



Harris Institute Working Paper
Forthcoming in the Cambridge Compendium of International Criminal Law

The International Criminal Court: Past, Present and Future

By
Leila Nadya Sadat
Henry Oberschelp Professor of Law
Director of the Whitney R. Harris World Law Institute
Washington University in St. Louis



WHITNEY R. HARRIS
WORLD LAW INSTITUTE

April 16, 2014

The International Criminal Court: Past, Present and Future

By Leila Nadya Sadat

On July 17, 1998, a Statute for a new, permanent International Criminal Court was adopted at a Diplomatic Conference held in the city of Rome, in an emotional vote of 120 to 7, with 21 states abstaining.¹ The vote was, for many, unexpected, for the road to the Court's establishment of the Court had been long with many twists and turns along the way. Indeed, when the Diplomatic Conference opened on June 15th, it was unclear whether it would lead to a concrete outcome. Some sixteen years later, the Court now has 122 State Parties and has been in existence since July 2002. Permanent premises are under construction, and several trials have been completed or are nearing completion. This Chapter will briefly explore the efforts that led to the establishment of the Court in 1998, outline the basic structure and operations of the Court as well as its current proceedings, and, finally, elaborate upon some of the challenges it faces as it begins its second decade.

The Road to Rome

The notion that a criminal court established by States could try individuals accused of committing crimes under international law was too radical for most statesmen – and even most scholars -- in the early 20th Century. Although the Treaty of Versailles entered into following the First World War provided that a “special tribunal” would try William II of Hohenzollern for the “supreme offence against international morality and the sanctity of treaties,” the American members of the Commission on the Responsibility of the Authors of the War expressed reservations about the legality and the appropriateness of such an exercise, and The Netherlands refused to extradite Kaiser Wilhelm for trial. Following this disappointing precedent, in the 1920s, expert bodies, including the Committee of Jurists of the League of Nations, the International Association of Penal Law and the International Law Association proposed the creation of a permanent international criminal court, but these proposals did not immediately bear fruit. Many experts concluded that the creation of a court to try individuals was an affront to state sovereignty, and to the “right” to be judged under domestic law and by one’s countrymen. They also argued that heads of state could not be liable to the international community but were accountable only to their own citizens, and noted that there was no international criminal code with which potential defendants could be charged. Finally, arguments were raised suggesting that the Court might not only fail to prevent war, but make matters worse, as the lawyers would “begin a war of accusation and counter accusation and

¹ L. N. Sadat & S. R. Carden, ‘The New International Criminal Court: An Uneasy Revolution’, (2000) 88 GEO. L. J. 381. For a fuller treatment of the issues raised in this chapter see W. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford: 2010).

recrimination,” preventing soldiers and sailors from opposite sides from shaking hands and settling matters peaceably.²

It was only with the decision of the Allies to conduct trials after World War II that the concept of an international criminal court achieved a certain momentum. The Allies announced their intentions to hold trials in declarations issued at St. James in 1942 and in Moscow in 1943, but holding a trial rather than simply executing Axis prisoners was not a foregone conclusion. Winston Churchill wanted the Nazi leaders executed, and President Roosevelt’s cabinet was divided. Morgenthau, Secretary of the Treasury, called for the execution of “German arch-criminals;” Stimson, Secretary of War, advocated for trials. Ultimately, Stimson’s view prevailed, and the four allied powers negotiated and adopted, on August 8, 1945, the Charter of the International Military Tribunal at Nuremberg.³ The Charter provided for the trial of the “major war criminals of the Axis powers,” and included three crimes in Article 6 setting forth its jurisdiction: Crimes against peace, war crimes and crimes against humanity. Twenty-three accused were indicted, twenty-two were tried, nineteen were convicted and three were acquitted. Twelve were sentenced to death and executed by hanging. The remainder received prison sentences ranging from ten years to life.⁴ Although the proceedings were undoubtedly a form of “victor’s justice,” their procedural fairness and the fact that twenty-three nations ultimately ratified the Nuremberg Charter helped to ensure their continued importance and legacy. Moreover, the principles established by the Charter and the International Military Tribunal itself were adopted by the newly-created United Nations in 1946.⁵

In contrast with the vociferous Allied response to war criminality in Europe was their comparative silence regarding issues of alleged Japanese war criminality.⁶ Following Japan’s unconditional surrender, a tribunal similar to the IMT at Nuremberg was established by proclamation of the Supreme Commander of the Allied Powers, General Douglas MacArthur, as modified by the Far Eastern Council (on which the four Allied Powers as well as China, Australia, Canada, the Netherlands, the Philippines and New Zealand sat). The Charter of the Tokyo Tribunal (also known as the International Military Tribunal for the Far East or the

² L. Sadat, ‘The Proposed Permanent International Criminal Court: An Appraisal’, (1996) 29 CORNELL INT’L L. J. 665, 672 (formerly Wexler)(discussing the International Law Association draft of 1926).

