Preface and acknowledgments

On July 17, 1998, 120 States voted to adopt the Rome Statute of the International Criminal Court (ICC). The Statute entered into force on July 1, 2002, just under four years after it was adopted, following achievement of the 60 ratifications required for its entry into force. The speed with which States endorsed the ICC statute was much swifter than anyone could have anticipated. The establishment of a standing international penal tribunal was a landmark achievement for the international community. Among the reasons for this was that, for the better part of half a century, states had been contemplating the creation of such a court with jurisdiction to prosecute individual perpetrators of heinous international crimes such as crimes against humanity, genocide, and war crimes. Rome represented the place where agreement had finally been reached on the details of how such a tribunal would work in practice. It was to be a court of last resort that would supplement, not replace, the role of national jurisdictions, and in that way contribute to shifting the global culture of impunity.

Today, 14 years after the Rome Statute took effect, 10 active situations involving the investigation of a total of 23 persons for crimes within the Court’s jurisdiction are ongoing in Uganda, the Democratic Republic of the Congo (DRC), Central African Republic (CAR), Darfur, Sudan, Kenya, Libya, Ivory Coast, Mali, and Georgia. Most of these have been self-referrals by the States-Parties which have through such action indicated that they were willing to address the crimes themselves but unable to do so and therefore requested international help. A couple, those involving Sudan and Libya, were referrals by the United Nations Security Council acting pursuant to its responsibility to ensure international peace and security. A number of cases have been completed, resulting as should be expected of a fair and impartial tribunal, in both convictions and acquittals. Several preliminary prosecutorial examinations of the situations of Afghanistan, Colombia, Nigeria, Guinea, Iraq, Ukraine, and Palestine are ongoing as of this writing. The ICC is, by any measure, beginning to establish itself as a key player in international affairs as it gives live meaning to its statutory provisions, develops
investigations and trial procedures, and builds an early body of useful jurisprudence.

Though the ICC is unprecedented, and by its mere existence represents a step forward in the fight against atrocity crimes, the reality is that it exists and functions in a wider system of international law and politics. It is also a single institution. The ICC is therefore facing some significant challenges in carrying out its core mandate to deliver credible and quality justice within a reasonable time-frame. Besides some of the start-up and other internal issues, one of the most fundamental of these is that its 124 States-Parties and 15 signatory states have, as of this writing, failed to give effect to a number of prominent ICC arrest warrants. The lag in state cooperation threatens to undermine the effectiveness of the Court, and is taking place in the shadow of tensions with African States. Furthermore, the Court is stymied by the absence of noteworthy states who have rebuffed it, including the United States, Russia, China, Israel, and India. These and a number of other countries remain non-States-Parties to the Rome Statute. The additional reality is that, even if it ramps up its numbers in terms of situations and cases that it covers around the world and the number of trials that it is able to complete swiftly, the ICC is and will always be only a small part of the solution in the investigation and prosecution of international crimes. The overwhelming quantity of justice for the most serious crimes of concern to the international community as a whole will only come, as the Rome Statute itself acknowledges, if states take measures at the national level and enhance their cooperation with each other to do so.

Fortunately, since 1993 when the Security Council created the International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) in 1994, the international community and national jurisdictions have gained experience with relationships between an international criminal tribunal and national processes. Although the combination of international and national proceedings has largely been ad hoc and uncoordinated to date, the ICC, which is the subject of this book, will benefit from these prior experiences as it moves forward with its cases in the future. Of course, the ICC’s statutory framework as the world’s first and only permanent court differs fundamentally from those of its predecessors. Nonetheless, the lessons learned from the practices of the earlier tribunals, whether positive or negative, can inform the ICC on how best to interact and coordinate with national and regional jurisdictions in the shared goal of helping to establish an effective system of international criminal justice.

Indeed, the experience of the ad hoc tribunals and the work of the ICC to date demonstrate that, no matter how powerful they may be on paper,
international criminal tribunals need to interface effectively with national and possibly regional jurisdictions to more effectively target impunity. This includes creating an effective partnership with states with regard to multiple types of proceedings and in multiple forums. National prosecutions, non-judicial, local proceedings, and cooperation matters require state action and ICC reaction. The ICC must also work with state and regional bodies, such as the Security Council, the African Union, the European Union and the Organization of American States. Finally, non-governmental and inter-governmental organizations are important actors with which the ICC has already had, and will continue to have, a continuing relationship.

The premise of this book, which grew out of informal discussions among the three authors when we had occasion to convene for a conference at the University of Pittsburgh School of Law in April 2012, is that an analysis of the earlier tribunals and the ICC’s own interactions to date with national jurisdictions will be informative and beneficial for the emerging field of international criminal law. The reasons for this are both principled and pragmatic.

