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The International Criminal Court: A New and Necessary Institution Meriting Continued International Support

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Judge Philippe Kirsch

Abstract

This Article highlights some of the key features of the ICC, and concludes by outlining the support it will need in striving to create a world in which devastating actions are properly addressed and punished. Part I of this Note describes the history of the ICC. Part II discusses the crimes within the Court's jurisdiction. Part III further discusses jurisdiction. Part IV reviews the procedure of the court. Part V concerns the current status of the Court.

ESSAYS

THE INTERNATIONAL CRIMINAL COURT: A NEW AND NECESSARY INSTITUTION MERITING CONTINUED INTERNATIONAL SUPPORT

*Philippe Kirsch**

I. *THE ESTABLISHMENT OF THE INTERNATIONAL CRIMINAL COURT*

A. *The Need For a Permanent Court*

The creation of the International Criminal Court (“ICC” or “Court”) may be seen as a global response to the extreme atrocities perpetrated in the last century. Unfortunately, in all too many cases, terrible crimes went unpunished and a perceived culture of impunity protected the perpetrators. National courts often did not investigate the crimes adequately, or at all. The absence of a permanent international court to investigate and try those responsible meant that the exceptions to this pattern of impunity were rare and notable: the Nuremberg and Tokyo Tribunals established at the end of the Second World War; and the International Criminal Tribunals for the Former Yugoslavia (“ICTY”) and Rwanda (“ICTR”), which were set up in the 1990s to address the crimes committed during the tragic conflicts in those countries.

The ICC will build upon the significant recent progress made by the ICTY and the ICTR (“the *ad hoc* tribunals”) in investigating, prosecuting, and punishing perpetrators of the most serious crimes known to humanity: genocide, crimes against humanity, and war crimes. It will do so on a global scale. In so doing, it will work towards overcoming impunity and creating a culture of accountability.

Given the Court’s significance to the furtherance of international criminal justice, and its relative novelty, this Article highlights some of the key features of the ICC, and concludes by out-

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lining the support it will need in striving to create a world in which devastating actions are properly addressed and punished.

B. *The Distinctions Between the Court and the Ad Hoc Tribunals*

The *ad hoc* tribunals were alternative fora created because, at the time of their formation, no national or international forum existed that could have prosecuted the atrocities that those tribunals addressed. Their significance cannot be underestimated, as their very existence demonstrated that international criminal justice could work in practice. However, only a permanent international criminal court can most effectively deal with the gravest offenses known to humankind. Notwithstanding the important work that the *ad hoc* tribunals do, they are limited in their scope, deterrent effect, and practicality.

First, by their very nature, the *ad hoc* tribunals only cover a particular situation, circumscribed by geographical limitations. Numerous perpetrators around the world are left unaffected and, in reality, immune from international prosecution. Conversely, the jurisdiction of the ICC extends to the nationals and territory of all countries which have ratified its Statute (“the Statute”) — a total of ninety-seven countries to date. In addition, the Court has jurisdiction where: (1) a State that is not a Party to the Statute nevertheless chooses to accept the Court’s jurisdiction; or (2) the Security Council of the United Nations refers a situation to the Court’s Prosecutor.

Second, *ad hoc* tribunals are generally a response to past events. In contrast, the Statute of the ICC addresses current and future offenses in that it applies to instances of genocide, crimes against humanity, and war crimes committed after its entry into force on July 1, 2002.

Third, the establishment of a new tribunal for each localized violation creates substantial cost and delay, which hinders the expeditious exercise of justice. In the time it takes to decide to establish a new tribunal, to draw up its statute and rules of procedure, and to appoint its judges, crucial evidence may be lost and the perpetrators may become more difficult to track down. In addition, whether such a tribunal is established at all depends upon the will of the international political community of the day. The ICC, on the other hand, is a permanent court with an established Statute, Rules of Procedure and Evidence,

and Regulations. It is immediately available. It will have the advantage of developing and drawing upon its own specialized experience of trying the grave crimes over which it has jurisdiction. Potential perpetrators who fall within the jurisdiction of the Court now know that there is an established institution that is capable of trying them if they choose to commit genocide, crimes against humanity, or war crimes. It is hoped that the ICC will thereby contribute towards the deterrence of such crimes.