³ W. Harris, *Tyranny on Trial* 9-24 (2d ed., 1999).

⁴ Judgment of October 1, 1946, International Military Tribunal Judgment and Sentence, (1947) 41 AM. J. INT’L L. 172, 333.

⁵ G.A. Res. 177(II), U.N. GAOR, 2d Sess., 123d plen. mtg. at 111-12, U.N. Doc. A/519 (1947). See also *Principles of International Law Recognized in the Charter of Nuremberg and in the Judgment of the Tribunal*, U.N. GAOR, 5th sess., Supp. No. 12, at 11, U.N. Doc. A/1316 (1950). In the Pacific theater, following WWII, General Douglas MacArthur issued a proclamation (the “Tokyo Charter”) establishing the International Military Tribunal for the Far East. The Tokyo Charter served the same purpose as the Nuremberg Charter, although it was never adopted as an international treaty among the Allied Powers, and the proceedings before the IMFTE were criticized as unfair.

⁶ N. Boister & R. Cryer, *The Tokyo International Military Tribunal: A Reappraisal* 17 (Oxford, 2008).

IMFTE) largely tracked the Nuremberg Tribunal, however the bench was included to encompass eleven members (the FEAC members as well as India). The IMFTE tried 28 Japanese military and political leaders. Seven were sentenced to death, three died of natural causes or were found mentally unfit and eighteen received prison sentences. The proceedings resulted in a lengthy judgment and a stinging dissent rendered by the Indian judge who objected to the exclusion of allied crimes and the lack of judges from the vanquished nations on the bench, allegations that were compounded by the doubtful procedural fairness of the trial itself. Thus, unlike the Nuremberg tribunal, although the IMFTE undoubtedly left a legacy in Japan itself, until very recently, it has had little or no legacy effect in the West.⁷

Following the war, the United Nations embarked upon a codification and institution building effort using the Nuremberg charter as a guide. The Convention for the Prevention and Punishment of Genocide was adopted by the General Assembly in 1948, and the four Geneva Conventions relating to the conduct of war followed one year later. In a resolution accompanying its adoption of the Genocide Convention, the General Assembly invited the International Law Commission to “study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes.”⁸ Thus instructed, the International Law Commission embarked upon a fifty-year long odyssey, voting initially in 1950 to support the desirability and feasibility of creating an international criminal court, only to have the question of the court’s establishment taken away from it by the General Assembly, which handed it over to a Committee on International Criminal Jurisdiction composed of the representatives of Member States. Although the Committee and a successor Committee did produce drafts of a statute for a new international criminal court, their work was shelved as the Cold War made it impossible to achieve consensus.

In 1989, the question of an international criminal jurisdiction found its way back onto the agenda of the General Assembly with the collapse of the Soviet Union and the re-opening of East-West relations. The International Law Commission was again instructed to proceed, and adopted a new version of a Draft Code of Crimes in 1991 and in 1992 established a Working Group which produced a report laying out the basis for the adoption of an international criminal court. The General Assembly responded positively, and the International Law Commission adopted a final draft statute in 1994 that served as the basic text upon which the provisions of the International Criminal Court were established.⁹

The ILC’s 1994 draft included five categories (but not definitions) of crimes: genocide, crimes against humanity, war crimes, aggression and “treaty crimes” that would be set forth in an

⁷ *Id.* 323-27.

⁸ *Study by the International Law Commission of the Question of an International Criminal Jurisdiction*, G.A. Res. 260B(III), U.N. GAOR 6th Comm., 3d Sess., 179th plen. Mtg., at 177, U.N. Doc. A/810 (1948).

