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## An Introduction to the International Criminal Court

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## **An Introduction to the International Criminal Court**

William A. Schabas

Cambridge, UK: Cambridge University Press, 2001 (406 pp.)

*Reviewed by Ian Rennie<sup>1</sup>*

William Schabas has undertaken an important work in writing an introductory volume describing the International Criminal Court.<sup>1</sup> The book is divided into two parts: first, a substantive description of the Court, the governing Statute, international criminal law and anecdotal information about the negotiations leading to the Statute and its associated documents. The second part is a compendium of the basic documents of the Court, including the Rome Statute,<sup>2</sup> the Elements of Crimes<sup>3</sup> and the Rules of Procedure and Evidence.<sup>4</sup> The compendium provides a useful resource for those interested in the Court. Schabas has adopted the standard approach of books on the subject of international criminal law – namely the inclusion of primary documents. While there are many books that provide such documents, analytical analyses of these documents are quite rare. The inclusion of the substantive half of the book is therefore a welcome departure from the norm. Schabas

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<sup>1</sup> The International Criminal Court (ICC) was formed, at least on paper, in the Rome Statute of 1998. *Rome Statute of the International Criminal Court*, 17 July 1998, UN Doc. A/CONF.183/9, reprinted in Schabas, *supra* note 1 at 167-247[hereinafter the *Rome Statute*]. Canada ratified the Statute in 2001 along with the United Kingdom. The Court will address the crimes of: Genocide, Crimes Against Humanity and War Crimes.

<sup>2</sup> *Rome Statute*, *supra* note 1.

<sup>3</sup> *Report of the Preparatory Commission for the International Criminal Court, Addendum, Finalized Draft Text of the Elements of Crimes*, UN Doc. PCNICC/2000/INF/3/Add.2, reprinted in Schabas, *supra* note 1, at 248-292 [hereinafter the *Elements of Crimes*].

<sup>4</sup> *Report of the Preparatory Commission for the International Criminal Court, Addendum, Finalized Draft Text of the Rules of Procedure and Evidence*, UN Doc. PCNICC/2000/INF/3/Add.3, reprinted in Schabas, *supra* note 1, at 293-382.

indicates that the goal of his work is to provide a comprehensive, accessible introduction to the ICC.

The book parallels the organization of the Statute. Most of the chapters are expository, commenting on the appropriate provisions of the Rome Statute and associated documents. Schabas delivers on his promise to direct readers to further sources where detailed analysis is available – in particular Lee and Bassiouni.<sup>5</sup> As a result of his participation in the Rome Conference where the Statute for the Court was adopted, it is at times unclear whether he is relating the views of the negotiators at the time or if he is drawing an analytical conclusion of his own.

Complementarity is the major “cornerstone” upon which the Rome Statute is based.<sup>6</sup> Schabas has adopted a definition of complementarity as the relationship between the domestic and international jurisdictions in the mathematical sense of the two being disjunctive complements of one another, but Schabas spends an entire chapter on jurisdiction and admissibility. The concept of complementarity, I would suggest is more important than this and may merit a full chapter of its own.

Professor Schabas has developed two themes in his work, but in both cases only partially. The first of these themes concerns human rights. Schabas suggests that the ICC was created to punish the most serious violations of human rights if a country fails to prosecute domestically. This is a somewhat misleading and sweeping categorization. The Rome Statute does not create a court with power to try and punish the most serious violation of human rights. Its jurisdiction extends only to a subset of violations with respect to the core crimes expressed in the Statute, and even within this the Court only has the power to prosecute where the admissibility of a case is valid. It is not for the Court to assess whether a state’s legal system has failed, merely whether a *bona fide* prosecution occurred in a specific instance.<sup>7</sup>

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<sup>5</sup> Schabas relies heavily upon: Roy S. Lee, ed., *The International Criminal Court: The Making of the Rome Statute – Issues, Negotiations, Results* (The Hague, The Netherlands: Kluwer Law International, 1999) and M. Cherif Bassiouni, ed., *The Statute of the International Criminal Court: A Documentary History* (Ardsley, New York: Transnational Publishers, Inc., 1998).

<sup>6</sup> John T. Holmes, “The Principle of Complementarity,” in Lee, *supra* note 5, at 73.

<sup>7</sup> This proposition is supported upon examination of the Rome Statute, which only brings individuals to account, not States. Some academic writers believe that the State is still brought to account in any event: see Madeline Morris, “High Crimes and Misconceptions: The ICC and Non-Party States,” (2001) 64 L. & Contemp. Probs. 14.

The book also addresses the nature of the Court as an institution, and its historical genesis. It is a hybrid of the English Common Law and the Continental Civil Law systems (Napoleonic/Romano-Germanic). The roles that the Pre-Trial Judge and the Prosecutor have are not unlike a French *juge d'instruction*.<sup>8</sup> He notes the lack of any rule of evidence excluding hearsay or indirect evidence as indicative of the “deep chasm” between the two legal systems.<sup>9</sup> However “a healthy balance” was achieved by the compromise on the issue of plea-bargaining.<sup>10</sup> Finally, he states, in his opinion, that the inquisitorial approach (civil law) might be the better in an international context, where the defence faces insurmountable obstacles in obtaining evidence and interviewing witnesses from uncooperative states.<sup>11</sup>

Like the recommendation for dealing with the themes of human rights and “complementarity”, the hybrid character of the Court may have been better described with a chapter of its own, rather than being dispersed over several chapters.<sup>12</sup> To undertake such a functional analysis would ultimately have required a departure from the parallel adherence of the book’s structure to that of the Rome Statute. It seems that Schabas has tried to produce a commentary of the Rome Statute, but has incorporated some elements of a functional analysis of the Court. Again, perhaps he is simply indicating that there are more complex themes underlying the Statute.

Professor Schabas’ book provides a satisfactory introduction to the International Criminal Court and the provision of basic documents governing the Court is a useful resource. His substantive commentary on the legal issues is insightful and useful. Schabas’ outlook on the concept of “complementarity” is from the disjunctive perspective rather than the conjunctive. The conjunctive is probably the intended conceptualization in the Statute and therefore readers new to the Court and its jurisdiction may have found it easier to understand with a different formulation.

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<sup>8</sup> *Ibid.*

<sup>9</sup> *Supra* note 1, at 125.

<sup>10</sup> *Ibid.*

<sup>11</sup> *Supra* note 1, at 96.

<sup>12</sup> Professor Schabas has published an article (in French) that develops the theme much more coherently and could in itself be the basis for such a chapter: William Schabas, “Common law, <<Civil Law>> et droit pénal international: Tango (le dernier?) à La Haye,” (2000)13 R.Q.D.I. 1 at 287-307.

The Rome Statute, representing a benchmark in the development of human rights, was really the theme of only the first chapter. Successive chapters proposed a second theme – that of the hybrid nature of the Court between Common Law and Civil Law. The theme was carried through successive chapters and was well developed. I would suggest that rather than following the sequential character of the Statute as the book is organized, each theme might have been addressed in its own chapter.

Despite the criticisms outlined, Schabas' work did set out to achieve his stated goals. It is a useful introduction to the Statute. His book has certainly provided a wealth of bibliographical resources to further inquiries into the field. Considering the nascent nature of the field and the Court, his work represents a valiant effort to bring sense to an area that is often confusing to the legal scholar.