Documentation

Through the Lens of Nuremberg

The International Criminal Court at its Tenth Anniversary

Conference 4–5 October 2012 in Nuremberg

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Bettina Ambach, Director, Wayamo Communication Foundation

On 4 and 5 October 2012, the Founding Office for the „International Nuremberg Principles Academy“ and the Wayamo Communication Foundation organised a conference to mark the tenth anniversary of the entry into force of the Rome Statute of the International Criminal Court. The conference was preceded and followed by a media workshop with 15 senior journalists from African and Arab countries.

Both events were generously supported by the German Federal Foreign Office. Indeed, without the funding received from the German Federal Foreign Office, the publication of the proceedings of the conference and workshop would not have been possible.

I would like to thank Anne Rübesame, my partner for this conference, as well as Michaela Lissowsky and Julia Rauh from the Founding Office for the „International Nuremberg Principles Academy“ for their tireless efforts in making this conference a success.

I also wish to thank Michaela Lissowsky for helping with the final compilation of all the different brochure elements including a CD containing video, audio and print reports produced by the journalists attending the media workshop.

Bettina Ambach

Introduction

Dr. Martin Ney, Legal Adviser / Director-General for Legal Affairs, Federal Foreign Office

Judge Sang-Hyun Song and Ambassador Dr. Martin Ney

On 1 July 2002, the Rome Statute entered into force and the International Criminal Court in The Hague was finally established. To commemorate the tenth anniversary of this milestone in international law, 2012 saw numerous activities and events being held throughout the world. Germany officially celebrated this anniversary on 4 and 5 October 2012 in Nuremberg, a site of particular significance for the development of international criminal law. The international conference, „Through the lens of Nuremberg – The International Criminal Court at its Tenth Anniversary“, brought together renowned academics and practitioners to discuss the past, present and future of international criminal law.

The days directly before and after the conference were devoted to a workshop, with fifteen senior journalists from African and Arab countries producing audiovisual and press reports about the issues discussed during the conference.

I am grateful to the authorities of the Free State of Bavaria and to President Küspert of the Higher Regional Court of Nuremberg for making available the historic court room 600 where the leaders of Nazi Germany were held accountable for their crimes. I extend my gratitude to the City of Nuremberg and to former Federal Minister, Dr. Oscar Schneider, the guiding spirit behind the idea of establishing an „International Nuremberg Principles Academy“ that is based on the Nuremberg legacy, for their invaluable support and assistance. They all contributed to the great success of the conference.

Opening Remarks

Peter Küspert, President of the Nuremberg High Regional Court

Let‘s turn the lens around for a moment and look back exactly 50 years into the past. It was in early October 1962 that our court returned to this building. Since then, we have also been responsible for Courtroom 600 and those interested in paying it a visit. The former President of the Court proudly wrote into the court‘s chronicles, „Foreign visitors continue to show keen interest in Courtroom 600. In 1963, there were a total of 273 visitors.“

Well, last year we had 54,000 visitors to Courtroom 600!

To me it is a sign of hope and encouragement that nearly 65 years after the end of the Nuremberg Trial, interest in the site and the lessons learnt from the Trial is constantly growing. Nuremberg is a synonym of the fight against impunity for the most serious crimes known to humanity; and indeed the legacy of Nuremberg was reaffirmed by the creation of the International Criminal Court 10 years ago.

I am convinced that the establishment of the International Nuremberg Principles Academy will be another logical step on the road towards the rule of law and respect for human rights world-wide. I am pleased to tell you that the Bavarian government strongly supports the establishment of the Academy, and I hope that very soon the Academy will be comfortably ensconced in this historic building.

Hassan Jallow, Brenda Hollis, Serge Brammertz, Peter Küspert

Opening Remarks

Dr. Oscar Schneider, Former Federal Minister

Oscar Schneider

On behalf of the Board of Trustees of the „Documentation Centre Nazi Party Rally Grounds Nuremberg“, I should like to extend a cordial welcome to you all. Members of the German Federal Government, the Bavarian State Government and the City of Nuremberg sit on our Board of Trustees. Since 2008, we have been striving to found an international institute for the implementation of the Nuremberg Principles, here in Nuremberg, and I must thank both the German Federal and Bavarian State Governments for all the support and aid given to us throughout this period. Similarly, we must also thank the members of the International Criminal Court for having supported our activities and participated in the compilation of the feasibility study and in the international consultative committee. Furthermore, very special thanks must go to the German Federal Foreign Office in Berlin for the enduring and successful support received over these past years.

It was in this courtroom that the US Chief Prosecutor, Robert H. Jackson, delivered his opening address on 21 November 1945 in the trial against the major Nazi war criminals. Historical significance must be accorded to this statement, in the view of the fact that it marked a break in international criminal jurisdiction. The Prosecutor repeatedly made the point that it was impossible for him to present and comment on all the legal, philosophical, historical and ideological reasons for the accusation in a way that was wholly appropriate: this task had to be left to a later date. With the founding of the International Criminal Court, the International Military Tribunal that convicted the major Nazi war criminals received the necessary continuation. Yet the political, historical, academic and juridical follow-up has still to be resolved.

In 2011, the Scientific Founding Committee chaired by Professor Christoph Safferling attested to the fact that the founding of the planned „International Nuremberg Principles Academy“ was both necessary and urgent. In addition, at conferences attended by renowned and competent international experts, further convincing arguments have been brought forward to support the founding of the Academy proposed by the Board of Trustees.

To us, the members of the Board of Trustees, the fact that you, ladies and gentlemen, have gathered here today in Nuremberg courtroom 600 on the occasion of the tenth anniversary of the International Criminal Court in The Hague, is an encouraging gesture and a sign of confidence.

We are eagerly looking forward to the decisions of the German Federal Government and the Federal Parliament, and trust that the necessary means and legal support will be made available to us.

What is it that we want?
We want to proceed from where Robert H. Jackson left off. We want to found an international discussion board that will provide answers to the questions raised by him. We want to make a systematic, universal and interdisciplinary contribution to the implementation of the Nuremberg Principles. This conference here today thus comes as a source of joy and encouragement; and this is precisely why I wish you all every success in terms of the outcome of this conference and a most enjoyable stay in Nuremberg, the city where a new understanding of international criminal law began on that November day not so very long ago.

It is an exceptional honour for me to yield the floor to the President of the International Criminal Court, Judge Song. We are most gratified that you have agreed to inaugurate the conference with your keynote speech on the implementation of the Nuremberg Principles within the framework of the International Criminal Court.

Opening remarks

Ambassador Dr. Ney

Ambassador Dr. Ney

On 1 July 2002, when the Rome Statute entered into force there was no guarantee of success, despite all the efforts that had been devoted to the creation of the International Criminal Court over the decades. Quite the contrary, from the start, the newly established court faced numerous, existential challenges.

Since then the Court has come a long way. After ten years in existence, the International Criminal Court has become a well-established international institution and an important factor in international relations. Today, whenever an international crime is committed, the international community's debate on how to respond necessarily centres on the ICC. No perpetrator of international crimes can seriously expect to escape justice.

The Court has earned its reputation by relentless judicial work on the different situations that have been submitted to its jurisdiction. During the first ten years, the foundations have been laid for the Court's case-law: 16 cases in seven situations are currently before the Court. All three triggers for the exercise of the Court's jurisdiction have been employed, namely, state referrals, referrals by the Security Council and investigations proprio motu.

Of particular significance here was, of course, the Court's first judgment, delivered this year in the case against Thomas Lubanga, who has been detained in The Hague since 2006. He was found guilty of having enlisted and conscripted children under the age of 15 and of using them to participate actively in hostilities in the Democratic Republic of the Congo. He was sentenced to a total of 14 years' imprisonment. In recognition of the Court's achievement in issuing its first sentence, Germany will make a donation of €300,000 to the Trust Fund for Victims, earmarked for reparations to the victims in the Lubanga case. I am happy to announce this donation to you today –as proof of the continuing support of Germany to the Victims Trust Fund– in spite of the current financial restraints that you are all aware of.

A major milestone in the Court's development was the first review conference in Kampala in 2010. It is fair to say that the review conference concluded the first phase of the Court's existence, particularly since the Conference reached agreement on the definition of the crime of aggression and the conditions for the exercise of jurisdiction over that crime. With the Kampala amendments, the Rome Statute is now complete.

I am confident that the requirements for the entry into force of the Kampala amendments will be met by the year 2017, as provided for in the Kampala compromise package. In this context, I am glad to inform you that German ratification is well under way. In August, the Federal Government adopted the corresponding draft law and forwarded it to Parliament. We expect the parliamentary ratification process to be completed by early next year.

While the Court's achievements of the first ten years are remarkable, many challenges still lie ahead. The court will have to concentrate on its core functions. Fighting impunity requires bringing perpetrators to justice, and this can only be done by imposing and enforcing judicial sentences. In this field, there is still a lot of work for the Court to do. The duration of proceedings is also a matter of concern.

The Court itself has acknowledged on various occasions that there remain shortcomings and obstacles in its work. It is encouraging to see that the Court is currently undertaking a "lessons-learned" exercise aimed at identifying potential improvements in the rules, procedures and practice of judicial process as a whole. There are other challenges, such as the issue of non-cooperation. We all know that the Court relies on state co-operation.

Germany has been one of the staunchest supporters of the International Criminal Court over the past ten years. Our firm commitment to the ICC is deeply rooted in German history. You only have to look around …and you will immediately understand: we are sitting in Courtroom 600 of Nuremberg's Palace of Justice!

The Nuremberg Trials made this room a worldwide historical site. In Courtroom 600, for the first time in history, high state officials were held accountable by a court for international crimes.

The principles of international law expressed in the Charter of the Nuremberg Tribunal, the so-called Nuremberg Principles, are the constituent core of today's international criminal law. I cannot imagine a better venue for commemorating the success story of international criminal justice, and I have to thank President Küspert and the State of Bavaria for giving us the possibility to hold our conference here. To all of you who have not yet done so, I recommend that you visit the exhibition on the Nuremberg trials in this building. This "Memorium" illustrates impressively the beginning of the road which led to the establishment of the ICC.

I am very happy to see that work is under way to establish an "International Nuremberg Principles Academy", which will be based on this legacy. The Academy is to be a forum for exchange and is intended to become active in three main areas:

- group-specific training and counselling programmes;
- multidisciplinary research; and,
- human rights education.