At the level of principle, in sharp contrast to the Yugoslav and Rwanda Tribunals which had primacy over national jurisdictions in relation to the prosecution of war crimes, genocide, and crimes against humanity, the ICC is founded on the doctrine of complementarity. Under the latter principle, it is only when states are inactive, unwilling or incapable of investigating and prosecuting that the permanent court’s jurisdiction is triggered, assuming of course that the gravity and other related admissibility criteria are fulfilled. It follows that better interaction with national jurisdictions not only enhances the work of the Court, but also the necessary State-Party discharge of their obligations to take action to combat international crimes. Indeed, as was so often said by the ICC’s first prosecutor, Luis Moreno-Ocampo, and equally often reiterated by the current one, Fatou Bensouda, the success of the Court may best be measured by the absence of cases before it. This prosecutorial ideal is only valid if national investigations and prosecutions are taking place, and the Court is taking its own share of the burden to prosecute those leaders most responsible for the crimes since they will seldom be prosecuted at the national level.

Second, and more pragmatically, people living in conflict and post-conflict regions, as well as the international community, would likely benefit from a study of what worked well and what did not work well in these situations, and what lessons, if any, they might hold for the fledgling system of global criminal justice anchored around the permanent ICC. In this vein, we can note that various efforts have been made at
the policy level to identify the best practices and lessons learned from the existence of the ad hoc tribunals for the rule of law and other transitional justice contexts that might arise in the future. For example, in August 2004, the Secretary-General of the UN issued a seminal report on the rule of law and transitional justice in conflict and post-conflict situations in which he attempted to identify key best practices for policymakers at the international level. Similarly, in the academic literature over the past few years, there have been various attempts to identify and enhance the legacy of the international criminal tribunals for Rwanda, the former Yugoslavia, and Sierra Leone.

That said, those policy and academic initiatives have been focused primarily on identifying the jurisprudential legacy of those tribunals through discussion of the impressive body of legal rules that they have bequeathed to the international community through their case law. Our own goal in this work is fundamentally different from earlier efforts. The task we have set for ourselves is not to identify how these tribunals contributed to the development of international law, whether through their case law or their rules of procedure and evidence. That is of course important. However, it is not our focus in this particular book.

Instead, we turn the lens on the practices of the tribunals that preceded the ICC to see what lessons, if any, they hold for the present challenges facing the global court on various questions that hold significance for the ICC vis-à-vis its interaction with states, whether on questions regarding what ought to be the relationship between international criminal tribunals and national non-judicial proceedings, such as truth commissions or amnesties; the issue of state cooperation with international and hybrid tribunals, and the role of the Security Council; the potential role of regional courts in the prosecution of atrocity crimes; and the role of Non-Governmental Organizations’ (NGOs’) interventions through amicus curiae briefs in the proceedings before the tribunal. We generally attempt to locate how the operations of the prior courts took place in a fashion that could develop ideas for the ICC while keeping in mind the Rome Statute’s unique legal framework and the specific controversies affecting its success today and in the future. Such a task must always be limited. So while we have touched on what we consider the more important issues, within the confines of a single book, we do not pretend that the work is exhaustive. We only hope to broach a particular kind of conversation on the critical topics with the assumption that this will be of benefit to the ICC.

This project has taken us a few years to complete. As always with collaborative endeavors of this kind, which took on a life of its own in between this and other competing commitments, we benefited from the
help of a number of people. We wish to take a moment to acknowledge a handful of them. First, we thank Kirsten Bowman, who worked with us as a research attorney through IBA Special Fund support and provided both ideas and initial drafting for the book in the early stages. Second, we are grateful to our research assistants who assisted us with this project: Erica Gaines from Florida International, Tiangay Kemokai, Matt Chen, Sarah Kanbar, and Alexander McKay from McGeorge, and Yannic Kortgen and Mariya Peykova from the IBA, all of whom provided top-notch assistance. In terms of administrators, we are forever grateful to the late Mandy Lee of the IBA.

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This book has been a truly collaborative effort and it has been a pleasure to work together on the project. Each of us brings different experiences, expertise, and perspectives to the table. Charles has extensive knowledge and experience in ICL with a special expertise in sub-Saharan Africa, one of the most crucial areas of the world in ICL.
today. He also worked in both the ICTR and the SCSL, which added knowledge of how the courts work from the inside, and he currently advises the African Union on issues such as aspects of the African Court which is poised to handle atrocity crimes. Mark worked for many years in the Balkans, bringing first-hand experiences into our discussions, especially about the impact of international justice on victims. In recent years, Mark has spearheaded efforts on diplomacy, cooperation, and training programs for lawyers and judges, all of which were highly significant in our analyses. Linda has worked in domestic and international criminal law, with a particular focus on the role of judges, the procedure of the courts, and non-judicial alternatives. These areas were important in understanding international and national court systems. In the course of our discussions on each chapter, we challenged each other. We pushed each other. We learned from each other. The result, we believe, is a book that is thoughtful and well-reasoned from multiple perspectives.

In closing, we hope that the book will provide helpful insight and ideas to all of those with interests in the tremendously important work of the ICC and the challenge of ensuring accountability for the far too often ignored victims of grave crimes around the world.