissibility has said that the gravity test was aimed at ensuring that the Court only pursued cases against "the most senior leaders" in any situation under investigation. They were the persons who could "most effectively prevent or

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stop the commission of . . . crimes" (Schabas 2008, 746). In the view of the Chamber, the gravity test was provided to maximize the deterrent effect of the Court.

Matthew Brubacher (2004, 81) has suggested that the concept of the "interests of justice" also requires that the Prosecutor take account of the interests of the international community, "including the potential political ramifications of an investigation on the political environment of the state over which he is exercising jurisdiction." Here, considerations about an ongoing armed conflict or any post-conflict reconciliation processes, including a possible amnesty, will need to be taken into account. Will a prosecution impact an ongoing negotiating or reconciliation process and operate to destabilize a situation? Fundamentally, the issue may be "indicting people [when] you may be negotiating with them," as described by one British official involved in negotiations in the former Yugoslavia (quoted in Brubacher 2004, 82). Such a situation occurred in Sierra Leone when the Special Court indictment of Charles Taylor, the former President of Liberia, threatened to disrupt power-sharing arrangements in that country (p. 82).

The Prosecutor is likely to follow the determinations of the UN Security Council in such a situation, as happened in the case of the Democratic Republic of Congo when the Prosecutor's preliminary investigation followed a determination by the UN Security Council that the situation in one province was a threat to international peace and security under Chapter VII of the UN Charter (Brubacher 2004, 83).

## Time, Declining to Initiate Investigation

The OTP notes that the Statute stipulates no timelines or time limits for the conduct of preliminary examinations but that the OTP may decide to decline to initiate an investigation where the factors stated in Article 53 (1)(a)-(c) are manifestly not satisfied, or it may continue to collect information in order to make a determination, or it may initiate the investigation, subject to any judicial review.

After, or together with, the determination of jurisdiction and admissibility issues, the Prosecutor is to evaluate the *credibility and reasonableness of the evidence* received. She must decide if a sufficient evidential basis for pursuing a prosecution exists (Article 53). She must be able to satisfy the Pre-Trial Chamber of this to obtain a warrant or summons. When she decides there is no reasonable basis to proceed, she must inform those who provided the information, and if they are states, they may request a judicial review of that decision (Rule 107 ICC Rules). It appears that the first Prosecutor together with officials of the Court conducted a ranking exercise in relation to the gravest situations over which the Court could exercise jurisdiction. Major conflict zones were first identified using information from the United Nations and human rights groups. After applying the criteria of the number of violent deaths over the last several years, the Democratic Republic of Congo (DRC) emerged at the top of the rankings. Accordingly, at his first press conference in July 2003, the Prosecutor announced he would examine first the situation in eastern DRC (Bosco 2014, 90).

## Pre-Trial Chamber and Arrest Warrants

When an investigation is commenced after authorization by the Pre-Trial Chamber, arrest warrants may only be issued when authorized by the Chamber. When a suspect has been arrested, the Chamber will conduct a hearing to confirm the charges that are to be tried. When the Chamber finds there is insufficient evidence, it may decline to proceed with the charges (Danner 2003, 518).

## Investigations and Resources

In practical terms, the Prosecutor will need to be mindful of the costs associated with full investigations. The first ICC allocated only about 3.9 million euros to the OTP out of a total budget of about 30.8 million euros (Danner 2003, 520). The ICC is funded by contributions from state parties and by the United Nations. It may also receive voluntary contributions (p. 527).

## State Cooperation, Policing, and Enforcement Powers

In conducting investigations, the Prosecutor will be dependent on states, and much of the evidence needed to prosecute will be in the hands of state authorities. Article 86 requires that states cooperate with the Court. Only in limited circumstances can the Prosecutor conduct investigations on his own in a state without the consent of that

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state. In other cases, the Pre-Trial Chamber may authorize the OTP to investigate in the territory of a non-cooperating state, but there are stringent conditions attached to such authorization. The state may also deny assistance where the request concerns documents or evidence that relate to national security (Danner 2003, 528–29). Justice Arbour said, about her experience with the ICTR and ICTY, that "it is more likely that the Prosecutor . . . could be chronically enfeebled by inadequate enforcement powers combined with a persistent and widespread unwillingness of States Parties to co-operate" (quoted in Danner 2003, 530). This statement has proved to be true of the ICC Prosecutor.

In contrast to national court systems, there are no policing or enforcement functions located within the ICC and it cannot seize evidence, or make arrests or searches, or compel persons to testify without the cooperation of national governments.[15] As discussed earlier, the Prosecutor will need to give some attention to the issue of likely state cooperation when deciding to initiate an investigation. It may not be possible to count on voluntary state cooperation, and while the ICC may make a finding of noncompliance and refer the issue to the UN Security Council (where it made the initial reference) or to the Assembly of State parties, this may not prove to be very effective (Brubacher 2004, 92). "Naming and shaming" may be the only recourse. Recognizing that the importance of effective cooperation with states will be essential, the Prosecutor has created a Jurisdiction, Complementarity and Cooperation Division within the OTP (ICC 2004 Regulation 7).