The guiding spirit behind this visionary idea is former Federal Minister Dr. Oscar Schneider. I seize the opportunity to thank you, Dr. Schneider, for your leadership in establishing this institution in Nuremberg.

Two days of an exciting conference lie ahead of us.
I thank the organisers who had to master huge organisational challenges. I am looking forward to the discussion, and wish that all of us may have two successful days of stimulating exchange.

Keynote Speech by Judge Sang-Hyun Song

Judge Sang-Hyun Song, President of the International Criminal Court

Judge Sang-Hyun Song

"Implementation of the Nuremburg Principles within the framework of the International Criminal Court"

To be in this historic courtroom evokes powerful images. One thinks:

- of the twenty-one former high officials of the Nazi Regime sitting in the dock as defendants, to be convicted of the gravest crimes known to humanity on 1 October 1946;
- of Chief Prosecutor Robert Jackson's forceful opening address;
- and of the historic judgment being read out in this courtroom, with each judge taking his turn.

These events, which began in this courtroom almost (about) 67 years ago, are ingrained in our memories and shape how we think about international criminal law and justice today. In my opening remarks today, I would like to speak to you about:

- how the legal principles guiding the trial of the major German war criminals before the International Military Tribunal have become the foundational pillars of the Rome Statute; and,
- the challenges that the ICC faces today in honouring these principles through its operations.

In 1945, at a time when international law paid little or no regard to individuals, the creators of the Nuremberg International Military Tribunal spearheaded one of the most remarkable developments in modern legal history. Firstly, the Statute of the Tribunal stipulates that individuals can and should be held accountable for crimes which constitute violations of international law. As was famously declared by the Tribunal in its Judgement, „Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."Secondly, the Tribunal embodied the modern conviction that individuals should only be punished through a fair trial which safeguards the rights of the accused.

As we know today, the Nuremberg proceedings had wide-ranging effects throughout the field of international law. In 1950, only four years after the final verdict against 21 defendants had been rendered, the United Nations' International Law Commission codified what is often called the legacy of Nuremberg: it adopted a text setting out the main principles of international law recognised in the Charter and Judgement of the International Military Tribunal. The seven core principles distilled from the Nuremberg trials include:

- the responsibility of individuals for international crimes;
- the right of each accused to a fair trial;
- the fact that acting pursuant to an order does not relieve one from responsibility under international law;
- the historic pronouncement that one's position as a Head of State or responsible government official does not relieve one from criminal responsibility; and,
- the definition of three crimes punishable as crimes under international law, namely,
  - crimes against peace
  - war crimes, and
  - crimes against humanity.

These so-called „Nuremberg Principles" have been widely cited by international lawyers ever since, and are at the core of international criminal law today. With the establishment of the Nuremberg Tribunal the foundations were laid for the building of a permanent international criminal court, and this ultimately gave rise to the adoption of the Rome Statute in 1998 and the establishment of the International Criminal Court in 2002. However, the legacy of Nuremberg permeates even further. A look at the Rome Statute reveals that the Nuremburg Principles stand as the main foundational pillars of the ICC:

- Article 25 of the Statute stipulates individual criminal responsibility for international crimes, such as the crime of genocide, crimes against humanity, war crimes and the crime of aggression.
- Article 27 clarifies that a person's official capacity does not bar criminal prosecution under the Statute. The ICC's arrest warrant against current Sudanese President Omar Al Bashir as well as ongoing proceedings against former Ivorian President Laurent Gbagbo are illustrative examples of this.
- Furthermore, the Rome Statute contains certain important elaborations of the Nuremberg principles such as:
  - a detailed definition of crimes;
  - inclusion of the crime of genocide;
  - extension of the applicability of war crimes to internal armed conflict;
  - codification of command responsibility; and,
  - detailed provisions guaranteeing the rights of the accused.

Finally, in some areas, the Rome Statute represents a major leap forward from Nuremberg. One often-cited progressive aspect is the right of victims to participate directly in the ICC's proceedings even when not called as witnesses, and to apply for reparations. Here one can see a fundamental shift in the development of international criminal law, bringing retributive and restorative justice closer to each other.

Let me now address some of the present and future **challenges** of the ICC.
To make the Rome Statute system truly comprehensive we must achieve **universality**.
More than 70 States have yet to join, including the world's most populous countries, such as China, India, the United States, Indonesia and Russia. A majority of the world's population therefore remains outside the Rome Statute's legal protection, and this limits the reach and applicability of its provisions. We continue to engage with signatories and non-State Parties with the hope that, in overcoming differences and resolving misunderstandings, we will encourage them to join the Rome Statute system.

Opening Remarks

Anne Rübesame, Commissioner, International Nuremberg Principles Academy

However, increasing the universality of the Rome Statute will require tireless awareness-raising and advocacy from a wide range of other actors, such as ICC States Parties, civil society, regional and international organisations and professional associations.

Another crucial aspect for the credibility and strength of the ICC is the **co-operation** of States with the ICC and enforcement of its orders. As you know, the ICC has no police force of its own. We rely entirely on States to execute our arrest warrants. We also require their assistance in the provision of certain evidence, to facilitate the appearance of witnesses, to identify and freeze assets, and for a number of other operations related to the Court's core activities. Unfortunately, several suspects subject to ICC arrest warrants have successfully evaded arrest for many years. The political will to bring these persons to justice is crucial.

The principle of **complementarity** is another important challenge for the ICC community, and indeed more so for the States Parties than for the Court itself. As you are aware, the principle refers on the one hand to the primacy of national jurisdictions, and on the other to the complementary role of the ICC to provide justice where this is not forthcoming at a national level. Accordingly, the strengthening of national justice systems is crucial for establishing a credible and comprehensive system of deterrence and prevention against atrocity crimes, and for ensuring accountability where crimes have occurred. For this to be possible, States need: firstly, to incorporate the Rome Statute offences into their respective national criminal codes; secondly, a professional and independent judiciary, investigators with skills and resources, witness-protection facilities and so on; and lastly, the political will to bring perpetrators to justice.

Complementarity is a key area where States Parties are called upon to help one another, and where development agencies can do more. Further, civil society can play a crucial role as a catalyst, information provider, and evaluator of national programmes to strengthen the judiciary.

With the Rome Statute strengthening the rights of victims to participate in court proceedings and its reparations regime, a new challenge has emerged for the ICC in the form of its capability **to manage the expectations of its stakeholders, and of the victims in particular**. The ICC's outreach and victim-participation sections actively engage with victims and communities affected by Rome Statute crimes, informing them of their rights to participate in the proceedings pursuant to the ICC's legal framework. Yet, when it comes to adjudicating mass crimes with up to thousands of victims, to ensure the meaningful participation of all such victims is an immensely difficult task and some of them will inevitably feel left out by the process.

A final challenge lies in the fact that, as a judicial body, the ICC interacts and co-operates with international and national political actors, such as the United Nations Security Council, the African Union, regional organisations and national governments. It is therefore crucial that the ICC delineate a boundary, establishing its place amongst these political bodies without becoming one itself. Just as national judicial systems must separate themselves from the executive, so must the ICC preserve its independence from the influences of the national and international political actors around it.

I would like to conclude by returning to the Nuremberg trial. In his opening statement, Chief Prosecutor Robert Jackson told the Tribunal, „The usefulness of this effort to do justice is not to be measured by the law or your judgment in isolation. This trial is part of the great effort to make the peace more secure."

This applies to the ICC as well. The ICC is not a panacea per se. It alone will not put an end to grave atrocities: but it is an essential part of the system of international criminal justice, which will over time lead to a culture of accountability and make peace more secure.

A few words on the history of the project and where it is headed.

The first round of thinking about what to do with the Academy was done by an inter-disciplinary group of leading German academics: Anja Seibert-Fohr, Heiner Bielefeldt, Eckhart Conze and Christoph Safferling. Together with a board of advisers which included Judge Hans-Peter Kaul and Prosecutor Serge Brammertz they wrote a **feasibility study** in which they identified three general working areas for the new institution: Multidisciplinary research concerning the prosecution of violations of international criminal law; practical training for specific target groups relevant to national prosecution efforts, international organisations and NGOs; and human-rights and civic education.

Following these general findings, in August 2012, we set out to find practical applications with the help of a group of practitioners and government experts drawn from Africa, Europe, the Middle East, as well as North and South America. The historic debt owed to the initiators of the Nuremberg trials was reflected in the many, albeit diverse, voices from the United States. The group had an overwhelmingly positive response to the idea of such an institution. The general sense was that there is enormous potential for an institution located at the historic site where global individual criminal accountability began, in particular for **education initiatives** of all kinds. The group of experts found that the **legacy of the Nuremberg trials** and their contribution to jurisprudence, to the advancement of due process, and to the historical record are **very relevant** to today's international justice efforts.

In addition, and perhaps more interestingly because it was unexpected, the group felt that Germany's contribution as the first instance of a nation successfully coming to terms with at least part of its terrible past, not just through the Nuremberg trials but domestically through its domestic trials and, most importantly, through its large-scale education measures, is another unique home-field advantage of the new institute. Practically too, it was felt that it was of great value to be located, not merely in Nuremberg itself but, thanks to the State of Bavaria, in this Wing of this building – including the very spot where we are today – the place where the Nuremberg trials were held and individual global accountability began. The new institution will occupy this East Wing of the Palace of Justice.

For all these reasons, Nuremberg has got enormous **convening power** that should be used to bring people together, including both those who do not often interact and those who are sceptical of international criminal justice. Thus, we would contribute to building greater confidence in the overall international criminal justice system and, ultimately, serve to make these institutions and the Nuremberg principles that underlie them more universal. We very much hope that you will be interested in joining us in our efforts to build a practical and forward-looking institution.

Panel: The Nuremberg Trials and their Relevance Today

Christoph Safferling, University of Marburg

Christoph Safferling

Panel I: The Nuremberg Trials and their relevance today

Ten years of existence of the International Criminal Court and we ask ourselves: Does it actually make sense to look back at 1945?; Does it make sense to look through the lens of Nuremberg?; What does it say for the future of international criminal law to take this perspective?; What is the legacy?; What is the promise that was given in this very room, Courtroom 600 of the Nuremberg Palace of Justice?