C. *The Creation of the Court*

The method of establishing the ICC was novel in international criminal justice. Unlike the Nuremberg and Tokyo Tribunals, which were constituted by post-war victorious Allies, or the ICTY and ICTR, which were created by the U.N. Security Council, the ICC was established by an international treaty. In other words, it was freely established by States for themselves.

A draft text of the Court's Statute was prepared by the International Law Commission ("ILC") and presented to the U.N. General Assembly in 1994. The General Assembly then created an *Ad Hoc* Committee to review the Draft Statute. After two meetings, the *Ad Hoc* Committee was succeeded by a Preparatory Committee which prepared a new text, incorporating comments from States on the ILC Draft Statute. Thereafter, that text formed the basis for discussions and negotiations at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court. That Conference was held in Rome and lasted for a period of five weeks in the summer of 1998. The overwhelming majority of the world's States — 160 in total — participated and were able to provide their input into the content of the Statute. The aim of the Conference was to produce a text that could be adopted with widespread agreement. On July 17, 1998 the Statute was adopted in its entirety by the vast majority of States who were present on the final day of the Conference: 120 States voted in favor, seven voted against, and twenty-one abstained.

At the end of the Rome Conference, a Preparatory Commission was established to prepare for the beginning of the Court's operation. It met at various intervals over three-and-a-half years and was open to all States that had been invited to participate at the Rome Conference. It was mandated with drafting the essen-

tial texts necessary for the establishment of the Court, such as the Rules of Procedure and Evidence and the Elements of Crimes. These two texts were adopted by consensus by the States on June 30, 2000. The ICC is unique among international criminal tribunals in that not only its Statute, but also these supplementary texts, were agreed to by States and not created by the Court. The Preparatory Commission was also charged with discussing how to enhance the effectiveness and acceptability of the Court. The involvement of States in the Preparatory Commission, and the practice of ensuring that texts were adopted by general agreement, led to greater acceptance of the Court and by December 31, 2000 (the last day on which the Statute was open for signature), 139 States had signed, nineteen more States than had voted in favor of the Statute at Rome.

In order to enter into force, the Statute needed to be ratified by sixty States. Less than four years after the Rome Conference, the 60th ratification had been received in the spring of 2002. The Statute entered into force on July 1, 2002. This was far sooner than many had expected at the end of the Rome Conference. The method of its creation and development ensured that the Court broadly reflected the aspirations and objectives of the international community.

II. *THE CRIMES WITHIN THE JURISDICTION OF THE COURT*

The ICC has jurisdiction over the most serious crimes of concern to the international community, namely: genocide, crimes against humanity, and war crimes. These categories of crimes are accepted to be part of customary international law. However, with the exception of genocide, there was no single, comprehensive treaty defining these offences in full. In drafting the Statute, States sought definitions of these crimes within customary international law. In formulating these definitions, the drafters looked to definitions in the statutes of prior international tribunals, multilateral treaties, and indicators of customary international law. The resultant Statute is a more extensive codification of the customary international law crimes than that provided by any previous international criminal tribunal.

Article 6 of the Statute adopts the well-established definition of genocide from the Convention on the Prevention and Punishment of the Crime of Genocide. It prohibits specific acts com-

mitted with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, such as killing, causing serious bodily or mental harm, or deliberately inflicting conditions of life calculated to bring about the physical destruction of the group.

In its definition of crimes against humanity, Article 7 of the Statute draws upon the statutes of the ICTY, ICTR, and the Nuremberg and Tokyo Tribunals. The codifications of crimes against humanity in the Statute go into more detail than the definitions contained in the statutes of previous international criminal tribunals. The Statute is the first broadly accepted multilateral treaty setting out definitions of crimes against humanity.

