

THE INTERNATIONAL CRIMINAL COURT: CURRENT CHALLENGES AND PERSPECTIVES

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This session is under the heading: “The International Criminal Court in the 21st Century.” On 17 July 1998, half a century after the Judgment at Nuremberg, which we are remembering here today, the Rome Statute—the founding treaty of the International Criminal Court (ICC)—was adopted at the Rome Conference.

By way of introduction, let me give a very brief summary of the work of the Court over the last four years:¹

On 1 July 2002, the date the Rome Statute entered into force,² a so-called “ICC Advance Team,” composed of the first five members of the staff of the future ICC, entered a completely empty office building in The Hague. Their aim was to start the build-up of the Court. Since then and up to the present day, significant, often enormous, progress has been achieved in the build-up of the ICC, in all key areas—in the Registry, in the Office of the Prosecutor and also in the Chambers. The Court has grown from a small embryonic unit to a newly emerging international organization with a current staff of around 700 and growing fast—sometimes maybe even too fast.

Indeed, we are now in the critical transition from the build-up of the Court to more and more judicial proceedings. With regard to Uganda, warrants of arrest concerning five members of the Lords Resistant’s Army (LRA) were unsealed in October 2005.³ The fact that the arrest warrants are not executed and that the five suspects are not yet in the custody of the ICC⁴ highlights the critical dependency of the ICC on effective

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1. See generally Hans-Peter Kaul, *Construction Site for More Justice: The International Criminal Court after Two Years*, 99 AM. J. INT’L L. 370 (2005); *Breakthrough in Rome—The Statute of the International Criminal Court*, 59/60 LAW AND ST. 114 (1999); *Towards a Permanent Criminal Court: Some Observations of a Negotiator*, 18 HUMAN RIGHTS L.J. 169 (1997).

2. To date, 105 States have ratified the Rome Statute, with Japan acceding last on 1 October 2007.

3. Decision on the Prosecutor’s Application for unsealing of the warrants of arrest, ICC-02/04-01/05-52.

4. *Submission of information on the status of the execution of the warrants of arrest in the situation in Uganda*, ICC-02/04-01/05-116. With its decision of 11 July 2007 (ICC-02/04-01/05-248),

cooperation.⁵ As for the Democratic Republic of Congo, the transfer to The Hague of one suspect, Thomas Lubanga Dyilo, is significant.⁶

At the same time, it is obvious that there continue to be various problems and obstacles for the ICC. Indeed, even today the ICC is still an imperfect construction site for more justice.

In this regard, let me make a confession: in September 2003, when I joined the Court as a full-time Judge, I did not know how unbelievably difficult it would be to build up a new international organization, especially such a complex one as the ICC, from scratch to a one hundred percent, fully functioning institution.⁷ The idea of an International Criminal Court or the Rome Statute as such is no guarantee for success or even progress. Every step forward requires hard work and sustained effort.

In my view, all the members of the ICC, from the President to the most junior law clerk, continue to face some fundamental questions:

How will we manage to turn the ICC into a functioning and effective institution?

How will we cope with the limitations of this Court and with the challenges ahead?

With these questions in mind, I would like to divide these remarks into two brief parts:

First: Let me recall some of the legal, factual and other limitations which, also in the future, will have an impact on the work of the ICC.

Second: In light of these limitations, what are current challenges and perspectives of the ICC?

I will end with some personal thoughts.

SOME IMPORTANT LIMITATIONS

In order to understand the ICC, it is in my view necessary to be fully aware of the limited reach of the jurisdiction and admissibility regime of

the Pre-Trial Chamber II decided to terminate the proceedings against Raska Lukwiya because of his death.

5. See Hans-Peter Kaul & Claus Kress, *Jurisdiction and Cooperation in the Statute of the International Criminal Court*, Principles and Compromises, 2 Y.B. OF INT'L HUMANITARIAN L. 143 (1999).

6. Thomas Lubanga Dyilo was handed over to the custody of the Court on 17 March 2006.

7. For an overview of the stages of this build-up, see Hans-Peter Kaul, *supra* note 1, 99 AM. J. INT'L L. at 371 *et. seq.*; *Auf dem Weg zum Weltstrafgerichtshof, Verhandlungen und Perspektiven*, 5 VEREINTE NATIONEN 177 (1997); *Durchbruch in Rom—Der Vertrag Über den Internationalen Strafgerichtshof*, 4 VEREINTE NATIONEN 125 (1998); *Der Aufbau des Internationalen Stragerichtshofs, Schwierigkeiten und Fortschritte*, 6 VEREINTE NATIONEN 215 (2001); *Baustelle für mehr Gerechtigkeit—Der Internationale Strafgerichtshof in seinem zweiten Jahr*, 4 VEREINTE NATIONEN 141 (2004).