Both the UN and the European Union have signed cooperation agreements with the Court. Belgium, France, and the Democratic Republic of Congo have arrested and transferred accused persons to the Court. The ICC has also entered into seven agreements with state parties covering witness protection and relocation, and Austria and the United Kingdom have signed agreements indicating their willingness to accept sentenced persons (Blattmann and Bowman 2008, 723).

### State Noncooperation

The issue of state noncooperation with the Court has been demonstrated in the prosecution of the President of Sudan, Omar Al-Bashir. Two arrest warrants issued by the Court in March 2009 and July 2010 remain unexecuted. In March 2013, the Pre-Trial Chamber issued a Decision on the Non-compliance of the Republic of Chad with the Cooperation Requests Issued by the Court Regarding the Arrest and Surrender of Omar Hassan Ahmad Al-Bashir (ICC 2013). On March 6, 2009, and July 21, 2010, the ICC Registry had issued a request and a supplementary request to all state parties to the Rome Statute for the arrest and surrender of Al-Bashir. The requests called for the cooperation from all state parties in the arrest and surrender of Omar Al-Bashir, according to the Statute of the ICC.[16]

In August 2010, President Al-Bashir visited Chad and this was reported to the UN Security Council by the Court. Chad, a state party since 2007, refused to comply with the cooperation request from the Court to arrest him. In February 2013 Al Bashir visited Chad again. The Court had previously sent a request for cooperation to Chad concerning his presence there, seeking to have him arrested. Chad again failed to make any arrest.

In its decision concerning the noncompliance of Chad, the Chamber said that Chad had continued to "welcome the visits of Omar Al-Bashir on its territory without any attempt to arrest him, despite several warnings on the part of the Court" (ICC 2013, 9). In acting in this way, the Court found that Chad "is engaging in a consistent pattern of deliberately disregarding not only the Court's decisions and orders related to its obligation to cooperate in the arrest and surrender of Omar Al-Bashir, but also the Security Council Resolution 1593" (p. 9). The Court noted that it had no police force and relied on states to cooperate. In accordance with the Statute, it therefore referred the noncompliance of Chad to the UN Security Council to take the necessary measures it deemed appropriate.

## The International Criminal Court and Transitional Justice

What will the ICC, and in particular the Prosecutor, do when confronted with a claim from a perpetrator of a crime within its jurisdiction to the protection of an amnesty granted to her or him under transitional justice arrangements? (Transitional justice amnesties are extensively described in Chapter 8: Transitional Justice.) This question is fraught with political and legal complexities. So far as the Statute of the ICC is concerned, its drafters

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grappled with the issue of whether an amnesty might constitute a bar to prosecution, but after a brief discussion, they abandoned the topic when it became clear there was no agreement about how to deal with them (Roche 2005, 567). Consequently, there is no explicit reference to amnesties or truth commissions or the like in the Statute, nor do any of the published policy papers of the OTP discuss amnesty.

While there is a general duty to prosecute under the Statute, amnesty could be allowed under what has been called a degree of "creative ambiguity" (Mayerfeld 2003, 103). This view is supported by the Article 17 test for admissibility of a "case," which allows the Prosecutor to decline to conduct an investigation where it is determined that "taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice" (Article 53). However, such a determination may be rejected by the Pre-Trial Chamber of the ICC. Carsten Stahn (2005, 698) argues that the concept of "interests of justice" need not be confined to considerations of criminal justice but could encompass alternative methods of providing justice such as truth commissions and the like. As stated earlier, the principle of complementarity requires the ICC to complement and not supplant national proceedings. Consequently, as noted, a "case" is inadmissible before the ICC unless the state "is unwilling or unable to genuinely carry out the investigation or prosecution" (Article 17[1]).

Based on this provision, those advocating amnesty could argue that it was not intended that the ICC intervene in a case dealt with by a truth commission because such commissions do not shield persons but promote truth and justice through truth telling, reconciliation, and victim reparation (Roche 2005, 568). If this argument fails to impress, the Prosecutor could be approached with the argument that an investigation "would not serve the interests of justice" (Article 53). Here, the Prosecutor would consider the gravity of the crime and victims interests, issues commonly given a high priority in designing the powers of truth commissions (Roche 2005, 568). It is also possible that the power of the UN Security Council to temporarily halt investigations or prosecutions might be deployed to facilitate the negotiation of a post-conflict peace agreement that included an amnesty (Scharf 1999, 514; Stahn 2005, 699).

In considering its response to an amnesty, the ICC may well examine the nature of the amnesty and its place in the context of any transition to democracy in a state, usually a post-conflict state. Relevant questions could include whether the amnesty is linked to a genuine democratic transition or whether it simply allows violators of human rights a pause before resuming violations. The ICC will be concerned that an amnesty does not become a form of impunity that extends to provide protection against future crimes (Mayerfeld 2003, 101). Other relevant questions would likely include whether an end to the conflict would have occurred without an amnesty, whether the state has agreed to establish a mechanism that will enable victims to be heard and discover the truth generally, whether the state has provided reparations or compensation to victims, whether the state has taken steps to prosecute those alleged to have committed violations of international humanitarian law, and whether forms of lustration have occurred (Scharf 1999, 516).