Article 7 defines crimes against humanity as any of a list of enumerated acts including murder, torture, enslavement, and rape, wherever such crimes are “committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.” This threshold requirement differentiates crimes against humanity from ordinary murder, rape, or other crimes, and limits the jurisdiction of the ICC to the gravest offences known to humankind. Article 7 includes several offences such as apartheid and enforced disappearances, which had not explicitly appeared as crimes against humanity in the statutes of the preceding tribunals. It also broadens the definition of persecution from that of the statutes of previous tribunals to include persecution on grounds such as gender and culture. In addition, it includes a comprehensive definition of enslavement, which is “the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children.” Finally, Article 7 was the first provision within the statute of an international criminal tribunal to include within its definition of crimes against humanity a detailed list of crimes of sexual violence such as sexual slavery, enforced prostitution, forced pregnancy, and enforced sterilisation.

The definition of war crimes in Article 8 of the Statute includes four categories of war crimes which are divided into fifty sub-articles. First, it includes grave breaches of the four 1949 Geneva Conventions. This provision, Article 8(2)(a), forbids specific acts against persons or property protected by the Geneva

Conventions,¹ such as “[w]ilful killing,” “[t]orture or inhuman treatment,” “[w]ilfully causing great suffering, or serious injury to body or health,” “[t]aking of hostages,” and “[e]xtensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly.” These provisions of the Geneva Conventions only apply in international armed conflicts.

The Statute contains a second set of war crimes, violations of Article 3 common to the Geneva Conventions, which applies to non-international armed conflict. Article 8(2)(c) prohibits four sets of acts against “persons taking no active part in the hostilities.” Prohibited acts include “[v]iolence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture,” and “[t]aking of hostages.”

In addition to violations of the Geneva Conventions, the Statute also defines as war crimes “[o]ther serious violations of the laws and customs” applicable in armed conflict. Article 8(2)(b) covers these violations in the context of international armed conflict, while Article 8(2)(e) covers these violations in non-international armed conflict. Acts prohibited under these two provisions include pillaging a town or place, intentionally directing attacks against the civilian population, and treacherously killing or wounding adversaries.

Article 8 focuses on such crimes “in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.” It includes a far more comprehensive codification of war crimes under customary international law than existed in the statutes of previous tribunals.² As with the

1. Each Geneva Convention protects a different class of persons and property. The First Convention protects wounded and sick members of the armed forces in the field. *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 (entered into force Oct. 21, 1950). The Second protects wounded, sick, and shipwrecked members of the armed forces at sea. *See* Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 (entered into force Oct. 21, 1950). The Third protects prisoners of war. *See* Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (entered into force Oct. 21, 1950). The Fourth protects civilian persons in times of war. *See* Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (entered into force Oct. 21, 1950). Each Convention contains a more specific definition of precisely who is protected by its terms.

2. For example, Article 3 of the ICTY Statute provides a non-exhaustive list of five

provision on crimes against humanity, Article 8 includes detailed prohibitions on crimes of sexual violence, which had previously been subsumed under prohibitions on torture, inhuman treatment, violence to life and person, or outrages upon personal dignity.

The Statute's definitions are supplemented by a text which sets out the elements of each crime, thereby providing additional detail and clarity.³ The "Elements of Crimes" are an innovation from prior tribunals and, as indicated above, they were adopted by consensus by the Preparatory Commission. The Elements of Crimes will assist the Court in interpreting and applying the Statute. Together, the Statute and the Elements of Crimes provide the Court (and the international community as a whole) with comprehensive, clear, and easily accessible definitions of genocide, crimes against humanity, and war crimes.

In addition to the above crimes, the Statute provides that the ICC will exercise jurisdiction over the crime of aggression once a definition and conditions for the exercise of jurisdiction with respect to it have been agreed upon. At the earliest, this will occur at a conference convened in accordance with Article 123, providing for review of the Statute in 2009, seven years after its entry into force. Any such definition and conditions must be consistent with the Charter of the United Nations.