⁹ Sadat, *supra* note 2, at 676-86.

annex. It was premised on a new principle, the notion of “complementarity” which meant that the proposed court would complement national criminal justice systems which would have priority over cases that might otherwise come to the Court. The 1994 draft conditioned all cases upon either the consent of the implicated state or the Security Council, except in cases in genocide over which the jurisdiction of the proposed court was automatic. Finally, the 1994 draft suggested that the prosecutor and deputy prosecutor could be elected on a “stand-by” basis and that the judges – except for the President -- would only be paid when actually sitting.

The General Assembly convened an ad hoc committee to discuss the ILC 1994 draft, and subsequently established a Preparatory Committee to begin the extraordinarily difficult process – both technical and political – of developing a statute that could be acceptable to states as well as civil society. The Preparatory Committee, composed of representatives of UN member States, held fifteen weeks of meetings beginning in March 1996 and ending in April 1998,¹⁰ and between the six official meetings of the Preparatory Committee, several inter-sessional meetings were held.¹¹ The text which emerged from these protracted and intense negotiations, which were closely followed by a global coalition of non-governmental organizations, was a complex document containing more than 1300 “bracketed” provisions, representing divergences of views between governments. When the Diplomatic Conference convened on June 15th, 1998, it faced a herculean task: to bring the 160 states attending the conference to a consensus not only on the court’s ultimate establishment, the desirability of which was far from unanimously agreed, but the principles under which it would operate, the crimes it would punish, and the jurisdictional reach and strength of the Court’s statute and its enforcement capabilities.

The Rome Diplomatic Conference of Plenipotentiaries

In the summer of 1998, the text of what we now know as the Rome Statute for the International Criminal Court was negotiated and ultimately adopted. The conference was held in the United Nations Food and Agricultural Organization building in Rome, and was well-attended, both by states and non-governmental organizations. The mood of the conference alternated between anxiety and exhilaration as delegates took up the extraordinarily complex draft text that had been submitted to the Diplomatic Conference by the Preparatory Committee, and attempted to achieve consensus on the difficult issues the conference needed to address. The negotiations would undoubtedly have failed but for several propitious factors: *first*, the emergence of a group of approximately 60 “like-minded” States, which had started as a caucus in 1994 and emerged as a formal and powerful group of countries committed to the court’s ultimate establishment based upon certain core principles;¹² *second*, the emergence of a powerful NGO

¹⁰ F. Benedetti, K. Bonneau & J. L. Washburn, *Negotiating the International Criminal Court* 39 (Martinus Nijhof: 2014).

¹¹ Sadat, *Uneasy Revolution*, *supra* note 1, at 383.

¹² WASHBURN, ET AL, NEGOTIATING THE INTERNATIONAL CRIMINAL COURT STATUTE, *supra* note 8, at 65.

coalition – the Coalition for the International Criminal Court (CICC) -- which engaged in a tireless campaign in support of the court and served as a crucial information dissemination function during the conference by providing information to small delegations that could not possibly cover the entire conference in its various working groups, and by recounting on a daily basis in email, a newsletter and on the radio the status of the negotiations; *third*, a strong commitment to the successful outcome of the conference by key UN leaders, including former Secretary General Kofi Annan and Under-Secretary General for Legal Affairs Hans Corell; *fourth* the successful establishment of the ad hoc international criminal tribunals for the former Yugoslavia and Rwanda, which demonstrated the feasibility of conducting modern international criminal proceedings; *and finally*, the serendipitous good fortune of having able and experienced diplomats undertake the negotiations, most of whom had also participated in the Preparatory Committee meetings and understood each other and the issues well.

During the negotiations, the “complementarity principle” underlying the structure of the proposed new institution in the ILC’s 1994 draft was quickly agreed upon; but less clear was whether its jurisdiction would be “inherent” meaning that states joining the treaty would automatically be subject to the proposed court’s jurisdiction; or whether they would have to opt-in to a particular case before jurisdiction could attach. Many other issues faced the drafters as well, including whether or not the Security Council would act as a filter for cases coming to the court (essentially giving the Permanent Members of that body a veto over all future cases, which was a non-starter for most other UN member states); whether war crimes in non-international armed conflicts and the crime of aggression would be included in the statute; whether the prosecutor would have independent powers of investigation or would require a referral from states or the Security Council prior to engaging the Court’s investigative powers; what the organization structure and trial procedures of the court would be; how to accommodate the interests of victims and witnesses as well as defendants and the prosecution; and what the court’s relationship would be with the United Nations, given that it was to be created as a free-standing institution rather than as UN organ created via an amendment to the UN Charter. Indeed, some of the debates became so fractious that NGO representatives, who were generally allowed access to meetings, were asked to leave as the Conference’s leaders endeavored to achieve consensus.