The ICC Prosecutor could elect to cooperate with a national government negotiating transitional arrangements that include an amnesty by delaying an investigation and then selecting persons for prosecution among those who did not gain an amnesty under the transitional arrangements. Roche (2005, 566) suggests that a cooperative approach of this nature would add to the legitimacy of both institutions. However, Andrei Greenawalt (2007, 594) argues that there is broad agreement internationally that transitional states that have suffered mass atrocities may fulfill their duty to prosecute by adopting a policy of targeted selective prosecutions which leave the vast majority of offenders unprosecuted. Stahn (2005, 719) proposes that amnesties should only be permitted in exceptional cases such as when they are conditional and linked to other forms of justice but that amnesties in respect of the very serious crimes within ICC jurisdiction should not be accepted.

As noted in Chapter 8, there is now a considerable weight of international opinion, both scholarly and from within international organizations, including the UN itself, that amnesties for crimes within jurisdiction of the ICC—namely, war crimes, crimes against humanity, and genocide—may not be the subject of any amnesty and that perpetrators of such crimes must be held accountable. For example, the UN Commission on Human Rights Resolution 2002/79 on Impunity states that "amnesties

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should not be granted to those who commit violations of international humanitarian and human rights law that constitute serious crimes" (p. 329). As Stahn (2005, 702) has pointed out, there is also a growing trend of domestic practice that prohibits amnesties in such cases, for example, in Ecuador, Argentina, Honduras, and Macedonia, where judicial decisions and laws prohibit this. As well, several states have legislated to allow war crimes to be prosecuted within their jurisdictions on the basis of the universality principle, and courts have held that amnesty agreements have no extraterritorial effect.[17]

It is likely that, in light of its purpose and functions, the ICC will only defer prosecution in the most exceptional cases and will never endorse amnesties that include crimes within its jurisdiction (Scharf 1999, 516). However, it is interesting to reflect on the comment of the former UN Secretary-General Kofi Annan, who, in 1998, argued in relation to the amnesty and alternative justice issue,

> No one should imagine that [the ICC] would apply to a case like South Africa's, where the regime and the conflict which caused the crimes have come to an end, and the victims have inherited power. It is inconceivable that, in such a case, the Court would seek to substitute its judgment for that of a whole nation which is seeking the best way to put a traumatic past behind it and build a better future." (Quoted in Greenawalt 2007, 594)

Alternatively, as Schabas (2011, 69) has suggested, the Court "might well decide that it is precisely in cases like the South African one where a line must be drawn establishing that amnesty for such crimes is unacceptable."

## Victims and the International Criminal Court

The subject of victims' rights became prominent from the 1960s onward in the United States and before then in Europe, with measures such as victim compensation schemes and victim impact statements in addition to well-established rights in states like France and Italy for victims to participate in the criminal process as *partie civile*.[18] International law, however, tended to neglect the subject until international humanitarian law began to develop after the two world wars (Funk 2010, 30, 33). International human rights conventions then granted personal rights to victims whose rights had been violated. In 1985, victims' rights gained more specificity with the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. While it did not grant any new rights to victims, the Declaration did call upon states to adequately recognize the rights of victims by providing them with access to justice mechanisms and with prompt forms of redress for harm suffered. It also stressed the need to keep victims informed about the progress of a case and to provide assistance during the legal process. Domestic justice systems were called upon to permit victims to present their views and concerns at appropriate stages in the proceedings.

In 2006, the UN General Assembly built upon the 1985 Basic Principles when it adopted the Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. The Basic Principles explicitly refer to the Statute of the ICC.

The Statute of the ICC can be seen as extending this international concern for victims and their rights and breaks new ground in international criminal justice in that Article 68 requires an international court for the first time to allow the "views and concerns" of victims "to be presented and considered at stages of the proceedings."[19] Victim participation is a novel feature of trials before the ICC and has not been codified under international law. In the view of the then Senior Vice President of the ICC, René Blattmann, "The Court is, therefore, creating a unique path for victims to participate in the proceedings" (Blattmann and Bowman 2008, 728), but care must be taken to ensure that "the implementation of these rights will not jeopardise the rights of the accused . . . and result in an unfair trial" (p. 728).

As well as participation in trials and other proceedings, the ICC Statute provides two forms of redress for victims, namely, court-ordered reparations and victim support through a Trust Fund established by the Statute (McCarthy 2012, 34). Both are discussed in this section. (Unless otherwise stated, the information that follows draws on sections of the ICC website dealing

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with victims: http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/victims/Pages/victims%20and%20witnesses.aspx.)

## Qualifying as a Victim

The ICC Rules define *victim* to mean "natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court" (Rule 85). Persons claiming to be victims must apply for that status to the Victims Participation and Reparation Section of the Court which in turn submits the application to the Chamber to decide on the manner of victims' participation in the proceedings. Victims may request participation or reparations or both. When the Chamber considers a person is not a victim whose crime falls within the Court's jurisdiction, it may reject that application.