this court. This is a combination of, on the one hand, a quite conservative and state sovereignty-oriented system of jurisdiction based on the principle of territoriality and the active personality principle,⁸ combined with, on the other hand, an admissibility regime based on complementarity. The principle of complementarity, as provided for in particular in article 17 of the Rome Statute, is the decisive basis of the entire ICC system.⁹ As you know, complementarity entails that judicial proceedings before the ICC are only permissible if and when states which normally would have jurisdiction are either unwilling or genuinely unable to exercise their jurisdiction. The Rome Statute recognizes the primacy of national prosecutions. It thus reaffirms state sovereignty and especially the sovereign and primary right of states to exercise criminal jurisdiction.

In sum, the founders of the ICC have created a new system of international criminal jurisdiction consisting of two levels which complement each other.

The first level is constituted by states and their national criminal law systems. As confirmed by the principle of complementarity as the decisive basis of the Statute, states continue to have the primary duty to exercise their criminal jurisdiction over those responsible for international crimes.¹⁰

The second level is constituted by the International Criminal Court. According to the principle of complementarity, the Court can only act as a last resort in cases in which national criminal law systems are unwilling or genuinely unable to carry out the investigation or prosecution.

The complex system apparently needs more time to be fully accepted and adhered to by all concerned in order to develop its full potential.

At the same time, the principle of complementarity creates a curious pair of conflicting forces and hence a dilemma for the Court itself. If states generally discharge their primary duty to prosecute crimes, the Court will not be given anything to do and will have no cases. On the other hand, the Court needs exemplary and successfully handled cases. Why? Well,

8. Rome Statute, Art. 12(2). See Hans-Peter Kaul, *Preconditions to the Exercise of Jurisdiction*, in *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 583 (Antonio Cassese, Paolo Gaeta & John R.W.D. Jones eds., 2002); Kaul & Kress, *supra* note 5, at 152 *et seq.*; Michael P. Scharf, *The ICC's Jurisdiction Over the Nationals of Non-Party States: A Critique of the U.S. Position*, 64 L. & CONTEMP. PROBS. 67, 110 (2001).

9. For an overview of the basic features of the complementarity principle, see John T. Holmes, *Complementarity: National Courts versus the ICC*, in *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 607–16 (Antonio Cassese, Paolo Gaeta & John R.W.D. Jones eds., 2002). See also Kaul, *supra* note 1, 99 AM. J. INT'L L. at 384.

10. Hans-Peter Kaul, *The International Criminal Court: Key Features and Current Challenges*, in *THE NUREMBERG TRIALS—INTERNATIONAL CRIMINAL LAW SINCE 1945* 245, 246 (Herbert R. Reginbogin & Christoph J.M. Safferling eds., 2006).

because the international community and the states parties have the legitimate desire to see concrete evidence that the ICC is a meaningful and useful institution.

A second major limitation is the fact that the Court is one hundred percent dependent on effective criminal cooperation, on the support of states parties. As the Court generally has no executive powers and no police force of its own, it is totally dependent on full, effective and timely cooperation from states parties.¹¹ As foreseen and planned by its founders, the Court is characterized by the structural weakness that it does not have the competencies and means to enforce its own decisions.¹² As already shown with regard to the principle of complementarity, also in this respect it was the wish of the Court's creators that states' sovereignty should prevail.

A third, very grave limitation on the factual side is the enormous difficulty of carrying out investigations and collecting evidence regarding mass crimes committed in regions which are thousands of kilometers away from the Court, of difficult access, unstable and unsafe.¹³ Carrying out investigations in Uganda, the Democratic Republic of the Congo, the Central African Republic¹⁴ or with regard to Darfur entails logistical and technical difficulties, unprecedented problems which no other prosecutor or court is faced with. Another grim reality is the notorious scarcity of financial and other resources available for investigations and other work of the Court.

Obviously, there are also other limitations and obstacles. For example, it seems realistic to assume that "Realpolitik" and states' interest will continue, in the future, to be important obstacles to the effectiveness of the ICC.¹⁵ In the apparently eternal struggle between brute force and the rule of law, further disappointments and setbacks seem possible. Steadfastness,

11. Jakob Katz Cogan, *International Criminal Courts and Fair Trials—Difficulties and Prospects*, 27 YALE J. INT'L L. 111, 119 (2002); Hans-Peter Kaul, *Der Internationale Strafgerichtshof—Stand und Perspektiven*, in VOM RECHT DER MACHT ZUR MACHT DES RECHTS 93, 95 (Frank Neubacher & Anne Klein eds., 2006).