On July 17, 1998, after five weeks of difficult negotiations, the Conference leaders (the “Bureau”) proposed a compromise text it hoped would accommodate the various positions represented at the conference. There was much agreement amongst delegates on the proposed court’s major features, but a few sticking points remained. On the final day of the Conference, both India and the United States attempted to undo the Bureau’s “package” proposal by offering amendments; these were met with “no-action” motions proposed by Norway, which carried overwhelmingly. The U.S. delegation had argued throughout the negotiations that the Statute should not permit any trials of individuals without the consent of their state of nationality unless the Security Council referred the case (thereby insulating any U.S. nationals from prosecution before the Court). Not willing to accept the defeat of its amendments, the United States then

called for a vote on the Statute as a whole – which it lost, 120 in favor, 7 opposed and 21 states abstaining. China, Iraq, Israel, Libya, Qatar and Yemen joined the United States in opposing the ICC Statute. Delegates supporting the statute – and NGO representatives – erupted in cheering and crying as the tensions of the past five weeks gave way to the realization that more than seventy-five years of hard work and false starts had just born fruit.

The Organizational Structure and Operational Features of the Court

The negotiators of the ICC statute created an institution almost breathtaking in its complexity and organizational structure. The 128-article Statute is divided into thirteen Parts, each addressing some feature of the Court's establishment, jurisdiction or operation.¹³ The Statute is supplemented by important ancillary documents negotiated following the Rome Conference (but prior to the Statute's entry into force), including, importantly, the Elements of Crimes, the Court's Rules of Procedure and Evidence, a relationship agreement between the Court and the United Nations, an agreement on the privileges and immunities of the Court and the rules of procedure for the Court's Assembly of States Parties (ASP) that would ultimately provide the Court's management and oversight. The drafting of these ancillary documents was taken up by a Preparatory Commission composed of representatives of member states which had signed the Final Act of the Rome Diplomatic Conference and other States which were invited to participate in the Rome Conference.¹⁴ Like the Preparatory Committee that had prepared the draft Statute taken up in Rome, the Preparatory Commission was composed of State delegates, many of whom had represented their governments during the Preparatory Committee meetings and the Diplomatic Conference. This facilitated the work of preparing the Statute's entry into force. The Statute attained the requisite ratifications needed for entry into force with the deposit of eleven ratifications in April, 2002, bringing the total number of States Parties to sixty-six.¹⁵ On July 1, 2002, the Rome Statute entered into force.

Jurisdiction and Admissibility

In terms of jurisdiction *ratione temporis*, pursuant to Article 11(1), the Court only has jurisdiction with respect to crimes committed after the entry into force of the Rome Statute. Additionally, with respect to States ratifying the Statute after July 1, 2002, the Court only has jurisdiction with respect to crimes committed after the entry into force of the Statute for that State, unless that State decides otherwise.

¹³ Rome Statute of the International Criminal Court, U.N. Doc. A/ CONF.183/9 (July 17, 1998).

¹⁴ *Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of the International Criminal Court on 17 July 1998*, Annex I, Resolution F, U.N. Doc. A/CONF.183/10 (1998). See also Philippe Kirsch, 'The Work of the Preparatory Commission', in *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* xivi (Roy S. Lee, ed., 2001).

¹⁵ See L. N. Sadat, 'Summer in Rome, Spring in the Hague, Winter in Washington?: U.S. Policy Towards the International Criminal Court', (2003) 21 *WIS. INT'L. L. J.* 557, 575.

In terms of jurisdiction *ratione materiae*, although the negotiators of the Rome Statute contemplated adding many crimes to the Court's jurisdiction including terrorism, drug trafficking, hostage-taking, and aggression, it was ultimately decided that it would be preferable to begin with universal "core crimes" defined in treaties or found in customary international law rather than add treaty crimes, the universality of which could be questioned. Moreover, although there was little doubt that the crime of aggression was a "core crime," and the Nuremberg judgment declared aggression to be "the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole,"¹⁶ many states were opposed to its inclusion in the Rome Statute. Thus, the Rome Statute initially defined only three crimes: Genocide (Article 6), crimes against humanity (Article 7) and war crimes (Article 8), which were the only offenses immediately chargeable.