The first and most important sign, legacy and signal to come from this courtroom is obviously that of ending impunity, by ensuring that there is accountability for human rights atrocities, and that those heinous crimes which we witnessed before and during the Second World War in Europe will not and must not be repeated, and must under all circumstances be prosecuted. This is the most promising signal, even if it is obviously based on a very rough notion that criminal law can actually achieve this goal (one which, as you all know, has not yet been empirically proven), that it actually contributes to a sustainable peace, that it actually deters people from committing human rights atrocities and that it actually prevents such things from happening. Nevertheless, the idea is that it can achieve these things and that if one does nothing, one obviously doesn't even have a chance of deterring and preventing atrocities from happening.

The second lesson to be learnt is obviously that, since the London Charter of the International Military Tribunal, we have a list of crimes, consisting of crimes against peace, war crimes and crimes against humanity, and -I might add- the crime of genocide, despite the fact that it does not figure on the list because it was only adopted in 1948. Yet the crime of genocide has also very strong links to Nuremberg and the IMT. Aside from this list of crimes, something that is as important as having a list of crimes per se is the idea and principle of individual responsibility. How does one actually attribute guilt? And the most important factor in this regard is the question of how one deals, in a criminal law context, with the phenomena of macro-criminality, in a setting where there are many people working together on different levels to achieve a certain goal, such as, say, the killing of millions of Jews. How is guilt actually to be attributed at these several levels? A question, I might say, that has not yet been resolved because Article 25 of the Rome Statute makes an initial attempt to address but does not give definite answers to questions of co-perpetration or of how one is actually to deal with a joint criminal enterprise, such as that invented by the Yugoslav Tribunal. In many ways, the Nuremberg Charter is also relevant to these questions of how guilt is to be attributed, and individual responsibility is in fact to be attributed, in the macro-criminal setting of these crimes.

My third point would be the procedural issues. Now, „fair trial" is a term that we often hear, but to actually achieve fairness in the courtroom is very, very hard. However, we must not forget -and this is what Robert H. Jackson said- that one of the risks whenever trials are commenced is that, if not proven guilty, the accused must be set free.

This then is an extremely high moral principle which, despite all the political animosities, even here in Nuremberg, in the heated atmosphere that prevailed after the end of the Second World War, lays down that one must be willing to set a man free if one cannot manage to prove his guilt in the courtroom... and indeed this is exactly what happened. As you might know, of the 22 people who were actually accused and prosecuted here (21 were present, one was tried in absentia), three were actually acquitted. So, the Nuremberg Tribunal was very keenly aware of this principle, something that we now refer to as the „presumption of innocence". Hence, procedural issues were very relevant at that time and remain just as relevant today.

The fourth point I wish to make is that, since Nuremberg, we have had a type of two-track system, with national prosecution on the one hand and international prosecution on the other, and for some obvious reasons the international level cannot deal with all the criminals in the kind of atmosphere that we had, for example, after the Second World War. The interplay between these two levels (now the ICC calls this the principle of complementarity) is still very weak, however, and sort of depends on whether the national jurisdictions actually do their homework; and, in my opinion, this is a question that has not been even raised to an appropriate degree. We have to do a lot more to put national jurisdictions in a position where they can actually do their homework and prosecute international crimes.

A fifth and last point, is the question of acceptance and acceptability of international crimes. This is also something that Nuremberg teaches us, and I am saying this to you as a German academic in 2012. It has taken decades, a very, very long time, indeed it has taken the end of the Cold War and the unification of Germany for German society and politicians to be ready to accept the Nuremberg principles and the Nuremberg trials as something good, as something that actually helped to develop a democratic system. So, if you are sometimes frustrated now in your every-day work, then, when you eventually do come to prosecute war crimes, be aware of the fact that it takes a long time, and that it might take a long time for the societies involved to actually accept an international intervention of this kind.

So, in my point of view, these five points are, very roughly speaking, the legacy of Nuremberg, the promise of Nuremberg. The idea of the "International Nuremberg Principles Academy" will be precisely to lay the foundations of its work on these five issues and work towards setting up an international system of international criminal justice that is worthy of the name.

Panel: The Nuremberg Trials and their Relevance Today

Ben Ferencz, Former Chief Prosecutor for the US Army at the Einsatzgruppen Trial

Ben Ferencz (r)

Years ago during a study visit to Heidelberg, I came across a little book entitled, *„Gesammelte kleine Schriften“*, containing the collected jottings of Johann Caspar Bluntschli. Bluntschli, the first Professor of International Law at the University of Heidelberg, was corresponding with Helmut von Moltke, namely, Field Marshal von Moltke, the hero of the Franco-Prussian War. Bluntschli wrote, *„Dear von Moltke, When we met at the ball, you asked me what I was doing. I am working on a book about civilised States: how States should end war-making and should settle all their disputes by peaceful means, by simply convening a conference and coming together“*. In essence, what he was outlining was something that came very close to what we would now recognise as the United Nations. The Field Marshal, in a rather high-flown tone, answered, *„My dear Bluntschli, what are you saying? Eliminate war? That‘s madness. War is glorious, it gives one the chance to die for one‘s country, to enjoy the camaraderie of all the other soldiers, to make sacrifices. What you are proposing is an idealistic dream, and is not even a good dream; you are interfering with God‘s divine law.“*

I was a combat soldier. I have seen wars in action as very few men have, and survived to tell the story. I have been a witness of the liberation of many concentration camps. I have seen all the horrors of war. The notion that all the crimes come out of war is absolutely true. There has never been a war without mass rape, and the biggest atrocity of all is illegal war-making itself. So, how does one begin to deter that mindset?

Nuremberg laid down basic principles, such as equal justice under law, as well as the tenet that aggression is the supreme international crime, the crime against peace as it was called.

For a long time, people said that there was still no agreed definition of the crime of aggression. But that is not really true. Already in 1945/1946, Justice Jackson had a definition of aggression, approved not only by the four occupying powers -the British, the French, the Soviets and the United States- but also by the International Law Commission and the General Assembly of the United Nations. That was for the International Military Tribunal.

In 1974, a consensus definition of aggression was reached. And yet people still said, „it has never been defined“: the real reason for saying this is that they are in the same category as von Moltke, a perfectly honourable guy. The big powers do not want to surrender and give any international group the right to tell them when they are going to go to war. That is where we are today...where von Moltke was and the rest of the world has been ever since. These people believe that war is inevitable and do not believe there is any way of internationally controlling it; and so they find every possible excuse, every legal twist and turn, to avoid having to give an international court jurisdiction over the crime against peace, as it was originally called.

Another compromise was reached in 2010 when we went to the Review Conference of the International Criminal Court in Kampala. It was decided that the entry into force of jurisdiction over this crime would be reconsidered in 2017 at the earliest. Now, as every lawyer knows, this could also mean that it will only be considered in 2096. Kampala was seen by many as a great victory. I think it was a victory for those who did not want to have aggression tried by the International Criminal Court, seeing as they postponed the issue again without any cut-off date.

Well, when I‘m giving this kind of lecture, I‘m giving it first of all to myself. I say, „Okay Ben, accept the fact that the big powers are never -not in my lifetime anyway- going to accept the idea that any international tribunal will determine the legality of any military force that they want to use. What does one do then? I am talking about the illegal use of armed force; by „illegal“, I mean that it is not being used in self-defence against an armed attack (which is permissible under the UN Charter) and has not been approved by the Security Council of the United Nations which has been entrusted with authority to deal with questions of war and peace. Such an illegal act must be committed by a leader who is aware and knows that it will inevitably kill large numbers of civilians.

I thought the biggest crime against humanity that I could imagine was this kind of illegal war. So it should be treated as a crime against humanity. How does one do that? The International Criminal Court may have an opportunity to make some statements along these lines: the statute itself is sufficiently vague to allow for collateral clauses. The crime could be investigated and prosecuted at the International Criminal Court but primary responsibility should rest with national jurisdictions. So national courts have to ratify the amendments. Germany is already on the way to ratifying the Kampala amendments on the crime of aggression. Then one has to move on by persuading the national jurisdictions to write a clause into their national laws, which says that any leader who is responsible for using armed force without legal authorisation and knowing that it will kill a large number of civilians, is committing a crime against humanity. Put that into your statute! It will certainly have a deterrent effect. Will it eliminate all wars? Certainly not! Will it have some deterrent effect? We hope so. We expect so. And even a small deterrent effect is worthwhile; any deterrent effect to stop any war is worthwhile.

So my way out of this terrible dilemma, out of the dispute between Bluntschli and von Moltke, is to call illegal war-making „a crime against humanity“. Using this term dispenses with the need for Security Council approval to start with a case. The Security Council only interferes when it hears the word „aggression“. But crimes against humanity?; that‘s not the Security Council‘s business. Of course, the Security Council can always intervene in the interest of protecting world peace; that‘s its job.

Bear in mind that all we can do is a sampling. One cannot try all the criminals. I had 22 defendants in that dock. Their units, consisting of 3,000 men, had murdered over a million people in cold blood. We tried 22 out of 3,000 because there are only 22 seats in the dock: ridiculous, but that‘s the truth. We must recognise the fact that we can only be symbolic in stopping crimes; we will never stop all crime. But we do have a duty to try as best we can. I am now in my ninety-third year. I have been working at it a very long time. The future is now up to you.

Interview

with Fatou Bensouda, Prosecutor, International Criminal Court, Interviewer: Joseph Roberts-Mensah, Africa Director, Wayamo

Fatou Bensouda, interviewed by Joseph Roberts-Mensah

What specific skills are you bringing to the job as the new prosecutor of the ICC?
Quite apart from my experience at the International Criminal Tribunal for Rwanda (ICTR) and also as a former Minister of Justice of the Gambia and Attorney-General, I have worked at the ICC as Deputy Prosecutor since 2004. That was the time when the ICC was starting up its operations; I was the Head of the Prosecutions Division and was part of the team that formulated the working methods and policies. I have also been the focal point for gender issues. So my presence at the ICC for the last 8 years has enabled me to gather a world of experience, while also providing me with a good preparation for my current position as Prosecutor.