## Victim Participation

Victim participation poses practical challenges. For example, where there are large numbers of victims in unstable situations, ensuring that all know how to participate in proceedings and are adequately supported in this role is a huge challenge (Blattmann and Bowman 2008, 728–29). In cases where there are a large number of victims, the Chamber may ask victims to choose a shared legal representative, called a "common legal representative" (Rule 90). When a victim or a group of victims lacks the means to pay for a common legal representative appointed by the Court, they may request financial aid from the Court. For example, in the Lubanga trial (see Box 9.2), there were three teams of victims' representatives, one led by the Principal Counsel of the Office of Public Counsel for Victims and the others led by non-ICC representatives (Funk 2010, 108).

In an important decision about victim participation, the Appeals Chamber decided in July 2008 that the harm alleged to have been suffered by a victim does not necessarily have to be direct in nature, but it must constitute personal harm. The Court has said that an indirect victim can suffer harm either as close family members or dependents of the direct victim or while intervening to aid victims or prevent them from becoming victims (Moffett 2014, 91). The Appeals Chamber also reversed a decision of the Trial Chamber and decided that victims who participate may bring evidence concerning the guilt or innocence of an accused, when requested, and may challenge the admissibility or relevance of evidence in a trial.

Questions about victim participation at the various stages of proceedings have been and continue to be under examination by the Pre-Trial Chamber. For example, some victims' representatives believed they possessed authority under the Statute to request that the Pre-Trial Chamber expand the charges laid against an accused to include additional charges. Consequently, in May 2009, victims' representatives formally asked the Chamber to add charges of sexual slavery and cruel and inhumane treatment to one indictment. As might be expected, the Prosecutor objected to what it considered to be "interference" with its case, and the defense argued that last-minute changes threatened the rights of the accused. The request was denied (Funk 2010, 61).

The Court has been clear that victims' legal representatives are not to function as supplementary prosecutors, as happens in some civil law systems, but rather as assistants, helping the Court to find the truth (Moffett 2014, 103). According to one Trial Chamber, this means the legal representatives' primary role is to present victim experiences of the harm those victims have suffered (p. 104). According to another Trial Chamber, however, the interests of victims include the question of which persons should be held responsible for the harm they have suffered, and this means victims "have an interest in making sure that all pertinent questions are put to witnesses" (p. 104). The Statute establishes the right of victims to present their "views and concerns" where their "personal interests . . . are affected," "at stages of the proceedings determined to be appropriate by the Court" and "in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial." In the practice of the Court, the following rights have been granted to victims:

- Victims may participate in court hearings about investigations but may not participate in an investigation at the "situation" stage.[20]
- Victims can participate in most pre-trial proceedings.
- Victims can participate at trial with remarks, present written submissions, and assess and present evidence.

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- Victims may make oral and written submissions concerning sentencing.
- Victims can participate when the Prosecution and Defense submit appeals to the Appeals Chamber.
- Victims may appeal orders awarding reparations to victims. (AMICC 2013)

Victims must be notified of any decisions by the Prosecutor not to open an investigation or not to commence a prosecution, and may file submissions before the Pre-Trial Chamber. The same notification is required before the confirmation of charges hearing in the Pre-Trial Chamber in order to allow the victims to file submissions and present their views. All decisions taken by the Court are then sent to the victims who participate in the proceedings or to their counsel.

## Office of Public Counsel for Victims

Established in September 2005, the Office of Public Counsel for Victims is tasked to ensure the effective participation of victims in the proceedings before the Court. It does this by providing legal support and assistance to the legal representatives of victims and to victims. Under Regulation 80 of the Court Regulations, members of the Office may also be appointed as legal representatives of victims, providing their services free of charge. This Office has published a manual to assist legal representatives appearing before the Court. In most cases, victims will be legally represented or represented by this Office. This ensures their concerns and views will be presented to the Court. Victims may choose their legal representative, who must be a person with extensive experience as a criminal lawyer, judge, or prosecutor and must be fluent in one of the Court's working languages (English or French).

## Victim and Witness Protection

A victim may also be a witness in proceedings, and therefore witness protection is another area marked out for the attention of the Court. It is given the power to apply protection measures, including in camera proceedings and protecting a victim's identity (Article 22). The Victim and Witness Unit (VWU), under the control of the Court Registrar, is charged with recommending protective measures and providing counseling and support to victims and witnesses (Schiff 2008, 131). It must be staffed with persons possessing expertise in trauma related to crimes involving sexual violence. Child witnesses and victims are covered by specific protective measures (Blattmann and Bowman 2008, 714). When a victim is believed by their legal representative to also be a likely witness in a prosecution, notice of this must be given to the Prosecutor as soon as the legal representative becomes aware of it.