As a compromise between those desiring the inclusion of the crime of aggression and those opposing it, Article 5 listed aggression as one of the crimes within the Court's jurisdiction, but specified that the Court could not exercise jurisdiction over aggression until it was defined by the Assembly of States Parties at a future time. In June 2010, the Assembly of States Parties held a Review Conference in Kampala, Uganda, during which a definition of aggression was agreed upon, and a new Article 8*bis* was added to the Rome Statute. However, pursuant to the text adopted, which includes two separate articles on the exercise of jurisdiction over the crime of aggression, Articles 15*bis* and 15*ter*, in the Court cannot exercise jurisdiction over the crime until the Kampala amendments have entered into force for at least thirty states (i.e., those states have ratified the amendments) *and* the States Parties to the ICC Statute so agree under the provisions of the Statute governing amendments thereto which require either a consensus vote or an absolute two-thirds majority *and* in any event, not before, at the earliest January 2, 2017.

Finally, Resolution E of the Conference's Final Act provided that terrorism and drug crimes should be taken up at a future Review Conference, and proposals for their inclusion in the Statute have been taken up by Working Groups of the ASP. However they have never been included in the Court's jurisdiction and progress on this issue has been very slow to date.¹⁷

Preconditions on the Exercise of the Court's Jurisdiction: Some of the most difficult features of the Court's statute to negotiate were the provisions on how the Court's jurisdiction could be activated in particular cases, and when a case would be admissible before the Court. As noted earlier, some States wished to be able to opt out of the Court's jurisdiction in cases involving their nationals, or to require all cases to be filtered through the Security Council. Conversely, civil society and eventually the members of the Like Minded Group of States

¹⁶ Nuremberg Judgment, *supra* note, 4 at 186.

¹⁷ See, e.g., *The Report of the Working Group on Amendments* at the tenth session of the ASP (New York, 12-21 December 2011), at 2-4 (consideration of proposals on terrorism from The Netherlands and drug trafficking from Trinidad and Tobago and Belize).

wanted a Court with a simple and automatic jurisdictional regime rather than a “Court á la carte.” The compromise is found in Articles 12-15 which set forth the “Preconditions” and conditions for the Court’s exercise of its jurisdiction. These provisions allow referrals to be made either by a State Party, by the Security Council and by the Prosecutor on his or her own initiative, using *proprio motu* powers. If the aggression amendments enter into force, the uniform jurisdictional regime of the Statute will be impaired as states are not bound by those amendments unless they choose to be, and in cases brought to the Court by a State Party or the Prosecutor, the Court has no jurisdiction over the nationals or territory or non-party states (which was the desired U.S. outcome at Rome with respect to all crimes within the Court’s jurisdiction).

While there has been a great deal of discussion as to whether jurisdiction in the Statute is “universal” or consent-based, it is undoubtedly the case that the prescriptive jurisdiction of the Statute is premised on the universality principle, which is why the Statute provides that the Security Council may refer a situation to the Court whether or not it involves crimes committed on the territory of a State Party or by a national of an ICC State Party.¹⁸ However, the adjudicative jurisdiction of the Court is more limited. In cases involving a referral by either a State Party or the Prosecutor on his or her own initiative, although the universality principle does not disappear, layered upon it is a State consent regime based upon two additional principles, which are disjunctive: either the territorial State or the State of the accused’s nationality must be a party to the Statute or have accepted the jurisdiction of the Court. Finally, in case of a referral by the ICC Prosecutor using his or her *proprio motu* powers, an additional pre-condition is found in Article 15 which requires the Prosecutor to apply to a Pre-Trial Chamber for authorization to open an investigation before proceedings as such.

Admissibility: In addition to jurisdiction, the Rome Statute requires that a case be admissible before the Court to proceed. Admissibility is linked to the principle of complementarity found in the Preamble and Articles 1 and 17 of the Statute. The ICC is envisioned as a Court of last, not first resort, and may exercise jurisdiction only if: (1) national jurisdictions are “unwilling or unable” to; (2) the crime is of sufficient gravity; and (3) the person has not already been tried for the conduct on which the complaint is based. Although the inclusion of the complementarity principle undoubtedly increased State support for the Court, it makes the Court’s operation more difficult and litigation regarding admissibility has complicated several of the Court’s early cases. For example, in the Kenyan situation, the ICC Prosecutor initiated the case under Article 15 of the Statute, claiming that Kenya was “unwilling” (and presumably unable) to prosecute individuals who had perpetrated crimes during the post-election violence that wracked Kenya in the wake of the 2007 elections there. An investigation was authorized by Pre-Trial Chamber II in March 2010, however, nearly one year later, Kenya then challenged the admissibility of the case before the ICC. Litigation ensued for several additional months and ultimately both the Pre-Trial Chamber and the ICC Appeals Chamber concluded that