On the tenth anniversary of the establishment of the Court, do you think enough progress has been made in dealing with the crimes described in the Rome Statute and for which the court was set up?
Yes, I think so. In fact the Court has made progress even beyond the expectations that we had at the very beginning. When my predecessor, Mr. Luis Moreno-Ocampo, started his tenure as Prosecutor in 2003, he had to build his Office from the ground; he had only two staff members, maybe about seven empty floors and no case ongoing. In June 2012, I inherited an Office of more than 250 staff members; we are engaged in 8 preliminary examinations on 4 continents; we are investigating in seven situations, with a number of cases deriving from these investigations. In fact, the Court has issued arrest warrants or summonses to appear against 29 individuals.

The ICC of today has become a relevant player in the international arena. The unanimous referral by the UN Security Council of the situation in Libya in 2011, with 15 votes in favour, including from 10 States that are not party to the Rome Statute, is a testament to that. Some feared that the Court would be just a paper tiger, without any cases. Practice has shown this to be untrue.

So then for those who might criticise that in ten years you only finalised one prosecution -what would be your response to them?
We may have only one verdict -the Lubanga verdict which was delivered by the Judges this year [March 2012]- but others are coming. Various cases are ongoing, and several others are in advanced stage of preparation. But in a way, this is not how the success of the ICC should be measured. It should be about the impact that the Court has had in 10 years. Even before the finalisation of the Lubanga case, we saw the impact that the case had on the recruitment of child soldiers, the message that was sent out by the Court, i.e., that you cannot continue to recruit children. We have had concrete evidence from the UN Special Rapporteur for Children and Armed Conflict, that the mere existence of the trial helped in negotiations with governments and militias on child soldiers demobilisations. The UN Rapporteur was able to get Nepal to demobilise 3000 child soldiers. This is the true success of the Court; its ability to affect a multiplicity of cases.

At the same time, we have also learned our lessons: we encountered various challenges in the Lubanga case, which were both legal and operational, such as those relating to the use of intermediaries, disclosure of evidence and protection of witnesses. The Office implements these lessons in its subsequent cases, moving on more efficiently and more expeditiously.

Talking about lessons learned, you have spoken publicly about continuity and change as the second prosecutor of the ICC. What are you going to continue?, what are you going to change?
It may be difficult now to say exactly what I will continue and what I will change. I have publicly stated what my priorities are, including those relating to gender violence and the use of new types of evidence. I will consistently revisit our practices. We now have the advantage of having an operational manual. This document has sought to capture all the practices that we have put together over the years. It is not a document cast in stone; it is a living document that we will be reviewing constantly, and one that we will be examining to see whether what we have done in the past is how we should continue in the future.

What are the major challenges you will face as the first woman and African in this role?
The fact that I am an African or the fact that I am a woman is not a challenge per se. [Applause]. The challenge that I perceive is to be a Prosecutor of 121 States Parties. Another challenge is the multiplication of cases and the diminishing of resources. The ICC Prosecutor has to have the resources available to be able to make independent decisions. My decisions to investigate or prosecute should not be dependent on the fact that I do or do not have the resources. It should be based on my mandate and what the Rome Statute says.

I also need to build on what we have achieved thus far in investigating and prosecuting gender crimes. Today, in the ICC case docket, about 76 per cent of the cases include charges of sexual and gender crimes. We need to continue to ensure that the staff who investigate and prosecute these crimes are well trained.

Another challenge is the relationship with Africa. I always say that the ICC is a court for Africa, promoted by Africa, built by Africa – it is an African court.

Speaking of Africa, critics have complained that the ICC applies double standards in selecting cases, that you target Africa. For the credibility of the Court, do you think you should start looking into non-African prosecutions?
There is no geographical consideration for bringing cases before the Court. It is not because I have opened cases in Africa that I should now open cases in another part of the world.

We seem to be focusing on the protection of those who commit the crimes, while we should be thinking of the victims of the crimes. Those who commit the crimes are a few compared to the millions of victims who are out there, who need justice and who need protection, which the ICC should and will offer. This is where we need to shift the focus.

The suggestion of targeting Africa is not a fair one. Quite the contrary, Africa has been coming towards the ICC. Africa played a critical role in the establishment of the Court and consistently supported the Court throughout its activities. The first investigations of the ICC were started following referrals from Africa. Africa requested the ICC's intervention. The idea of the ICC targeting Africa was again demystified when Mali in July 2012 requested the

Fatou Bensouda

ICC to intervene, making it the fourth African State to ask for an intervention. ECOWAS fully supported the ICC's intervention. Even a non-State Party, Côte d'Ivoire, requested the ICC's intervention.

We should not trivialise the leadership role that Africa is taking in international criminal justice. This is what those who say ICC is targeting Africa are in effect doing. Africa is taking responsibility, is looking for ways to address its crimes. It is coming to an institution which it has created, and of which today 33 countries are members. They are requesting that the ICC take up these cases but the propagandists are turning it around. We need to refocus: the ICC is not targeting Africa. The ICC will continue to work for and with the victims in Africa. Those who do not want to be targeted should stop committing the crimes.

What kind of support does the OTP need from States Parties to do its job efficiently? Does the fact that big nations, such as China, Russia and the USA, are not States Parties affect the courts ability to do its job effectively?

The Rome Statute has created a system where the ICC is the judicial pillar and States the enforcing pillar for this system. We cannot do our work without the co-operation of States Parties and other partners, especially in the area of executing arrest warrants. At present, we have 13 outstanding warrants that have not been executed. States should rethink a strategy whereby they can assist the Court in bringing people before it to proceed to trial.

The Court could do with more positive and swift responses from States Parties to requests for assistance by the Court. Delays or lack of co-operation will impact directly on the Court's efficiency.

It is also important to get public political support from States Parties. The Court first needs State Parties to speak out against some of the attacks the Court continues to receive.

Regarding non-States Parties, such as China, Russia or the USA, I would like to stress that it is the independent decision of every country, big or small, to be part of the ICC. But even though they are non-States Parties, we have had many occasions where these States are willing to engage with the ICC. The US has been giving public support and assistance to the Court. If you look at our preliminary examination in Georgia, you will see that Russia, a non-State Party, has submitted over 3000 documents to the Office of the Prosecutor. This shows that even with non-Member States, there is some level of engagement with the Court, and that the Court has become part of the international landscape.

The UN Security Council recently decided to refer Libya to the ICC; Syria was not referred. How can one avoid a situation where ICC prosecutions depend on these political considerations and decisions?

The international community has been very clear in the division of roles: the UNSC is responsible for peace and security and the ICC is responsible for justice. With the creation of the ICC, the UNSC acquired an additional tool for ensuring that there is peace and security. But even where the ICC receives a referral from the UNSC, the Office of Prosecutor will make its own independent decision as to whether or not to proceed with the opening of an investigation, solely based on Rome Statute criteria and the information it gathers.

The States Parties who sign and ratify the Statute do so knowing that the UNSC has the power under the Statute to be able to refer cases to the ICC.

In conclusion, a look to the future: another ten years from now, where would you like to see the Office of the Prosecutor?

I would like to leave a well-respected Office, an Office that helps prevent crimes, that holds criminals accountable and constantly addresses the plight of the victims. And I want to leave an Office that will have addressed gender crimes.

Brenda Hollis

My remarks are given in my personal capacity and do not reflect the position of the Office of the Prosecutor of the Special Court for Sierra Leone or any other organ or individual of the Special Court.

Is head of state immunity a thing of the past? As with most questions asked of a lawyer, my answer to whether head of state immunity is a thing of the past is: it depends. The query has a factual and legal component.

Factual component of the question

The answer to the factual component of the question is more susceptible to a ready and clear answer, so I will speak to that component first. In my view, the answer to the factual part of the question is totally dependent on the political will of the State and the international community. If there is no or insufficient political will to abide by the evolved international law which gives no such immunity for certain crimes tried in certain courts, then, *de facto*, head of state immunity is not a thing of the past.

Legal component of the question

The answer to the legal component of the question depends in large part on the nature of the alleged crimes and the nature of the court attempting to exercise jurisdiction. The legal component of this question was presented to the SCSL as a challenge to its jurisdiction. In 2003, though he was not in the custody of the Court, the Appeals Chamber allowed Charles Taylor to contest the jurisdiction of the Court based on alleged head of state immunity.

Historically recognised immunities of heads of state and certain other officials from foreign jurisdiction are both personal and substantive. *Ratione personae*, or procedural or personal immunity, attaches to the status of an incumbent head of state and certain other incumbent officials, and bars the exercise of jurisdiction over them by courts of another State. This immunity is forfeited when the person leaves office. *Ratione materiae*, or substantive immunity, shields the official conduct of a head of state from foreign jurisdiction for official acts carried out in the exercise of his functions while in office, and continues in effect even after he or she leaves office.

Dapo Akande, Brenda Hollis, Stefan Barriga, Helmut Kreicker

These immunities evolved, at least in part, from the principle of sovereign equality, in which one State shall not be subject to the jurisdiction of another State. These immunities continue to serve an important function in the appropriate circumstances. They are important for the effective and efficient conduct of international relations. International rules on personal immunities are designed to safeguard State sovereignty by shielding State officials performing State functions abroad. Persons are safeguarded from, for example, arrest and the criminal jurisdiction of local courts, so that no obstacle is raised, nor any impediment set, to the exercise of their official functions.

However important these immunities may have been, and may still be, they are today qualified immunities, at least when heads of state and others who would be entitled to the immunities are charged with international crimes in international courts. In such circumstances, the official, be he a head of state or other official, no longer enjoys the protection of these immunities, whether he is currently serving or formerly served in this official capacity. He may no longer hide behind his office to avoid criminal accountability for his involvement in these types of crimes.

As stated in the **Nuremberg Judgment**, the principle of international law that in some circumstances protects representatives of a state cannot be applied to acts that are condemned as criminal in international law. The authors of those acts cannot shelter behind their official position in order to be freed from punishment in appropriate proceedings. The very essence of the Nuremberg Charter is that individuals have international duties which transcend national obligations of obedience imposed by the individual State.

Cancellation of head of state immunities in relation to international crimes, at least when the head of state is being tried in international courts, has also been reaffirmed by the Statutes of the ICTY, ICTR, SCSL and the ICC.

So, one answer to the legal component of the question is: yes, head of state immunity is dead **if** the crimes are international in nature – war crimes, genocide, crimes against humanity, or other serious violations of International Humanitarian Law – **and** the person is being tried in an international court.