## Victims and International Criminal Court Trial Practice

Like the ICTY and the ICTR, trial practice before the Court and its Chambers is an amalgam of common law and civil law systems. Accordingly, the hybrid system used by the ICC is neither fully adversarial nor fully inquisitorial. While trials are conducted with evidence being given orally, and with examination and cross-examination of witnesses and not through a written dossier as occurs in many civil law systems, there are elements of civil law systems present in the management of cases by the Pre-Trial Chamber. As in civil systems, the ICC judges are far more proactive in the pre-trial stages than is usually the case in common law systems. Similarly, there is no right to trial by jury, and Court rulings are persuasive but not binding under the *stare decisis* doctrine (Funk 2010, 64). The OTC more resembles such offices in civil law systems because it is charged with being the investigator for the prosecution and for the defense and must establish the truth by investigating both incriminating and exculpatory circumstances (p. 65).

Victims are generally permitted to make opening statements at trials, and practice so far indicates that the Court will allow victims' representatives to question a witness after the prosecution has completed its examination and before the defense begins its cross-examination. Before seeking to examine a witness, however, a victim must file a request outlining proposed questions. This reflects the notion that the victim will generally augment the function of prosecution (Funk 2010, 190).

## Reparations and Trust Fund for Victims

Under Article 75 of the Statute, the Court may establish principles for granting reparations to victims which may include restitution,

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compensation, and rehabilitation. There is no existing body of international principles upon which the Court can draw, and therefore establishing principles will be a challenging task (McCarthy 2012, 129). The Court may also make an order against a convicted person stating the appropriate reparation for the victims or their beneficiaries. This reparation may also take the form of restitution, indemnification, or rehabilitation.

The Court may order reparations to be paid through the Trust Fund for Victims, which was set up by the Assembly of States Parties in September 2002. The Fund may receive funds from state parties and in the form of voluntary contributions and from fines and forfeitures ordered by the Court. To date, the bulk of its funds have come from state parties (McCarthy 2012, 59). The ICC does not manage the Trust Fund, which is under the control of a Board of Directors appointed by the Assembly of States Parties (p. 227).

Victims have the right to apply for reparations at any time, and where they do not do so, the Court may nevertheless order reparations but only in exceptional circumstances (McCarthy 2012, 191). Reparation proceedings take place after the person prosecuted has been declared guilty of the crimes charged. The Court may order individual or collective reparation, concerning a whole group of victims, a community, or both. If the Court decides to order collective reparation, it may order that reparation be made through the Trust Fund for Victims, and the reparation may then also be paid to an intergovernmental, international, or national organization.

In 2008 the Trust Fund expended about $2.5 million on projects in Uganda and DRC as services to victims. These projects, numbering thirty-four, provided physical rehabilitation and psychological support for men, women, and children who had experienced sexual violence and who were ex–child soldiers or abducted children. These payments did not constitute actual court ordered reparations but represented victims services (Funk 2010, 70).

## How Effective Is the International Criminal Court?

Any assessment of the effectiveness of the ICC must take into account that it only commenced its task a short time ago. It began its first trial only in 2009 and its first active investigation only in 2004.

As the first permanent international criminal court, the ICC may bring an end to the practice of creating ad hoc international tribunals like the ICTY and the ICTR, both modeled on the Nuremberg trials. It may also replace the mixed international courts, such as those employed in Sierra Leone and East Timor for the crimes over which it has jurisdiction. The permanence of the ICC is a mark of its effectiveness because, unlike the ad hoc international tribunals, it is always in existence and therefore able to act in a timely manner while armed conflicts are still under way and perhaps intervene to bring about a cessation of those conflicts by investigating and punishing violations of international criminal law as they occur (Dutton 2013, 19).

In any event, it is able to investigate and prosecute war crimes as soon as there is evidence they are occurring. That in itself is said to constitute a significant measure of deterrence to would-be human rights violators (Shany 2014, 228). A contrarian view concerning the capacity of the ICC to fulfill the objective of deterring war crimes is that research based on a set of post-conflict devices used in civil armed conflicts between 1989 and 2003, including international and domestic criminal trials, has shown that international prosecutions fail to deter human rights abuses, to consolidate democracy, or to assist in peace-building. Both the ICTY and the ICTR have failed to deter subsequent international crimes, such as occurred in Sudan (Snyder and Vinjamuri 2003, 5, 20).

According to Yuval Shany (2014, 223), the ICC "has been a crucial step in the development of international criminal law." The Court has been active in issuing important decisions, issuing arrest warrants, and generally conducting its business in conjunction with an active Prosecutor. Both the Court and the Prosecutor have effectively navigated the complexities of the Statute with its procedural and substantive safeguards.

State parties have endorsed the legitimacy of the Court by referring situations to it, as has the UN Security Council, and the Prosecutor has exercised the discretion to investigate and prosecute. Accordingly, all the stakeholders with capacity to invoke the powers of the Court have done so. As well, the Prosecutor has conducted numerous investigations and the Court conducted several full trials.