¹⁸ *Rome Statute, supra* note 12, art. 13(b).

the cases were admissible because the Kenyan government had failed to provide sufficient evidence to substantiate that it was investigating the six suspects charged before the ICC for the crimes alleged against them. The Appeals Chamber clarified the meaning of “inadmissibility” by holding that for a case to be inadmissible under article 17(1)(a) of the Rome Statute, the national investigation must cover the same individual and substantially the same conduct as alleged in the proceedings before the Court.¹⁹ Conversely, in the Al-Senussi case, involving the situation in Libya, the Pre-Trial Chamber concluded that Libya was investigating Al-Senussi for the conduct with which he was charged at the ICC, and that Libya was neither unwilling nor unable to carry out the investigation. Thus, it concluded that the case was inadmissible before the ICC although it recognized that the absence of defense counsel and the security concerns in Libya were serious issues.²⁰ Indeed, Al-Senussi expressed a clear preference to have his case heard before the ICC, undoubtedly believing the trial would be fairer before an international court. Thus, even with respect to a particular situation, some accused will be tried before the ICC, whereas others will be tried in national courts.²¹

Organizational Structure

The Court’s organizational structure is much more complex than predecessor international tribunals. The four organs of the Court are the Presidency, the Judiciary (composed of three divisions: Appeals, Trial, and Pre-Trial Divisions), the Office of the Prosecutor and the Registry. In addition, the Assembly of States Parties established by Part 11 of the Statute oversees the operations of the Court (including its budget) and the Trust Fund for Victims, established by a decision of the Assembly of States Parties under Article 79. The Trust Fund administers funds and other forms of assistance for the benefit of victims of crimes within the jurisdiction of the Court. It advocates for victims and mobilizes individuals, institutions with resources and the goodwill of those in power for the benefit of victims and their communities. As of this writing, the Court’s annual budget is just short of 122 million Euros, 10 million of which are allocated to the Judiciary, 33 million to the Office of the Prosecutor and 66 million to the Registry, and the staff number in the several hundred.

The Court has eighteen judges, nominated and elected by secret ballot by the Assembly of States Parties. Each judge must be a national of an ICC State Party and be a person of “high moral character, impartiality and integrity” who possess the qualifications required in their

¹⁹ Prosecutor v. Muthaura, et al., Case No. ICC-01/09-02/11 OA, *Judgment on the Appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 31 May 2011 entitled “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute,”* ¶ 39 (Aug. 30, 2011).

²⁰ Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi, Case No. ICC-01/11-01/11, *Decision on the admissibility of the case against Abdullah Al-Senussi* (Pre-Trial Ch. I, October 11, 2013).

²¹ *Id.*

respective States for appointment to the highest judicial office of that State. In choosing, Article 36 of the Statute requires the Assembly to “take into account” the need for gender balance, equitable geographical representation, and the representation of the principal legal systems of the world. Each judge serves one, non-renewable nine-year term, and at least nine of the judges must have established competence and experience in criminal law and procedure; five must have competence and experience in relevant areas of international law. The judges organize themselves into Divisions upon their election, and elect the members of the Presidency, who serve for a term of three years. Five judges sit as members of the Appeals Chamber, which decides upon a Presiding Judge for each appeal. Three judges sit in each Trial Chamber and Pre-Trial Chamber, although the functions of the Pre-Trial Chamber may be carried out by a single judge if the Statute so provides. The Pre-Trial Chamber oversees the initiation of a case until confirmation of the charges against the accused, after which time the accused is committed to a Trial Chamber for trial.