12. Kaul & Kress, *supra* note 5, at 157 *et seq.*

13. This point was emphasized by Chief Prosecutor Moreno-Ocampo in his address to the fourth Assembly of States Parties to the Rome Statute in The Hague. Luis Moreno-Ocampo, Prosecutor of the Int'l Criminal Court statement to the Fourth Assembly of States Parties to the Rome Statute (Nov. 28, 2005).

14. The Prosecutor announced the opening of investigations in the Central African Republic on 22 May 2007.

15. See M. Cherif Bassiouni, *The International Criminal Court: Quo Vadis?*, 4 J. INT'L CRIM. JUST. 421 (2006); Kai Ambos, *Prosecuting International Crimes at the National and International Level: Between Justice and Realpolitik*, in INTERNATIONAL PROSECUTION OF HUMAN RIGHTS CRIMES 55 (Wolfgang Kaleck, Michael Ratner, Tobias Singelstein & Peter Weiss eds., 2007).

stamina and the readiness to weather future difficulties and crises with determination will therefore be indispensable.

MAJOR CHALLENGES

With regard to major challenges, let me highlight three ongoing tasks which are of particular importance.

First, the ICC must continue to consolidate its ongoing development into an efficient and professional international organization and, at the same time, into a functioning and credible international court. It also remains essential that the ICC continues to show, through the way it conducts all its activities, that it is a purely judicial, objective, neutral and nonpolitical institution.

Second, the Prosecutor and his office as the driving force of the ICC bear a special responsibility. In this respect, let me share with you a saying which I have picked up from the young people at our Court. They say—and you can hear this quite often—: “The Office of the Prosecutor is the engine, professional and effective investigations are the fuel for the entire Court.”

In more legal terms: the Rome Statute and the ICC Rules of Procedure and Evidence set up the legal framework for the work of the Office of the Prosecutor. The Prosecutor and his Office are called upon to use this legal framework for, firstly, the sustained build-up of an organization which is as efficacious as possible, and secondly, the continued development of professional and efficient working methods, with clear goals and priorities, in particular with regard to investigations.

The efficiency of the work of the Office of the Prosecutor is essential for the Court as a whole. Without professional and efficient working methods, without an Office of the Prosecutor which carries out its duties in an optimal manner, the ICC cannot function.¹⁶

Third: it is obvious that the Court cannot be successful without active and steadfast support from states parties, not only in word but also, more importantly, in concrete deed. States parties must draw appropriate conclusions from the well-known fact that the Court has no executive powers, no police, no armed forces or other executive mechanisms. Consequently, states parties and the Court must in a foreseeable future develop a new system of best practices of effective criminal cooperation:¹⁷

16. See Antonio Cassese, *Is the ICC Still Having Teething Problems?*, 4 J. INT'L CRIM. JUST. 434 (2006).

17. Kaul, *supra* note 1, 99 AM. J. INT'L L. at 379.

direct, flexible, without unnecessary bureaucracy, with a fast flow of information and supportive measures. This system must fully take into account that the ICC can be only as strong as the states parties make it. This concerns in particular the unresolved question about serving arrest warrants and transferring suspected criminals to The Hague. It is obvious that the states parties and all forces who support the ICC cannot let down the Court in respect of arrests, by adopting an attitude along the lines of, for example: “We have given you the money for the first budgets—now see for yourselves how you get the perpetrators before your Court”

This will not work. One must hope that this is clear to all concerned. In the former Yugoslavia, NATO and coalition forces have made most arrests for the International Criminal Tribunal for the Former Yugoslavia. With regard to Rwanda, most arrests have been made by neighboring states. Likewise, states parties and U.N. Security Council members who, in a regrettably weak resolution,¹⁸ referred the Darfur situation to the Court, must now find ways and means of supporting the ICC with regard to the decisive question of arrests and transfers to The Hague.¹⁹ Currently, there are five arrest warrants confirmed by Pre-Trial Chamber II with regard to suspects from Uganda.²⁰ It remains unclear whether and when these arrest warrants will be executed.²¹ This is not good.

SOME PERSONAL THOUGHTS

For somebody who is an active ICC Judge and at the same time a German national, it is a very special experience to participate in a conference on the Judgment at Nuremberg, sixty years on.

Allow me to restate an obvious truth. Without the International Military Tribunal of Nuremberg, there would be no International Criminal Court. Like others, I believe that Nuremberg was in essence an American creation that resulted in a giant step forward for the entire world—and this

18. S.C. Res. 1593, U.N. Doc. S/RES/508 (Mar. 31, 2005). See Andreas Zimmermann, *Two Steps Forward, One Step Backwards? Security Council Resolution 1593 (2005) and the Council's Power to Refer Situations to the International Criminal Court*, in VÖLKERRECHT ALS WERTORDNUNG—FESTSCHRIFT FOR CHRISTIAN TOMUSCHAT 681 (Pierre-Marie Dupuy, Bardo Fassbender, Malcolm B. Shaw & Karl Peter Sommermann eds., 2006).