III. *FURTHER ASPECTS OF JURISDICTION AND ADMISSIBILITY*

A. *The Jurisdictional Scheme of the Statute*

The Statute creates a jurisdictional scheme whereby the personal and territorial jurisdiction of the Court is related to the means by which a case may come before it. States Parties may refer situations to the Court or the Prosecutor may initiate an investigation *proprio motu*. As touched upon above, in such instances the Court only has jurisdiction over: (1) nationals of States Parties; (2) crimes committed on the territory of States Parties; or (3) nationals or territory of a non-State Party where

sub-clauses which constitute violations of the laws and customs of war. By contrast, Article 8(2)(b) of the ICC Statute, covering violations of the laws and customs applicable in international armed conflict alone, contains twenty-six sub-clauses.

3. See Philippe Kirsch & Valerie Oosterveld, *Completing the Work of the Preparatory Commission*, 25 *FORDHAM INT'L L.J.* 563, 569-72 (2002).

that State has accepted the jurisdiction of the Court. The Security Council, acting under Chapter VII of the U.N. Charter, may also refer a situation to the Prosecutor for investigation, irrespective of the nationality of the accused or the location of the crime.

The Statute includes procedural mechanisms whereby the Security Council or States referring a situation to the Prosecutor can challenge a decision of the Prosecutor not to investigate. In relation to *proprio motu* investigations, the Prosecutor requires the authorization of the Pre-Trial Chamber before such an investigation can proceed. In any event, by whatever means a case is referred, once it is before the Court, it will necessarily be determined judicially.

B. *The Relationship Between the Court and National Criminal Jurisdictions*

The exercise of the Court's jurisdiction is limited by the principle of "complementarity," which affords primacy to national legal systems for crimes within the ICC's jurisdiction. The Preamble to the Statute expressly states that "it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes." The ICC will not become involved where national systems genuinely investigate or prosecute the crimes described above. Instead, the ICC complements national jurisdictions by only acting when States are unwilling or unable genuinely to investigate or prosecute crimes within the jurisdiction of the Court.

In deciding whether a State is unwilling to investigate or prosecute, the Court will look at whether proceedings were undertaken to shield a person from criminal responsibility or were otherwise inconsistent with an intention to bring that person to justice. In determining whether a State is unable to investigate or prosecute, the Court will consider whether the State is unable to obtain the accused or the necessary evidence and testimony or is otherwise unable to carry out its proceedings due to a total or substantial collapse or unavailability of its national judicial system.

In order for the principle of complementarity to work, national jurisdictions need to adopt domestic legislation prohibiting crimes within the jurisdiction of the Court. One of the benefits arising from the very existence of the ICC is that a number of

States already have reinforced their domestic legislation to ensure that it appropriately covers such crimes. Other States are in the process of doing so. A determination to investigate and, where appropriate, to prosecute such crimes at the national level is an essential element of the overall goal of ending impunity. Indeed, if all national systems had appropriate legislation prohibiting the crimes set out above and always acted to enforce these laws, the ICC would theoretically never need to hear a single case. Until such a day, the ICC will remain a Court of last resort, pursuing the end of impunity for the commission of the most serious crimes under which humankind has had, and still has, to suffer.

IV. *SOME SPECIFIC ASPECTS OF THE LAW AND PROCEDURE OF THE COURT*

The law and procedure to be applied by the Court combines features of the major legal systems of the world, including the adversarial and inquisitorial systems. Article 21 of the Statute provides that the Statute, Elements of Crimes, and Rules of Procedure and Evidence are the primary sources of law before the Court. As appropriate, the Court may also have recourse to applicable treaties, principles of international law and general principles of law derived from national legal systems. Article 21(3) provides that the application and interpretation of each source of law shall be consistent with internationally recognized human rights standards.

At all levels of proceedings, the procedures developed in the Statute and Rules of Procedure and Evidence maintain the fundamental protections of the independence of the judiciary and the rights of the accused while providing an innovative role for victims. The ICC also includes an important structural innovation, the Pre-Trial Chamber, which enhances both the fairness and the efficiency of the Court.