It was largely on this latter criterion, namely, the issue of whether the SCSL was indeed an international court, that Charles Taylor based his application to the Special Court to quash the Indictment against him and set aside the arrest warrant that had been issued. He argued in large part that he had immunity from prosecution because the SCSL was not an international court, but rather a court within the judicial system of Sierra Leone. The Appeals Chamber ultimately determined that the SCSL was an international court and thus Mr. Taylor could not claim immunity from prosecution in that Court. The judges also looked at the high level of involvement of the Security Council in the establishment of the Court and the fact that the SCSL has the characteristics associated with classical international organisations. So, settled law today is that there is no head of state immunity if the person is being charged with international crimes in an international court.

But, what if the court is not an international court? What if the crime is not an international crime? What if it is a state attempting to exercise jurisdiction over a head of state? For a domestic crime? For an international crime? The legal component of the question of head of state immunity is not so clearly decided in these situations.

If a sitting head of state is accused of a domestic, as opposed to an international, crime in a foreign jurisdiction, the current status of the law would seem to indicate that the foreign state would not be able to exercise jurisdiction over him, unless certain other conditions were met, such as, perhaps, waiver of immunity by the state which the person represents.

If the sitting head of state is accused of international crimes – war crimes, crimes against humanity or genocide – which come within the jurisdiction of the foreign state, then, in the absence of a waiver by the state which he represents, there is disagreement as to whether such a foreign State could exercise jurisdiction over the official. The **Yerodia** case **(DRC v. Belgium)** seems to say by extension that, in this circumstance, the foreign state would not be able to exercise jurisdiction over the sitting head of state.

Conclusion

So the answer to the legal component of the question would seem to be that it is settled law that if the head of state, past or present, is charged with international crimes in an international court, no immunities protect him or her from prosecution. However, if he or she is charged in a state court, he or she may be protected by immunities.

And, again, in my view, the answer to the factual component of the question of whether head of state immunity is dead, is totally dependent on the political will of each state and the international community.

Panel: Head-of-State Immunity – A Thing of the Past?

Dapo Akande, Co-Director, Oxford Institute for Ethics, Law and Armed Conflict, St Peter's College

Dapo Akande

What is the position in relation to Head-of-State Immunity before international courts? Whether or not Head-of-State Immunity is a thing of the past, depends on different scenarios. The view that has been expressed by the ICC is that there is a broad rule of customary international law which says that there is no immunity from the jurisdiction of international tribunals or truly international tribunals. In my view, this goes too far. Certainly, there are a number of tribunals where the instrument setting up the tribunal has removed the immunity of those States that are bound by the instrument.

Three of the accused persons before the ICC were either serving heads of states at the time of the arrest warrants or former heads of states, i.e., Al-Bashir, Gaddafi, and Laurent Gbagbo of Ivory Coast. Even with the critical issue of the Al-Bashir case, the ICC actually avoided deciding on this question of immunity until December 2011. The Court ought to have decided on this issue much earlier. The African Union repeatedly adopted resolutions calling on African states not to co-operate with the Court in relation to the Al-Bashir case, relying specifically on Article 98 of the statute, and the Court just did not deal with that.

Is there a **rule** of **customary** international law that says that there is no immunity before international tribunals? There are two questions that we need to answer. **First**, is there immunity from prosecution by the ICC? Second, is there immunity from arrest by national authorities which are acting at the request of the Court? This **second** question asks whether, in the case of the ICC prosecution, there is immunity from the enforcement jurisdiction of national authorities which are acting at the request of the Court? It is important to note that these two issues raise two separate questions.

In relation to the first question, namely, of whether there is immunity from prosecution by the Court, the ICC Pre-Trial Chamber decided in December 2011, following the decision of the Special Court for Sierra Leone in the Taylor Case, that there is a rule of customary international law, which states that, once there is an international tribunal, there is no immunity. The evidence cited in support of this rule was based on the statutes of a number of prior international tribunals couched in words to the effect that a Defendant's official capacity shall in no case excuse him/her from criminal responsibility.

The ICC has two provisions that deal with immunity, namely: Article 27, which says that no immunity shall bar the court from exercising jurisdiction; and Article 98 which, in contrast, seems to suggest that the court may not request a surrender, if this would cause a violation of immunity. I agree that in cases where one is dealing with the head of state of a State Party to the ICC Statute, then the effect of these provisions, and of Article 27 in particular, is to remove such immunity. Yet, Article 27 cannot remove the immunity of a head of state of a non-State Party. The reason for this is that the ICC Statute is a treaty and treaties can bind only such States as have become party to them. Hence, in the case of a State that is not a party to the treaty, its immunity must be deemed to remain in force.

Let us take the example of the proposed extension of the jurisdiction of the African Court of Human Rights to include international crimes. If this argument is correct, i.e., that there is a rule of customary international law which states that there is no immunity for heads of states before international tribunals, then this would mean that, when the African Court of Human Rights has the proposed expanded jurisdiction, it would then be able to prosecute any head of state from any country in the world for international crimes. It seems to me that there is no State practice that would support this. Article 98 of the Rome Statute talks about the Court not requesting surrender where this would violate immunity, which suggests that, in the minds of the drafters -even though they were thinking of the ICC- the question of whether immunities are **still** relevant in the context of international prosecutions was left open. We also have the resolutions that the African Union now repeats every six months about the immunity of Bashir. The Arab League adopted a similar resolution after Bashir was indicted, likewise including a reference to his immunities. So it is not at all clear to me that there is a State practice which supports this supposed rule of customary international law.

The second issue is: even if there were a rule relating to immunity from prosecution before the international tribunal itself, there would still be the separate question of whether States which were acting at the request of the International Tribunal could arrest the head of state concerned. If he/she were the head of state of a State Party, the effect of the Rome Statute would be to remove such immunity but in the case of a non-State Party that immunity would remain in place.

Where there is a Security Council referral, the situation changes again. The Darfur and Libya cases were referred to the ICC by the Security Council. Both of these countries are UN members bound by Security Council resolutions. The Security Council has in effect imposed the obligations under the Rome Statute on Sudan and Libya, with the effect that Article 27 applies to them as if they were parties to the ICC. So the Head-of-State Immunity of the leaders of Sudan and Libya has been removed, though by reference not to the alleged position in customary law but rather to the referral by the Security Council.

The Relationship between Head-of-State Immunity and International Criminal Law

Helmut Kreicker, Attorney General's Office, Karlsruhe, Germany

1. National Prosecution of Heads of State by Foreign States

Incumbent heads of state enjoy full immunity from the criminal jurisdiction of foreign States. This immunity has to be granted by States without any exception in all cases of national prosecutions. This means that, even if a foreign head of state is accused of having committed an international crime such as genocide, crimes against humanity or war crimes, he or she cannot be prosecuted by a third State. The International Court of Justice confirmed this full immunity in its 2002 judgment in the Congo-Case, and this has never been challenged.

But there is no immunity for former heads of state from third State prosecution in cases of international crimes. Former heads of state can only rely on the functional immunity which every state organ enjoys in respect of its official acts and which is part of state immunity. But this state immunity finds an exception in cases of international crimes. This is one of the Nuremberg principles. Thus, Pinochet –the former Head of State of Chile – enjoyed no immunity from British jurisdiction simply because there is no state immunity for international crimes.

2. International Prosecution of Heads of State by the ICC

In cases of prosecution by the ICC, one has to differ between heads of state of countries that are State Parties to the ICC Statute and heads of state of countries that have not ratified the Rome Statute.

a) There is no immunity that can prevent the ICC from prosecuting heads of state of State Parties of the Rome Statue. This is because Article 27 of the ICC Statute stipulates that all immunities are of no relevance to the ICC. Furthermore, by ratifying the Rome Statute and thereby consenting to Article 27, all State Parties effectively waive the immunities of their heads of state (and all other state functionaries), insofar as measures of the ICC itself are concerned.

b) But what about the immunity of heads of state of non-member States of the ICC-Statute? Some argue that such persons enjoy full immunity, even vis-à-vis the ICC, because the Court is based on an international treaty, the Rome Statute, and a treaty is only binding on its parties. This is true of course: immunity of heads of state of third States cannot be declared irrelevant in a constitutive manner by Article 27 of the ICC Statute. Nonetheless, I agree with the recent jurisprudence of the ICC in the Al Bashir case, to the effect that a rule of customary international law has emerged, which declares international immunities irrelevant in cases of prosecutions by truly international courts such as the ICC; and this rule of customary international law is binding on all States, whether or not they are State Parties to the Rome Statute.

To my mind, there is sufficient State practice to assume the existence of a rule of customary international law that declares international immunities irrelevant vis-à-vis a truly international criminal court, such as the ICC. One can even go back to Nuremberg, where there was a generally held belief that no immunity whatsoever could stand in the tribunal's way. In 2002, the ICTY stated that Article 7 of the ICTY Statute, which declares immunities irrelevant, reflects customary international law. Charles Taylor was still Head of State of Liberia when the Special Court for Sierra Leone confirmed the arrest warrant against him. Moreover, one can even take the case of Al Bashir as an instance of State practice supporting a customary-law-based immunity exception in cases of prosecutions by truly international criminal courts.

Hence, there is no need to have recourse to UN Security Council resolutions referring cases to the ICC. Needless to say, however, if the UN Security Council were to refer a case to the ICC (as it has in the case of Sudan), then this referral would per se constitute a bar to any Head of State of a third State seeking to claim immunity against prosecution by the ICC, i.e., since all States are bound to accept Security Council Resolutions, it follows that they are equally bound to accept a UN decision to the effect that there should be no immunity. This is also why the President of Sudan, Al Bashir, does not enjoy Head-of-State Immunity vis-à-vis the ICC.