It was initially thought that the addition of the Pre-Trial Chamber would assist with the streamlining of cases by preparing them for trial and avoiding some of the procedural delays experienced at the ad hoc international criminal tribunals, which averaged 3 years between arrest and judgment.²² Thus far, however, the addition of the Pre-Trial Chamber seems not to have had this effect: in the *Lubanga* case, for example, the accused was transferred to The Hague on March 16, 2006, the decision confirming the charges was issued in January 2007, but trial did not begin until two years later, and the decision was not issued until March 14, 2012, six years after arrest. Likewise, the *Katanga* case took nearly seven years between arrest and judgment. Moreover, there has been some confusion about the respective roles of the Pre-Trial and Trial Chambers, perhaps due to the fact is that the functions and operation of the divisions are spread throughout the Statute and difficult to discern, and because the addition of this preliminary phase of the proceedings is new to international criminal justice. In contrast, the first case before the ICTY took less than a year to try, and the trial judgment was rendered two years following the accused’s transfer to the Tribunal.

Like the judges of the Court, the ICC Prosecutor and Deputy Prosecutors are elected by the Assembly of States Parties, and serve one, non-renewable, nine-year term. Although the Prosecutor and Deputy Prosecutor(s) must be of different nationalities, unlike the judges they need not be nationals of an ICC party state. It is the ICC Prosecutor who drives the caseload of the Court, and it is thus not surprising that during the Statute’s negotiation both during and prior to Rome, defining the powers of the Prosecutor was highly contentious. In particular, one innovation of the ICC Statute is that the Prosecutor can initiate cases on her own initiative, using her “*proprio motu*” powers set forth in the Statute, and subject to the jurisdiction and

²² International Criminal Tribunal for the former Yugoslavia, Weekley Press Briefing, 15 January 2003, www.icty.org/sid/3446 (noting that a typical ICTY trial is 16 months); *See also* Report on the Completion Strategy of the International Criminal Tribunal for Rwanda, UN Doc. S/2009/247. 14 May 2009 (stating that the average length for a trial at ICTR is from two to four years).

admissibility requirements of the Statute. As a response to concerns about the potential overreaching, the Statute contains extensive checks on the Prosecutor's power including a requirement that the Pre-Trial Chamber must authorize any investigation brought on the Prosecutor's own initiative only if it independently determines that a "reasonable basis" exists that crimes within the jurisdiction of the Court have been committed.

Finally, the Registry is the administrative organ of the Court for non-judicial matters. A full-time member of the Court, the Registrar is elected by the Judges for a five-year term and exercises his or her functions under the authority of the President of the Court. Although the Statute has very little to say about either the Registrar or the Registry, this organ is by far the largest at the Court with a great deal of control over the Court's operations. The Registry is responsible for initiating staff regulations governing the court's personnel, and for the establishment and operation of the Victims and Witnesses Unit. It also carries out outreach activities, and is responsible for information technology and perhaps most importantly, creates and maintains the list of defense counsel from whom the accused may choose if counsel is to be provided and otherwise supports the defense in its work.

The Court's Current Caseload

As of this writing, the Court has eight situations on its docket, involving 21 cases brought against 30 individuals. All eight situations involve African nations, five of which referred their own situations to the Court including the Central African Republic, Côte d'Ivoire, the Democratic Republic of the Congo, Mali and Uganda. Two situations, Darfur, Sudan and Libya, were referred to the ICC by the Security Council in 2005 and 2011, respectively.²³ One situation, Kenya, was brought by the Prosecutor on his own initiative, pursuant to Article 15 of the Statute.²⁴ Of those accused in these situations, one has been acquitted, two have died, and charges have not been confirmed against four persons. Three trials have been completed and two are ongoing; three more will commence shortly. The three completed trials have resulted in two convictions and an acquittal, and each involved accused from the Democratic Republic of the Congo. Several appeals – by both the Prosecution and the defense – are pending. More than a third of the accused remain at large. In addition to the eight situations currently on its docket, the Office of the Prosecutor is currently conducting preliminary examinations in a number of situations, including Afghanistan, Georgia, Colombia, Honduras, Korea and Nigeria.

Challenges and Future Prospects

²³ United Nations Security Council Resolutions 1593 and 1970.

²⁴ Côte d'Ivoire was technically a *proprio motu* case. It was not a party to the ICC Statute at the time the investigation began, but had accepted the jurisdiction of the Court and requested the Prosecutor to proceed. It has now ratified the Rome Statute.