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In relation to UN Security Council referrals to the ICC, there is some concern among Court officials that the Security Council has not followed through with its referral to fully support the Court and ensure its effectiveness. Instead, it has used the reference power as a political and strategic instrument. An example of this was the attempt by some members of the Security Council to have the prosecution of the President of Sudan deferred under the Article 16 power despite having previously referred the situation in the Sudan to the ICC (Bosco 2014, 171). This lack of commitment by the Security Council flows through into its lack of response to the ICC on complaints of noncooperation by state parties on arrest warrants, where the Security Council has taken no enforcement action.

It has also been argued that referrals by the Security Council constitute "significant acts of control" in that the Court launches full investigations consuming limited resources and allows the major powers to shape the case load of the Court (Bosco 2014, 180). The perception that the Court is managed by the Security Council, and therefore by its permanent members, affects the overall legitimacy of the ICC, as does evidence that the major powers "have regularly communicated their preferences on investigative strategy to the court officials," such as occurred in the issue of the arrest warrant for Sudan's President (p. 181).

One outcome of the existence of the ICC has been that states have legislated on war crimes and genocide consistent with the principle of complementarity.[21] The ICC has acted as a catalyst in this regard. States have enacted new laws that punish these crimes and that will hopefully deter their nationals from committing these grave international crimes. Before the creation of the Court, war crimes were seldom prosecuted and it has been left to the international tribunals for the former Yugoslavia and Rwanda to develop international humanitarian law and punish offenders. The existence of the Court and domestic systems of laws that punish war crimes should collectively make major contributions to ending impunity—a goal of the Court as stated in the preamble of the Statute. The Court has affirmed that even Heads of State are not exempt from criminal liability.

There is, however, no mention in the Statute of the Court providing training or assistance to states in drafting their domestic war crimes legislation. Many states in the developing world lack the capacity to undertake this task. Both the Prosecutor and the Assembly of State Parties have advocated developing strategies to facilitate this work (referred to as "positive complementarity"), and it remains to be seen whether there is an appropriate role for a judicial institution in such capacity building (Dutton 2013, 163; Shany 2014, 235).

The Statute has given new prominence to victims, following the models of the ICTY and the ITCR, and the victim services and outreach activities have been seen as key to the success of the Court. Previously, the status of victims under international law was unclear, but the Statute allows victims to actively participate in proceedings and secure reparations for harms (Shany 2014, 232). At the same time, the complexity of having victim participation has affected the pace of trials and pre-trial applications.

The creation of field offices has been essential in the collection of evidence, witness protection, victim assistance, and outreach to affected communities. However, it has also revealed severe logistical challenges, the inaccessibility of some regions, and the difficulties of ensuring that all languages used in a region are accommodated (Blattmann and Bowman 2008, 724).

In relation to the conduct of trials and the necessity that they occur without undue delay, "the complexity and magnitude of international crimes are exceptional circumstances that influence the pace of conducting and concluding such trials" (Blattmann and Bowman 2008, 724).[22] Certainly the duration of trials before the ICC Trial Chamber is lengthy, but this also proved to be the case in the ICTY and the ICTR. As an example for the ICC, the trial of Lubanga (discussed in Box 9.2), commenced on January 26, 2009, and closing statements were given August 25–26, 2011. Sixty-two witnesses gave evidence: thirty-six were called by the prosecution, nineteen by the defense, three by legal representatives of witnesses, and four by the Trial Chamber (Corrie 2012, 147).

The focus of the Court on Africa has provoked adverse comment from African states and the African Union and claims that the Court can expect no state cooperation: this has proved to be true in the case of Chad's attitude to the arrest warrant issued against the President of Sudan (see "State Noncooperation," earlier). As the Chairman of the African Union, Jean Ping, stated, "We think there is a problem with ICC targeting only Africans, as if Africa has been a place to experiment with their ideas. The law

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should apply to everyone and not only the weak" (quoted in Bosco 2014, 151). The Court can be criticized for pursuing a double standard. While it can be said to be enforcing the rule of law in a continent ravaged by armed conflict, it can also be argued that international criminal law is being primarily enforced in weak and fragile states (Shany 2014, 245).

Issues of legitimacy and double standards were also raised when the Prosecutor declined to conduct investigations into events in Iraq and Afghanistan. In the case of Iraq, complaints were made that the U.K. Armed Forces and those of other nations committed war crimes there. In 2006, the Prosecutor advised having investigated the complaints which had been contained in some 240 referrals to the ICC. In most instances he had found no basis to conclude the ICC should exercise jurisdiction. However, the Prosecutor did find some basis for concluding that some British soldiers had committed crimes of willful killing and inhumane treatment. He declined to proceed with an investigation, relying on the fact that fewer than twenty injuries or deaths had resulted from the actions and on the need to preserve the resources of the Court for crimes of gravity. He also advised that in any event, the United Kingdom had taken action under its International Criminal Court Act 2001 to investigate the alleged crimes and prosecute its soldiers. In fact in 2006, Corporal Donald Payne became the first British soldier to be convicted of committing a war crime. Payne pleaded guilty to inhumane treatment of civilians in military activities in Iraq (Dutton 2013, 91).