Helmut Kreicker (r)

3. Support of ICC prosecution by State Parties to the Rome Statute

The most delicate legal question is whether States are prevented from supporting the ICC because of Head-of-State Immunity. As I have already pointed out, Head-of-State Immunity means that single States are not allowed to use their own national courts to prosecute incumbent foreign heads of state, even if the respective head of state is accused of having committed an international crime. However, are States prevented from even arresting a foreign head of state, if asked to do so by the ICC? Again, to answer this question, one has to differ between heads of state of State Parties to the ICC statute and heads of state of third States.

a) The prevailing view is that, by ratifying the ICC-Statute, State Parties have waived their immunities, not only in respect of action taken by the ICC itself, but also in respect of measures of other States in support and on behalf of the ICC, especially in the case of an arrest of a head of state.

b) Yet, what about the heads of state of third States? In the Al Bashir case, Pre-Trial Chamber I of the ICC has laid down that the customary international law exception to Head-of-State Immunity in cases of international prosecutions, not only covers prosecutions by the ICC itself, but also extends to supportive measures undertaken by single States for the ICC. I disagree with this statement. In this regard, I share the view of the African Union in the Al Bashir case. I believe that single States may not arrest and surrender a head of state of a non-member State to the ICC as long as that third State has not given its formal consent. Hence, the ICC may not ask a Member State to arrest and surrender the head of state of a non-Member State, as long as the ICC has not received that State's consent in advance.

On the other hand, one should not forget that the ICC is backed by 121 States which, by virtue of their consent to Article 98 (1) of the Rome Statute, have authorised the ICC to determine in a binding manner whether or not there is immunity of a type that would bar a head of state (or other functionary) from being arrested by another State on behalf of the ICC. Accordingly, the decision of Pre-Trial Chamber I is a strong sign of new international practice in favour of the above-mentioned immunity exception. Hence, while we may perhaps be witnessing new customary international law in the making, it is nevertheless far too early to speak of existing customary international law.

Yet, there is an exception to every rule: if the UN Security Council, by way of a resolution under Chapter VII of the UN Charter, were to request or even oblige States to support the ICC, this might be construed as declaring the immunities of the relevant functionaries of a third State irrelevant, not only in general but also vis-à-vis an arrest on behalf of the ICC and surrender to it by another State. The pertinent third State would be bound by such an effect of a Security Council resolution (Article 25 of the UN Charter). In the case of Sudan, the UN Security Council requested all States to support the ICC and so no State may use Head-of-State Immunity as a pretext for not arresting President Al Bashir.

Conclusion

In my opinion, there are sound reasons for maintaining full immunity for heads of state in cases of national prosecutions by third States. If there were no such full immunity, there would be a danger of third-State prosecution for political reasons, by claiming that the defendant had allegedly committed an international crime. There is no such danger in cases of prosecution by the ICC, however, and it must thus be appreciated that no head of state can claim international immunity vis-à-vis the ICC.

Nuremberg Lecture for Peace and Justice – Tribute to Benjamin Ferencz

Hans-Peter Kaul, Judge at the International Criminal Court

Dr. jur. h. c. Hans-Peter Kaul

Let me start with some quotations:

One- *„Now let us look at the more positive things. The progress toward a world under the rule of law has been fantastic! We now have a truly international criminal court for the first time in human history.“*

Two- *„The most important point of Nuremberg was the conclusion that aggressive war, which had been a national right throughout history, was henceforth going to be punished as an international crime.“*

Three- *„You have to begin very early to educate young minds that war is not glorious. War is an abominable crime, no matter what the cause.“*

Well, I am pretty certain that you already know who made these statements. Furthermore, all those who took part in the ICC negotiations before and in Rome, will know somebody who had the habit of ending his interventions, and often his pep talks, with, „Never give up! Never give up! Never ever should you give up!“

Of course, the person to whom I am referring is, as you all know, Benjamin Ferencz.

This is the language of a passionate fighter for international law, peace and justice. This first „Nuremberg Lecture for Peace and Justice“ is in honour of Benjamin Ferencz, to many of you, a friend, a long-time friend, or even an idol. Here is a man, not really tall, but standing tall in terms of principles, courage and experience in life. Here is a man who has travelled a long road, often stony and difficult, with many ups and downs: birth in Transylvania, immigration to the USA, education in New York and at Harvard Law School, with General Patton on the beaches of Normandy, war crimes investigator, and Chief Prosecutor in the Einsatzgruppen case, continuing work in post-war Germany, and then a lifelong commitment to peace and justice, to international co-operation; decades of work for the criminalisation of aggression, and for the future ICC, which brought Benjamin Ferencz to Rome and to Kampala, as one of the most respected and influential international experts.

What is probably less known is the enormous work done by Ben Ferencz towards reconciliation between Germany and Israel –many know the photo in which he can be seen together with Konrad Adenauer and Ben Gurion when signing the Luxembourg Agreements in 1952. What is also an integral part of Ben Ferencz‘ life is his work to assist victims of the Nazi Regime seeking compensation for their suffering, their losses during the war and during forced labour.

In sum, here is a man who has seen it all: genocide, war crimes, crimes against humanity, and the disastrous consequences of the wars of aggression waged by Hitler and his followers against many countries; then, active participation in the liberation of concentration camps and the Einsatzgruppen case in Nuremberg, sometimes called the most important mass murder trial ever. Hence, here is a man who has looked into the eye of evil, death and disaster, a man who has likely looked into Dante‘s Inferno, someone who has travelled to hell and back. And yet -and this is so astonishing, so admirable, almost a miracle- here is a man who never lost his inner balance, his sense of humanity. Instead of becoming cynical, Benjamin Ferencz remained undisturbed; he kept his objectivity, his well-known sense of humour and fondness for good jokes, and also his special ability to encourage others to fight for a better world.

When I first met Benjamin Ferencz in 1996 and 1997, I did not know too much about him. Yes, I had heard about him as a former Nuremberg Prosecutor, and yes, I had heard about him as a respected international lawyer and leading advocate for the criminalisation of aggression. Yet it is different to meet somebody in person, to see somebody in action at the United Nations and at the ICC PrepCom, and then to become closely acquainted, before becoming a friend. In 1997, the Green Party held a preparatory meeting at the German Parliament for the forthcoming Rome Conference in Bonn. Of their own initiative, they had invited Benjamin Ferencz as the keynote speaker along with the head of the German ICC delegation, a post to which I had been appointed one year earlier. This was a quite special seminar with a remarkable and indeed astonishing outcome. When it was over, I realised that, thanks to his powerful interventions, Benjamin Ferencz had converted all the Bundestag members present into determined supporters for the establishment of the future ICC. I myself felt greatly encouraged when he approached me after the seminar and told me that I should persist in (yes!, „never give up“) working for an effective, independent and credible ICC.

Ben Ferencz and Hans-Peter Kaul

This demonstrates yet again (and this is only one example) that, among his many outstanding qualities – including personal courage, persistency and principled determination – Benjamin Ferencz has a special talent for motivating others, encouraging others, and often even making them enthusiastic supporters of the fight for peace, justice and human rights.

Let me also mention another anecdote and e-mail correspondence with Ben Ferencz in 2008, which has to do with him as well as this little postcard. The picture is of Berlin in 1945; it shows ruined buildings, ruins, ruins, ruins and piles of rubble. But on a wall that had somehow remained standing, somebody had written three words, only three words, in large white letters, „Nie wieder Krieg“ (war never again).

We know how hungry the people were in Berlin in 1945, what deprivations they suffered and how they had to fight each day to survive. Nevertheless, here were individuals or small groups criss-crossing the ruined city with a bucket of paint and a brush to spread the message, „Nie wieder Krieg“, as far and wide as they could. I was moved by this idea.

I sent this card to him in the USA and soon received the following reply: „I vividly recall the scene depicted in your photo of Berlin „Nie Wieder Krieg.“ I hope one day, with your help, we can add a PS: „Krieg ist Strafbar!“ I am still working on it.“ Yes indeed, Ben, you and so many good people kept working on it, with steadfastness and determination. It is my firm belief that without the lifelong commitment of Ben Ferencz, the inclusion of the crime of aggression in Article 5 of the Rome Statute would not have been achieved; and that without him, the Kampala breakthrough on the crime of aggression would not have been possible.

By way of illustration, let me mention another memorable event in which Ben Ferencz, with his usual determination, made full use of a further chance to promote the criminalisation of aggressive war-making. This concerns the inauguration of the Memorium Nuremberg Trials, just above courtroom 600, which took place on 21 November 2010. This was a quite powerful ceremony, attended by Russian Foreign Minister, Sergey Lavrov, German Foreign Minister, Guido Westerwelle, former French Foreign Minister, Roland Dumas, UK Attorney-General, Dominic Grieve, and US Ambassador-at-large for War Crimes, Stephen Rapp. In courtroom 600, all those present not only underscored the historic importance of the Nuremberg Trials but also acknowledged -albeit with some nuances- the establishment of the ICC and its role in the international community.

I was sitting beside Benjamin Ferencz, who spoke last. It will not surprise you that Ben delivered yet another gripping, if not mesmerising, speech. Before the high-ranking guests and ministers lined-up in the first row -I could not help thinking to myself, „They are sitting before him like schoolboys!“– he strongly reminded them that the IMT had found aggression to be „the supreme international crime“, that the notion of crimes against peace was the most important outcome of Nuremberg. Referring to the Kampala amendments to the crime of aggression, he appealed directly to them and to all present to ban and criminalise aggression both internationally and in their own national law.

When he ended, his speech was met by unusually long applause, a standing ovation. Likewise, in the media reports, in the newspapers and on television, the presence of the high-ranking guests was certainly mentioned but the big story was Benjamin Ferencz and his powerful speech.

Dear Ben, we owe so much to you. You have set an example for all of us: the former Nuremberg Prosecutor who, throughout a long life, has fought relentlessly for international peace and justice, for the criminalisation of the crime of all crimes, which breeds the other core crimes. You are our beacon, our pillar of hope and encouragement!

It was clear right from the beginning: it was glaringly obvious that you should be the first „Nuremberg Lecture for Peace and Justice“ prize-winner.

We respect you! We admire you!

We adore and, yes, we love you!

We thank you and continue to need you.

May I ask you, Ben, to come forward to receive the insignia of this prize from the hands of Dr. Schneider, former Federal Minister and the driving force behind the future Nuremberg Peace through Law Academy! Ladies and gentlemen, let us all rise in honour of Benjamin Ferencz, the first recipient of this new award.

Panel: How to deal with Critical Perceptions of the ICC in African and Arab Countries?

Bill Pace, Convener, Coalition for the ICC (CICC)

The Rome Statute, as we look at it ten years after the treaty entered into force, remains one of the greatest advances of all times in international law, as opponents and supporters both agree. It is a treaty that could not be achieved in the political climate of the world today, and most certainly could never have been achieved in the first 50 years of the political climate of the international legal order established by the UN charter in 1945.