A. An Independent and Impartial Judiciary

The Court is premised on the understanding that only a judicial body that is independent, impartial, and fair can produce authoritative decisions. To that end, the Statute declares that judges of the ICC must be persons of high moral character, impartiality, and integrity who possess the qualifications required

for appointment to their highest national judicial offices. Judges are required to have established competence in criminal law and procedure or in relevant areas of international law such as international humanitarian law and the law of human rights. The Court must contain an appropriate balance of judges with experience in criminal and international law. The Statute also requires that, in selecting the judges of the Court, States Parties take into account the need for the judges to embody an equitable geographical and gender representation, as well as representation of the principal legal systems of the world. In electing judges, States Parties are also directed to take into account the need for judges with expertise on specific issues such as violence against women and children.

The first eighteen judges of the Court were elected in February 2003. The judiciary is comprised of eleven men and seven women, with at least one judge from Africa, Latin America, North America, Asia, the Caribbean, Eastern Europe, and Western Europe. Among the eighteen judges are a former President of the ICTY, a former President of the ICTR, three other former judges of the ICTY, experienced criminal practitioners and national judges, and judges who have specialized practical and academic knowledge and experience of international humanitarian law and the law of human rights. A number of the judges have experience in areas ranging from the protection of the rights of women and children to sexual violence and gender issues.

The Statute includes numerous features to ensure the independence of the judiciary of the Court. Judges are prohibited from engaging in any activity likely to interfere with their judicial functions or to affect confidence in their independence. Should a judge's impartiality be questioned, the Statute and Rules of Procedure and Evidence provide clear mechanisms for the recusal or disqualification of judges.

B. *Protecting the Rights of the Accused*

The Statute includes detailed protections of the rights of the accused, incorporating the rights guaranteed under the International Covenant on Civil and Political Rights which are also enshrined in the major regional human rights conventions. The Statute requires that the law be interpreted and applied consistently with internationally recognized human rights, and provides

thorough guarantees of the rights of the accused. In addition, the definitions of crimes must be strictly construed and, in case of ambiguity, the definition must be interpreted in favor of the person being investigated, prosecuted, or convicted.

At the core of the rights of the accused, the Statute guarantees that he or she is presumed innocent until proven guilty beyond reasonable doubt. The privilege against self-incrimination is enshrined in the Statute, as is the necessary corollary that guilt shall not be inferred from silence. The right to counsel is protected, and it includes the right to be granted free legal assistance where the interests of justice so require and where the accused lacks sufficient means to pay for it. Other fundamental rights include: (1) the right to produce and cross-examine witnesses; (2) protection from double jeopardy; (3) the right to an interpreter; and (4) the right to an expeditious and public trial. In addition, the Prosecutor has an obligation to disclose all exculpatory and mitigating evidence, including evidence casting doubt upon the credibility of the Prosecutor's case.

The Statute also provides for the clear protection of the rights of individuals before trial. Individuals are protected against arbitrary arrest or detention and must not be subjected to any form of coercion, duress, or threat. Anyone who is unlawfully arrested or detained has an enforceable right to compensation. In addition, before being questioned, suspects must be notified of their rights, which include the right to remain silent, to have counsel present during questioning, and to be informed that there are grounds to believe that they have committed a crime within the jurisdiction of the Court.

C. *The Role of Victims and Witnesses*

The Statute, Rules of Procedure and Evidence, and Regulations of the Court provide mechanisms for the protection of victims and witnesses, and for victims to be able to participate directly in the proceedings and claim reparations. The recent report of the U.N. Secretary-General on the rule of law and transitional justice in conflict and post-conflict societies has confirmed the growing importance of both victim participation and reparations to societies in transition.⁴

4. See *Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General*, ¶¶ 50, 54-55, U.N. Doc. S/2004/616 (2004), available at <http://>

The Statute and Rules of Procedure and Evidence specifically address the needs of victims and witnesses, particularly victims of gender violence and violence against children. The Court is empowered to provide protective measures, counselling, and other appropriate assistance to victims and witnesses who appear before the Court and to others who are at risk on account of testimony given by witnesses. The Court is also required to protect the dignity and privacy of victims and witnesses, and proceedings may be held *in camera* to the extent necessary to protect victims, witnesses, or the accused.