The situations in Afghanistan (where the Prosecutor declined to open an investigation) and Iraq arguably reveal a tendency to avoid situations that involve major powers. Other, similar cases have occurred. For example, while the Prosecutor opened an investigation in Kenya,[23] it declined to do so in relation to the Georgia–Russia conflict and decided that the ICC lacked jurisdiction in a referral by Palestine (Bosco 2014, 186).

Has the ICC then favored the major powers and brought its legitimacy into question? The Court has been described as being "exceptionally cautious," and it is said that the Prosecutor has "operated strategically, sending conciliatory signals and orienting early court investigations so as to avoid tension with major powers" (Bosco 2014, 20–21). The first ICC Prosecutor advanced what was considered to be a novel view about how to measure the effectiveness of the Court. Speaking in April 2003, soon after his election, he said:

> The efficiency of the International Criminal Court should not be measured by the number of cases that reach the Court or by the content of its decisions. Quite on the contrary, because of the exceptional character of this institution, the absence of trials led by this court as a consequence of the regular functioning of national institutions would be its major success. (Quoted in Bosco 2014, 88)

Here, the Prosecutor is simply stating the effect of the principle of complementarity. Assuming that all or most states' domestic legislation covers war crimes, genocide, and crimes against humanity and that no offenders are improperly shielded from accountability, the Prosecutor would be correct because the Court would indeed be only a court of last resort. Where a state could not itself conduct investigations or prosecutions, the Prosecutor envisaged that the state concerned would refer its own situation to the Court "smoothing cooperation and reducing or eliminating the possibilities that the State would challenge the ICC's jurisdiction on cases admissibility"[24] (Schiff 2008, 115).

Of course, the developed states would enjoy an advantage in having justice systems that were capable of handling such cases and in adhering to the rule of law in the conduct of trials. The statement can therefore be read as reassurance to developed states and also as indicating a cautious Prosecutor and Court anxious to avoid confronting major powers.

Finally, it has to be recognized that international crimes which come to the attention of the Court are committed in the context of political events that engender high levels of violence sometimes rising to the level of atrocities and even genocide. The Court therefore operates within an environment that is political, and consequently its decisions and acts carry political implications for states and will inevitably be interpreted as political acts. While the Court seeks to act judicially, it is not always a simple matter to separate the political from the legal. Questions of legitimacy will continue to arise even while the Court acts as transparently as possible and explicitly frames the issues coming before it as matters of international criminal law (Schiff 2008, 9–10).

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## Notes

1. The ICTY had a budget of approximately US$329 million or about 273 million euros, and more than one thousand staff in 2005 (Burke-White 2008, 66).

2. The creation of the various international tribunals and special courts by the UN Security Council led to "tribunal fatigue," in the opinion of some, and reinforced the merits of creating a single permanent international criminal tribunal. The United States did not hold this view and initially argued for the situation in Sudan to be referred to a Sudan tribunal created under the auspices of the African Union using the ICTR facilities rather than being referred to the ICC. The United States argued that using the ICC would not be a good option due to its remoteness from Sudan and its preoccupation with situations in the Democratic Republic of Congo and Uganda (Schiff 2008, 58, 229).

3. The International Law Commission was created in 1947 by the UN General Assembly to assist in the progressive development of international law and its codification. It comprises thirty-four persons of recognized competence in international law who are elected for terms of five years (Schiff 2008, 26). They serve part-time but meet each year for about twelve weeks. The topics they undertake emanate from the General Assembly, states and international agencies or even the ILC members themselves. The ILC produces drafts of international conventions for consideration by the United Nations. The ILC first submitted a draft international criminal court statute in 1954 (p. 27).

4. The U.S. position not to ratify was not unusual. For example, it took the United States forty years to ratify the Genocide Convention, and even then with substantial written reservations (Ball 2009, 501).

5. The field offices support the investigations of the Office of the Prosecutor and also facilitate victim assistance on applications for participation and for reparations, and for protecting and relocating witnesses and conducting outreach programs to affected communities (Blattmann and Bowman 2008, 711).

6. Convention on the Prevention and Punishment of the Crime of Genocide 1948.

7. This term was adopted to avoid prejudging the existence or nature of a conflict. Once a "situation" comes under investigation, evidence of criminality may emerge and criminal charges can then be formulated.

8. This was proposed by the American Bar Association in 1978 who urged the State Department to begin negotiations. The proposal was advocated again in 1990 and 1992 (Feinstein and Lindberg 2009, 30).

9. The European Union unusually issued an official démarche stating that it would "continue to oppose efforts that would undermine the ICC" (Council of European Union, July 27, 2004). Later, however, the European Union announced that EU states could sign such agreements in accordance with a set of EU-approved guiding principles. Despite this concession, European states were unable to negotiate acceptable agreements (Kelley 2007, 585).