The key elements in the Rome Statute which certainly could not have been agreed to, as they were in Rome, include: an independent prosecutor and an independent court; automatic jurisdiction; no immunities; no reservations; application of jurisdiction to internal armed conflicts; definition of gender crimes, victims' rights and victims' participation; and reparations. These are only a few of the elements that would be left out, if we tried to achieve this today.

Hence, as an historic advance, the Rome Statute and the International Criminal Court must be protected. However, the Rome Statute would never have been agreed to and achieved without the overwhelming support of African nations; 47 nations participated in almost all the decisions and voted "Yes" in Rome.

The group of governments succeeded with a very important contribution from civil society and, if you look at the 121 nations which have now ratified the treaty (one more than those that voted "Yes" in Rome), these are the world's middle- and small-power democracies. Of the 33 African countries that have ratified the treaty, the majority are emerging democracies. Tragically, after 2002, for a variety of reasons -only one of which was the global war against the ICC waged by the most powerful country in the world in the form of the Bush Administration- this high-powered political support began to disappear and, at this point, migrated to desk officers in foreign ministries. In Africa, ironically, the ICC portfolio has migrated to heads of governments, and to anti-ICC heads of governments in particular. They are suppressing the pro-ICC ministers and legal advisers. This is one of the big challenges we face. Nevertheless, we still we have 800 African civil society members in the Coalition for the ICC, 21 countries have national coalitions for the ICC, and there is a high African representation in the court in the form of judges, prosecutor and staff.

One of the achievements of the Rome Statute is a major modification of a reality that was mostly true for 500 years. International law was simply a tool of the big powers: they used the tool against the smaller powers, obeyed international law when it was in their interest, and ignored it when it was not. This tool was also used to assist in transferring wealth and resources from south to north, from the least to the most developed countries. In sharp contrast to this 500-year process, the ICC represents almost the opposite. The ICC is an example of African States taking excellent advantage of the new international legal system and court, i.e., while the 33 African governments that are States Parties contribute less than one percent of the ICC budget, the nonetheless account for 80 percent of the use of this new institution.

As regards the misuse of the new African court, this is the concern of many of our members in Africa and they have written letters on the issue. It will essentially be the civil society members in Africa that will be defending the ICC from the prospect of becoming a court which actually shields leaders against justice and promotes immunity and impunity. I am confident that African civil societies and progressive African governments will protect the idea of belonging to the ICC.

On the ICC in the Security Council, I hope to see progress on this issue in the next decade. The reproach of selectivity when it comes to choosing cases has nothing to do with the Rome Statute: the selectivity issue has instead to do with the misuse of the Council by the five and the other ten elected members of the Council. The ICC is improperly tainted by this accusation of selectivity but I hope we can make some very important advances. The challenge lies in getting high political support in the Assembly of States Parties, in the UN General Assembly and in the Security Council, and it is a matter of reforming the working methods of the Council.

To conclude, I would like to stress that 33 African nations have ratified the Rome Statute. This reality represents African support for the ICC far better than anything that we might read in the newspapers or see in the declarations of the African Union, which were basically promoted by the anti-ICC leaders.

Message from Nabil Elaraby, Secretary General of the League of Arab States

read by Dareen Aboul Naga, Desk Officer for Legal Affairs at the Cabinet of the Secretary General of the League of Arab States, Cairo

Nabil El Arabi

Everyone gathered here today respects and values the great leaps in development that have taken place since the Nuremberg trials in the field of humanitarian law, and specifically, the steps taken in attaining the target of putting an end to impunity to gross violations of humanitarian law. The International Criminal Court attests to that. However, the international justice system is not flawless and has yet to reach the epitome of what it could be and what it should be. And again, we can find this mirrored in the application and execution of the relevant international bodies, and the ICC in particular.

I would like to emphasise from the outset that the Statute of the ICC ushered in a new era in human history. The Preamble to the Statute declares very clearly that the ultimate objective is to put an end to impunity. However, this lofty objective should be premised on the basis of equality before the law.

Often, the international community and those working in the ICC ask why many countries, including Arab countries, are reluctant to ratify the Rome Statute. Reasons vary but a common denominator lies -among other things- in the perception of the ICC as a politicised tool of the Security Council.

Although the ICC is not an organ of the UN, the Security Council has the power to curtail its activities and to interfere with the workings of the court to a far wider extent than with those of the UN's own judicial organ, namely, the ICJ. Article 13 of the Rome Statute gives the SC the authority to refer cases to the ICC, while Article 16 gives the SC the right to defer cases before the ICC, and in such cases the ICC has no discretionary power but must abide by the SC's decisions, thereby, losing one of its most important characteristics –its independence.

The Security Council enjoys a central and unparalleled place in our contemporary international system, as it is the sole organ vested with the authority to enforce. And, as the saying goes, with great powers come great responsibilities. Over the years, the SC has been accused of acting according to the political interest of various super powers, which is often seen in the abuse of the right of veto. And without reforming the veto application, the issue of double standards and politicisation of legal issues will continue to plague the international community.

The Security Council's use and abuse of the veto, has for many years led to the perception that its decisions are politicized. Giving the Security Council the power to control the ICC has further led many countries – among them Arab Countries – to view the Court as a political tool of the Council. Unfortunately, some of the courts activities have not helped in dispelling that perception.

For this view to be changed the ICC has to prove in action and proceedings that it is an independent body beyond the scope and political influence of the Security Council. And this will not be an easy task. The Statute of the ICC at Article 13 (b) stipulates that, when acting under Chapter VII, the Council can refer a situation to the Prosecutor, in which one or more crimes that fall under the jurisdiction of the ICC appear to have been committed. To act under Chapter VII the Council has to determine the existence of a threat to the breach of the peace or an act of aggression. This determination required by Article 39 of the Charter can be blocked by a Permanent Member casting a negative vote, i.e., a veto.

So, when viewed with a critical eye, one quickly recognises that the referral function to be exercised by the Council is, in actual terms, controlled by the veto, which is unfortunately being overused in accordance with political considerations, possibly turning the ICC into the political whip of the SC.

10 years ago I was completely against the referral option. However, after the passing of all these years and looking at the limited number of States that have joined and accepted the jurisdiction of the ICC, as well as the number of heinous and gross violations of human rights and humanitarian law that continue to take place at this time and age, I find that I have to reconsider my complete objection to the referral option made in the Statute. For it may be viewed as the only means to bring to justice perpetrators of crimes that fall under the jurisdiction of the International Criminal Court. However, my considerations regarding the possible abuse of the deferral license still stand.

My position of 10 years ago regarding the power to defer remains unchanged however. Under Article 16, the Rome Statute gives the SC the right to stop the investigation or prosecution under way. For, if the SC adopts a resolution under Chapter VII and requests the ICC to halt proceedings or investigations in a case for 12 renewable months, as there is no specification as to how often this request can be made, an investigation or proceeding can be held off indefinitely. Thus the question arises of how this is reconcilable with the concept of "no impunity" for perpetrators of grave crimes, as well as equal standing before the law.

It is always a difficult balance that must be held between justice and attainment of true peace and security. Will justice attain peace or will impunity hold the peace. This is an ongoing struggle between theorists, but before the law and before a court all should always stand equal and double standards should have no place before a court.

How can the ICC overcome its current image? Through balanced, judicial and wise application of the current Statute. It will require both restraint from the SC body and wise application and exercise of this right, as well as careful and wise application and interpretation of this right by the ICC and its judges.

In retrospect and after taking into consideration the record of the ICC in the last decade, I have no hesitation in recognising the achievements attained. The ICC is now a recognised judicial institution. The Judges and Prosecutors of the ICC have succeeded in confirming their own jurisprudence. The court is a living institution capable of development and growth, and it is for those working in the court and its judges and prosecutor to convince the international community that will be observing and following its activities closely, that it represents the international community as a whole and is a protector of rights and values and norms which are the basis of the Nuremberg trials and the Rome Statute. All should stand equal before the law. And as they say, actions speak louder than words.

Panel: How to deal with Critical Perceptions of the ICC in African and Arab Countries?

Max du Plessis, Associate Professor, University of KwaZulu-Natal, Durban; Senior Research Associate, International Crime in Africa Programme, Institute for Security Studies, Pretoria; Barrister, South Africa

It has become fashionable to criticise the International Criminal Court (ICC) for its exclusive focus on African cases. Developing nations, particularly from the south, now repeatedly and rightly complain about the skewed power relations reflected in the Security Council. After a decade of the ICC's work, we have witnessed how the Security Council referred two African situations to the ICC (Sudan, and Libya) but has repeatedly failed to do so in respect of equally deserving situations (in relation to crimes committed by Israel, and most recently in respect of the crimes unfolding before our eyes in Syria). Geographically, we now have ten years of the ICC's work, and the reality that all the cases opened by that Court are in Africa.

It is time to accept that all these African cases give rise to a perception problem, the sum of which can no longer be ignored, and which threatens to undermine the credibility of the court. Let me tell you why, for three reasons. The first reason is because this exclusive African focus undermines claims that the international criminal justice project is truly universal in its justice aspirations, or free from the vicissitudes of international politics. So long as the Security Council and the ICC ensure that the Court busies itself exclusively with African situations, and ignore or evade dealing with the sins of Syria or the plight of the Palestinians, the Court will suffer from a credibility problem.

That leads to a second reason why the ICC perception problem can no longer be ignored. Aside from the justice principles of equality and fairness, this exclusive focus on Africa affords the selfsame African tyrants and powerful elites a gift, an excuse, a weapon. It allows them to draw deserving attention away from African crimes and the plight of African victims, by insisting that the spotlight be kept trained on the skewed nature of international criminal justice. When the Security Council referred the Sudan situation to the Court, the net fell on President al-Bashir. It became clear in a flash to others similarly situated on the continent, that his fate might be shared by other elites -that the net might be extended to them.

The backlash by the African Union (AU) against the ICC is well chronicled. We know about the repeated requests by the AU for the Security Council to defer the case against al-Bashir; about Resolutions adopted by the AU commanding AU member states not to co-operate with the ICC in arresting African heads of state; and about the invidious position in which a majority of African states have found themselves, torn between fidelity to their regional mother-body, the AU, and their commitments to the ICC as treaty members of the Rome Statute.