The International Criminal Court has faced significant challenges during its first twelve years. Many have been political. It weathered a brutal campaign waged by the United States during the first term of President George W. Bush that explicitly advocated for its “wither and collapse”²⁵ and involved the adoption of anti-ICC legislation by Congress, the negotiation of bilateral immunity agreements for U.S. persons with more than 100 countries, the extraction of concessions in Security Council resolutions on peacekeeping exempting non-state party peacekeeping missions from the ICC’s jurisdiction and perhaps, most famously, the sending of a letter attempting to “un-sign” or nullify the U.S. signature of the Statute that had taken place in the final days of the Clinton administration. The punishing treatment from Washington notwithstanding, membership in the ICC grew due to the unceasing work of civil society, particularly the NGO Coalition for the International Criminal Court, the successful work of the ad hoc international criminal tribunals for Rwanda, the former Yugoslavia and Sierra Leone, and increasing support from regional organizations. The Obama administration has taken a much more positive view of the ICC, sending a high-level US delegation to ASP meetings, cooperating to the extent possible given the anti-ICC legislation adopted by Congress in assisting with arrests and more generally adopting a positive and productive tone towards the Court and its activities. Although it is unlikely to submit the treaty for ratification in the Senate, current policy is to “engage” with States Parties to the Rome Statute on issues of concern and support the prosecution of cases that advance U.S. interests and values.²⁶

At the same time, as U.S. opposition has diminished, other political opposition has surfaced. The leaders of many African Union member states have challenged the ICC on the basis that it has “targeted” Africa. These objections have increased over the years, centering first upon the Prosecutor’s decision to issue an arrest warrant directed to Sudanese President Omar al-Bashir, which resulted in efforts to get the Security Council to use Article 16 to defer the proceedings against him as well as a proposal to extend the possibility of deferral (for ongoing cases) to the General Assembly.²⁷ Subsequently, with the election of ICC indictees Uhuru Kenyatta and William Ruto as President and Deputy President of Kenya, respectively, the ICC Assembly of States Parties yielded to political pressure and amended the ICC’s Rules of Procedure and Evidence to permit them to be absent from their trials (subject to judicial approval) to perform “extraordinary public duties.”²⁸ Although most of the African situations

²⁵ Paula R. Kaufman, *Bolton is on Duty as America’s Sentry*, INSIGHT ON THE NEWS, July 22, 2002, at 3639, available at 2002 WL 8338907 (quoting Bush administration official John Bolton).

²⁶ See The White House, National Security Strategy 48 (May 2010), available at http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf.

²⁷ ‘Braced for the Aftershock’, *The Economist*, Mar. 7, 2009, at 67 (citing efforts pushing for the deferral from African-Arab groups at the U.N.); Franklin Graham, Op-Ed., ‘Put Peace Before Justice’, *N.Y. Times*, Mar. 3, 2009, at A27 (stating that deferral by the U.N. is necessary for encouraging peace in Sudan).

currently before the Court were referred by African states themselves, the African Union's anger at the ICC and threats of a mass withdrawal of African states parties pose a significant threat to the Court's real and perceived legitimacy and public support. It also highlights another challenge for the ICC – which is the need for universal ratification and support from the 70 states which are currently outside the Rome Statute system and which represent approximately three-fifths of the world's population. This includes China, India, Russia and, as aforementioned, the United States. The absence of three permanent members of the Security Council is particularly damaging to the Court's effectiveness and credibility as those states have the power to block or refer situations that might be heard by the Court.

Finally, the Court has challenges of a more mundane nature – financing, public outreach, streamlining trial procedures, arresting the accused. Amongst these challenges, both mundane and extraordinary, it is easy to lose sight of the Court's successes and the achievement of the Rome Conference. The International Criminal Court was the last international institution established in the Twentieth Century, a tribute to the judgment of reason over power, to paraphrase Justice Jackson's famous opening address at Nuremberg. It is an institution dedicated to the prevention and punishment of serious crimes that threaten the security of humankind, a living tribute to the idealism of Nuremberg and the belief that the world can be safer and more secure under the rule of law. Given the values its establishment represents, one can only hope it prospers, and that the States which created it provide it with the political and financial support it needs to thrive.

²⁸ M. Plachta, 'African Union Requests Deferral of Trial by the International Criminal Court', (2014) 30 Int'l Enforcement L. Reporter 29-32; *See also* 'Kenya's 'Victory' At Assembly of States Parties Meeting', AllAfrica, November 28, 2013, http://allafrica.com/stories/201311281686.html?aa_source=sptlgt-grid.