19. See Han Ru Zhou, *The Enforcement of International Arrest Warrants by International Forces—From the ICTY to the ICC*, 4 J. INT'L CRIM. JUST. 202, 208 (2006).

20. Warrants of Arrest for Dominic Ongwen, Okot Odhiambo, Raska Lukwiya, Vincent Otti, ICC-02/04-01/0554–57. For the latest developments see *supra* note 4.

21. See Kasajja Phillip Apuuli, *The ICC Arrest Warrants for the Lord's Resistance Army Leaders and Peace Prospects for Northern Uganda*, 4 J. INT'L CRIM. JUST. 179, 186 (2006).

essentially thanks to the vision of Justice Robert H. Jackson.²² I feel privileged that during the ICC process in the last decade, I have had the chance to become acquainted with and even befriend three outstanding American jurists and former Nuremberg Prosecutors, Messrs. Henry T. King, Jr.,²³ Benjamin Ferencz²⁴ and Whitney Harris.²⁵ As during the Rome conference, and ever since then, their principled attitude and their commitment continue to be an invaluable source of encouragement for many, including me personally.

I have had the chance to live and to work almost eight full years in this great country. My youngest daughter was born in Washington, D.C. while I served as political counselor in the German Embassy. I believe, in all modesty, that I know a little bit about this country. Therefore, if I look at Nuremberg, at the distinguished former Nuremberg Prosecutors present at this conference and at the principles which govern this country, there is no doubt in my mind: the International Criminal Court, this novel institution to which I belong, embodies fundamental American values of accountability, equality and justice.

Finally, let me reaffirm one point which I have already made quite often, and most recently in Nuremberg itself on 19 July 2005,²⁶ when Whitney Harris gave a gripping keynote address in historic courtroom 600 of the Palace of Justice in Nuremberg on the occasion of the 60th anniversary of the opening of the trial of the major German war criminals.²⁷

This point is: the Court needs the support of the United States of America, this great country, which time and again has played a decisive

22. The role of Robert H. Jackson as a driving force behind the Nuremberg trials has, in recent years, been the focus of increasing interest both in the United States and Germany, leading for example to the creation in 2001 of the Robert H. Jackson Center in Jamestown, New York, and giving rise to numerous publications. See, e.g., Benjamin B. Ferencz, *Tribute to Nuremberg Prosecutor Jackson*, 16 PACE INT'L L. REV. 365 (2004); see also the numerous tributes to Robert H. Jackson in 68 ALB. L. REV. 1 (2004). For German publications, see, e.g., Gregor Kemper, *Der Weg nach Rom—Die Entwicklung völkerrechtlicher Strafgerichtsbarkeit und die Errichtung des Ständigen Internationalen Strafgerichtshofs*, Peter Lang Verlag (2004); Klaus Kastner, *Von den Siegern zur Rechenschaft gezogen*, Hofmann Verlag (2000).

23. Henry T. King, Jr., *Remarks—American Bar Association's Commemoration of the 60th Anniversary of the Nuremberg Trials*, 40 INT'L LAW. 1 (2006).

24. Benjamin B. Ferencz, *From Nuremberg to Rome—A Personal Account*, in JUSTICE FOR CRIMES AGAINST HUMANITY 31 (Mark Lattimer/Philippe Sands QC eds., 2004).

25. Whitney R. Harris, *TYRANNY ON TRIAL: THE TRIAL OF THE MAJOR GERMAN WAR CRIMINALS AT NUREMBERG, 1945–1946* (1999).

26. See Kaul, *supra* note 10, at 249.

27. Whitney R. Harris, *Tyranny on Trial—Trial of Major German War Criminals at Nuremberg, Germany, 1945–1946*, in THE NUREMBERG TRIALS—INTERNATIONAL CRIMINAL LAW SINCE 1945 106 (Herbert R. Reginbogin & Christoph J.M. Safferling eds., 2006).

role in bringing about the fall of tyranny²⁸ and in re-establishing the rule of law. However, I need not elaborate on this, especially here, at a conference on the Judgment of Nuremberg. We continue to hope that the US government will, also, eventually make its peace with the ICC, to which Americans have contributed so much—and this includes in particular David Scheffer and Bill Pace. The Court needs American support morally, politically, materially and in many other ways. It also needs American Prosecutors and other U.S. staff working for the Court. We also continue to hope that, one day, the Judges may have an American colleague on the bench—possibly someone with the stature of Justice Jackson—whom they may even elect as the first American President of the International Criminal Court.

This day must come. It will.

28. See Harris, *supra* notes 25, 27.