The Statute and Rules of Procedure and Evidence facilitate an unprecedented level of victims' participation in the proceedings of the Court. Victims or their legal representatives may participate directly in proceedings within the requirements of a fair trial and the protection of the rights of the accused. Under the Statute, a Victims and Witnesses Unit exists within the Registry (the organ of the Court responsible for the non-judicial aspects of its administration and servicing) to provide assistance and support to both victims and witnesses involved in proceedings.

The ICC is also the first international criminal tribunal to enable victims to claim reparations. It may order a convicted person to provide reparations to victims, including restitution, compensation, and rehabilitation. The Court may order a convicted person to make reparations directly to victims or order that the award be made through an ICC Trust Fund. This Trust Fund is an independent body created by the Assembly of States Parties to the Court in accordance with Article 79 of the Statute.

D. *The Pre-Trial Chamber*

The Statute and Rules of Procedure and Evidence also include an important structural innovation in international criminal proceedings, the Pre-Trial Chamber ("PTC"). Court proceedings will commence in the PTC, which serves the dual purposes of protecting the integrity of the Court and increasing its efficiency.

By imposing judicial scrutiny on stages in the proceedings before trial, the PTC acts as an important check on the actions of the Prosecutor. Before launching an investigation *proprio*

motu, the Prosecutor must first obtain authorization from the PTC. This requirement ensures that investigations comply with the strict legal standards set forth in the Statute, including the Prosecutor's obligation to consider whether there is a reasonable basis to believe that a crime within the jurisdiction of the Court has been committed and whether the case is admissible. In relation to all investigations, the Prosecutor is required to fully respect the rights of suspects and the interests and personal circumstances of victims and witnesses.

Additionally, the PTC may issue a warrant of arrest upon the application of the Prosecutor. Prior to trial, the PTC holds a hearing to confirm the charges against the accused, determining that substantial grounds and sufficient evidence exist to proceed to trial. If the PTC is so satisfied, a Trial Chamber is thereafter responsible for the continued conduct of the proceedings. The PTC also has other powers necessary to carry out its tasks including: satisfying itself that a person appearing before it has been informed of his or her rights under the Statute (including the right to apply for interim release (bail) pending trial); deciding upon whether a person should be granted interim release (with or without conditions); and ensuring that a person is not detained for an unreasonable period prior to trial due to inexcusable delay by the Prosecutor.

V. *THE COURT: WHERE DOES IT STAND TODAY?*

A. *An Update*

Two and one-half years after its establishment, the Court is now in a position to commence full judicial proceedings. The Regulations of the Court, necessary for its routine functioning, were adopted by the judges in May 2004. They regulate issues including: (1) the composition and administration of the Court; (2) the operation of proceedings before the Court; (3) defense counsel and the legal representation and participation of victims; (4) the rights of a detained person and conditions of detention; and (5) the enforcement of the Court's sentences. In drafting the Regulations, the judges tried to draw relevant lessons from past practice, including that of the *ad hoc* tribunals, to ensure that the Regulations contributed towards fair and efficient proceedings. Consistent with the transparency with which the Court's other basic documents have been adopted, these

Regulations were circulated to States Parties for comments in accordance with Article 52 of the Statute. Under that Article the Regulations would remain in force unless a majority of States Parties objected within six months. The six-month period expired on December 17, 2004. No States made any formal objections within the time period. As such, the Regulations remain in force.

Since the establishment of the Court, the Prosecutor has received over one thousand communications from organizations and individuals from around the world, drawing his attention to alleged crimes. Many of the communications describe alleged crimes that would be outside the jurisdiction of the Court. Other communications, which are not public, may merit the continued attention of the Prosecutor.