10. See Human Rights Watch (2003).

11. The ILC draft of the Statute did not allow a prosecutor to initiate a case for fear that an independent prosecutor would bring frivolous or politically motivated proceedings. The ILC said that independent powers were not advisable "at the present stage of development of the international legal system" (Danner 2003, 513). However, NGOs, especially, campaigned for an independent prosecutor arguing that limiting referral power to the Security Council and the state parties would result in the Court being politicized. Thus both sides feared the same outcome if their recommendation was not adopted. The United States also argued that allowing the Prosecutor independence would mean he would be inundated with frivolous complaints from non-state organizations and that the ICC needed to have a screening mechanism in the form of states and the Security Council to select only the deserving cases (p. 514).

12. This fear has proved unfounded. From July 2002 to 2009, the Prosecutor received more than 2,200 reports of alleged crimes from more than 100 states, individuals, and groups, alleging crimes in 139 states. The prosecutor found that 80 percent of the reports were manifestly outside the jurisdiction of the ICC and did not merit further analysis, while 20 percent had some merit. A closer examination resulted in only 4 being deemed worthy of investigation (Feinstein and Lindberg 2009, 83).

13. The source of the information is irrelevant (Article 15[1]).

14. Danner (2003, 527) points out that states must have domestic laws that permit them to investigate and prosecute the crimes under ICC jurisdiction, and they should also have laws that allow for cooperation with the ICC on evidential and investigative issues.

15. The ICTY and the ICTR ultimately established their own arrest units, which included "trackers" whose task was to analyze information on the location of those indicted to facilitate the execution of arrest warrants (Bosco 2014, 118).

16. As well as Chad, the ICC informed the UN Security Council of the failure of other state parties—Djibouti, Kenya, and Malawi—to execute the arrest warrants when President Al-Bashir visited their countries (Dutton 2013, 18). Significantly, President Al-Bashir has not traveled to Western Europe, where he is much more likely to be arrested and sent to The Hague for trial.

17. However, not all states share this view. For example, when Colombia ratified the ICC Statute, it submitted a declaration, without any states objecting,

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interpreting the Statute not to preclude amnesties, reprieves, or judicial pardons (Greenawalt 2007, 594).

18. In *partie civile* proceedings, victims can initiate a prosecution, participate in proceedings, and bring damages claims based on the prosecution case. The German version, called *Nebenklage,* allows victims to have their own legal representative who acts as a supplementary prosecutor (Moffett 2014, 94). In Rwanda, victims of the genocide were able to apply for reparations through the *partie civile* process in the Rwandan legal system, and in cases where victims could not be identified, convicted perpetrators have been ordered to pay into a victims compensation fund (McCarthy 2012, 28).

19. During the negotiation of the Statute, there was considerable resistance to giving broad rights to victims, and a more limited model was advocated. The reason for this was concern that victim participation on a wide scale could threaten the accused's rights, interfere with the Prosecutor's decision making, and impede the ability of the Chamber to effectively manage cases (Funk 2010, 86). Neither the ICTY nor the ICTR had power under their Statutes to order payment of reparations to victims, but they did have power to seize the assets of perpetrators and did so in a number of cases (McCarthy 2012, 47).

20. There were differences of opinion on this issue between Pre-Trial Chambers, but the Appeal Chamber found that an investigation is not a "judicial proceeding" which victims can participate in. It is an inquiry conducted by the Prosecutor. Clearly this decision weakens the position of victims. In regional human rights courts in America and Europe, the contrary view has been taken (Moffett 2014, 116).

21. Even in Sudan, the Court's action prompted the amendment of laws to cover international crimes when a Special Prosecutor was appointed to investigate possible crimes in Darfur and three Special Courts created in Darfur. Thus, despite the tension between the Court and Sudan, the government nevertheless created a legal regime to punish atrocities. The Justice Minister stated that the new court was a substitute for the ICC and announced it had begun hearing the first cases of 160 persons accused of crimes in Darfur (Schiff 2008, 233). The ICC Prosecutor determined, however, that the Sudan Courts were not dealing with crimes within the ICC jurisdiction but only with cases such as arms possession, robbery, and stolen goods (Burke-White 2008, 72). As well, Shany (2014, 250) argues that pressure by the African Union to hold accountable those who had committed atrocities can be attributed to the influence of the ICC action.

22. Schabas (2011, 97) argues that it has become evident that the ICC will only be able to deal with "a very limited number of cases," that is, the gravest crimes committed by leaders and commanders. Schabas therefore regards it as "entirely unrealistic" to believe that the Court's jurisdiction will ever be expanded to cover additional crimes such as drug trafficking and terrorism.

23. In December 2014, the Prosecutor announced she was withdrawing charges of crimes against humanity brought in 2011 against the President of Kenya, Uhuru Kenyatta, following the 2007 election when more than one thousand people had died. She asserted that the Kenyan government had harassed and intimidated potential witnesses and had "breached its treaty obligations under the Rome statute by failing to cooperate" with the investigation. The withdrawal was perceived as "a new blow to the credibility of the court's prosecution office" (http://www.theguardian.com/world/2014/dec/05/crimes-humanity-charges-kenya-president-dropped-uhuru-kenyatta ).

24. It is said that this view of the relationship between the ICC and states provoked "widespread skepticism among the ICC 'old hands.'" To some, it revealed the Prosecutor as engaging in politics (Schiff 2008, 116).

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