Last year, the Prosecutor announced that two referrals had been made to his office by States Parties: Uganda and the Democratic Republic of the Congo. He is conducting investigations in both situations. It therefore appears probable that the Court's first judicial proceedings will begin in the near future. The Central African Republic recently referred the situation of crimes committed on its territory to the Prosecutor. As of February 2005, the Prosecutor had not announced whether he would begin an investigation in that situation.

The judges of the Pre-Trial Division and the Appeals Division are based permanently at the seat of the Court and are ready to commence the first cases. Three PTCs have been constituted and the three situations referred to the Prosecutor have each been assigned to a PTC. The Trial Division, whose judges are not yet all based permanently at the Court, will be fully established once proceedings are at a more advanced stage.

B. *The Court: Part of a System*

The ICC is a new institution which is a humanitarian imperative, necessary to combat impunity and to establish a culture of accountability. The U.N. Secretary-General has described it as "the most significant recent development in the international community's long struggle to advance the cause of justice and rule of law"⁵ Moreover, as this Article has set out, the ICC is

5. *Rule of Law*, *supra* note 4, ¶ 49.

well-equipped to prosecute and punish those who have committed the gravest crimes known to the international community, while maintaining all the requirements of fairness, impartiality, and efficiency that we should demand of a court. However, the Court cannot accomplish its mission on its own. The support of States, inter-governmental and non-governmental organizations (“NGOs”), and the international community at large, is necessary for its success.

As the Court’s personal and territorial jurisdiction is limited in the manner set out above, universal ratification of its Statute is necessary for the Court to achieve a truly global reach in the fight against impunity. Ratification, however, is only the initial step towards the Court reaching its full potential. States Parties and non-States Parties alike can contribute to a strong and effective Court in many ways. The investigation and prosecution of specific cases will not only require the cooperation of the States where the atrocities occurred, but will also call upon the resources of all States which can contribute to the Court’s operations. The ICC relies upon the practical assistance of States in relation to different stages of its proceedings, from the arrest of suspects to the enforcement of the sentences of the convicted.

The Court also seeks cooperation from international organizations, in particular the United Nations, in carrying out its tasks. The United Nations has extensive resources which could aid investigations or prosecutions as well as the implementation of Court decisions. In addition, the Security Council can play an important role in referring cases to the Court. The Assembly of States Parties to the Court and the U.N. General Assembly approved a draft Relationship Agreement in early September 2004. This Agreement was formally concluded by myself on behalf of the Court and the U.N. Secretary-General in October 2004. This Agreement provides a sound basis for cooperation between the Court and the United Nations while recognizing that the Court is an independent, permanent judicial institution.

Support from NGOs is also vital to the success of the Court. NGOs have played a large role in pushing for the creation of the Court and in seeking ratification of its Statute worldwide. These organizations will continue to be important in promoting ratification of the Statute and in encouraging States to implement domestic legislation which complies with the Statute. In addition, many NGOs possess local knowledge and resources that

can aid the Court in its investigations and in its activities in relation to victims. Perhaps the most important role of NGOs, and of civil society more broadly, is in cultivating awareness and understanding of the Court's functions.

Over fifty years lapsed between the calls for a permanent international tribunal in the wake of World War II and the establishment of the ICC. The ICC is not merely our next effort at securing the legacy of Nuremberg and Tokyo; in the light of the time that it took to come into being, it is probably our only chance. Every effort must now be made to ensure that it succeeds.

As I have indicated throughout this Article, the ICC has all the elements necessary for its success. What it now needs is support. The more that people understand that the Court is both a necessary and a credible institution, the more that support for its mission and its operation will grow. As the Court continues to demonstrate its credibility in practice and as awareness of it continues to increase, the ICC will chip away at the wall of impunity which has heretofore protected some of the worst criminals known to humankind, and create in its place an atmosphere of accountability. The true measure of the Court's success will never be merely its number of prosecutions or convictions, but the degree to which it contributes to establishing a culture of accountability.