Also, more recently, we have seen how the AU's discontent with the ICC has fuelled efforts to create a regional international criminal chamber, grafted onto the extant African Court on Human and Peoples' Rights. In November 2011 a draft protocol for the creation of such a chamber was rushed into existence under the AU's stewardship.

A second difficulty is the Court's proposed subject-matter jurisdiction. Aside from the African Court being asked to tackle the traditional international crimes of genocide, crimes against humanity and war crimes, the proposal is that the Court should also tackle a raft of continental plagues, including terrorism, piracy, mercenarism, corruption, money laundering, trafficking in humans and drugs, and aggression.

Aside from the difficulty of complementing the Court's judicial role with fully capacitated prosecutorial and investigatory bodies that can meaningfully pursue cases against the accused, there is the little problem of money.

Max du Plessis

Without money the AU cannot capacitate the African Court to do the type of international criminal justice work that the ICC is already doing on the continent, in the service of African victims. To overexpand the Court might be a headshot to a body that is already kneecapped.

Of course, one does not want to be read as being unduly negative about the prospects for an African regional criminal chamber, or worse, as being an Afro-pessimist. So let me conclude this portion of the paper by saying the following: if, in due course, the African Union were to unveil a sufficiently funded, meaningfully resourced, legally sound and capacitated African criminal court that would fearlessly and independently prosecute the likes of President al-Bashir or Hissen Habre, or other African warlords, while simultaneously performing without compromise the Court's parallel mandate of protecting African human and peoples' rights … then we should all applaud.

Allow me now to focus on the positives. The first is to herald, despite all the AU's naysaying, the leadership role that Africa has taken in respect of the ICC. We have the world's first examples of self-referrals from this continent.

The second is to celebrate the important role that complementarity has played. On the ground, domestic investigations and prosecutions of international crimes have shown promising signs of a home-grown form of international criminal justice that should serve as an example beyond Africa.

For all the AU's attempts to co-ordinate an „African" response to the ICC, various examples have undermined the attempts at a homogenous continental position. For example, South African civil society mobilised in 2009, after reports that al-Bashir (by then sought by the ICC) had been invited to attend the inauguration of President Zuma in Pretoria. Ultimately, the Government stated publicly that it was committed to the Rome Statute and undertook to arrest al-Bashir if he did arrive in the country. Al-Bashir chose not to visit South Africa.

Ultimately, when it comes to international criminal justice, it remains for the international community to take the call for less double-speak and hypocrisy seriously. It is in the interests of justice and of the reputation of the ICC that the Court extend its work beyond Africa. By doing so, the Court will deny the powerful African elites the stick which they so easily and distractingly wave at the ICC. Moreover, where the evidence shows a need for the Court's intervention, it will also be a means whereby homage can be paid to the principle of equal justice under law.

Here then is the potential for a win-win situation, namely, for the ICC to do justice, as it should, both to the African victims of the cases that are rightly before it and to the victims of such crimes outside of Africa, who equally deserve the Court's and the international community's attention.

The Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights

Tiyanjana Maluwa, Pennsylvania State University School of Law and School of International Affairs

I. The genesis of the idea of an international criminal jurisdiction for the African Court

It is important to note from the outset that, contrary to a common assumption, the genesis of the current process to create an international criminal jurisdiction for the African Court does not lie in the contemporary debates about Africa's relationship with the ICC, at least not exclusively. Specifically, this process did not emanate from the debate about the indictment of and arrest warrant issued against President Omar Hassan al Bashir of Sudan by the ICC.

Rather, the process must be located in the context of three contemporaneous issues.

First, the emerging discourses within the AU on the perceived abuse of the principle of universal jurisdiction by courts in some European countries targeting high-level African officials and politicians. Second, the challenge faced by the AU over Senegal's repeatedly stalled efforts to prosecute former Chadian president Hissene Habre. And, third, the need to give effect to Art. 25(5) of the African Charter on Democracy, Elections and Governance, which requires the AU to formulate a novel international crime of „unconstitutional change of government."

At its February 2009 Summit, the AU Assembly requested the AU Commission to examine the implications of the Court being empowered to try international crimes such as genocide, crimes against humanity and war crimes, and report thereon to the Assembly in 2010. In June 2010, the first draft legal instrument was submitted to the Commission, and validation workshops and meetings of Government legal experts have been held. At a meeting of Ministers of Justice and Attorneys-General convened in Addis Ababa in May 2012, the Draft Protocol was referred back to the Commission for further study on the financial and structural implications and definition of the crime of unconstitutional change of government.

II. Key elements of the Draft Amendment Protocol: the international crimes

- Provides for jurisdiction over the serious international crimes of genocide, crimes against humanity and war crimes in a manner that is complementary to those in the Rome Statute, to which African States Parties form the largest bloc. The definitions of these crimes incorporate all the elements contained in the Rome Statute, as it represents the consensus of the international community on the definitions of these crimes.
- Gives effect to the requirement of the African Charter on Democracy for the speedy formulation of a new crime of „unconstitutional change of government".
- Provides for other serious crimes of concern to the African States and the international community. These currently comprise:
  a. aggression;
  b. corruption;
  c. illicit exploitation of natural resources;
  d. mercenarism;
  e. money laundering;
  f. piracy;
  g. terrorism; and,
  h. trafficking in: (i) drugs; (ii) persons; and (iii) hazardous wastes (illegal transboundary movements).
- Also provides for corporate criminal liability (in addition to individual liability).
- Contains detailed provisions regarding, among other things, the structure of the proposed African Court of Justice and Human and Peoples' Rights into a General Affairs section, Human and Peoples' Rights section, and International Criminal Law section; appointment and number of judges; organisation of the registry; protection of victims and witnesses; gender and children's issues; international co-operation and judicial assistance.

III. Relationship with other international courts and the ICC

The proposed Court will be complementary to national courts, and will co-exist with other international courts that will have similar mandates and jurisdictions to it.
The „International Criminal Law mandate" (at least in respect of the crimes of genocide, crimes against humanity and war crimes currently, and the crime of aggression in the future) will be shared with the International Criminal Court.

This multiplicity may bring about its own challenges, e.g., how best to handle this shared jurisdiction and competing mandates so that the ends of justice are met in an effective, efficient, credible and fair manner. Should the courts themselves, once fully constituted, negotiate, possibly by way of Memoranda of Understanding, how will they work together? How can the possibility of „politics" or „political considerations" creeping into what should essentially be a judicial task be avoided? And so on. As advocates for international criminal justice, we always ought to bear in mind that the prime arena for investigating and prosecuting all crimes (including those of serious international concern) is the State. The ICC, the proposed African Court of Justice and Human and Peoples' Rights with its extended jurisdiction, and any other international courts should only come into play when the state is unable or unwilling to genuinely investigate and prosecute alleged crimes. This requires the establishment of real positive complementarity, including building the capacity of African national judicial, prosecutorial and investigative mechanisms to handle serious crimes of international concern.

As has been seen, the Draft Amendment Protocol proposes a wider range of crimes than the ICC covers. If adopted, this has the potential of introducing into international criminal law several innovations that were either not accepted during negotiations for the Rome Statute or were not envisaged at that time. This would not be the first time that international legal developments in Africa, under the aegis of the OAU or AU, have preceded developments in the international system, including the UN. The Draft Amendment Protocol enables a complementary and harmonious relationship with the ICJ, the ICC and other courts.

The real question, therefore, should be whether the proposal to establish a regional criminal tribunal for Africa and to characterize some of the acts included in the draft protocol as international crimes provides a possible basis for the expansion and deepening of international criminal law and enhances the fight against impunity or weakens the system of international criminal justice altogether? Put differently, does the draft protocol undermine the Rome Statute and the ICC or does it, on the contrary, represent or offer the possibility of a new regime that, for lack of better words, might be described as „Rome Statute Plus"?

Panel: The Role of the United States in International Criminal Justice

Beth Van Schaack, Deputy to the Ambassador-at-Large for War Crimes, State Department , Washington

Beth Van Schaack

This panel is devoted to the evolving relationship between the United States and the International Criminal Court. As I was preparing my introductory remarks, I was struggling to find the right metaphor to describe this evolving relationship and, perhaps finding inspiration in its outgoing prosecutor, Luis Moreno Ocampo, I landed on the image of an Argentine tango.

Watching the evolution of this relationship between the United States and the ICC is like watching a great tango, replete with bold and tumultuous gestures, tempered by more subtle and delicate shifts in position.

This dance has been a long and complicated one. The United States first took centre stage in an effort to revive the promise made in the post-World War II period of a standing International Criminal Court to prosecute the worst abuses known to humankind.

Nonetheless, the final jurisdictional package presented at the Rome Conference in 1998 crossed too many United States red lines, and so the Rome Conference ended with a dramatic, yet ultimately futile effort by the United States to reconsider the final package, an effort that was roundly rejected by the other delegations present. Even so, the United States remained engaged in the dance, contributing to the drafting of the rules of procedure and evidence and the elements of crimes.

In a second bold gesture - and in the waning days of the Clinton Administration with just hours left to do so - the United States signed the Rome Statute. This embrace was not long-lived, however. In the early days of the Bush Administration, this move was extensively reversed by an equally dramatic and unprecedented piece of choreography, namely, the "unsigning" of the Statute by John Bolton, then Under-Secretary for Arms Control and International Security.

This development marked the beginning of a period of overt hostility towards the court, during which time the US negotiated scores of Article 98 agreements, enacted the American Service-Members' Protection Act (the ASPA), and opted out of all subsequent negotiations sessions, including the negotiations surrounding the crime of aggression.

Following this period of rejection, however, the Bush Administration softened its stand and a more nuanced approach emerged.

The Administration stopped pursuing Article 98 Agreements; while they are still technically in force, they are probably moribund. Many of the more punitive aspects of the ASPA were dismantled, largely because they ultimately proved counterproductive and undermined other US interests and the interests of other friends.

The Darfur referral, which the United States through its abstention allowed to go forward, heralded a new tone altogether. It signalled that, in the face of an unfolding genocide, the United States was willing to put aside its reservations toward the Court and use the Council referral process to advance US interests in deterring the worst international crimes, marginalising genocidaires, offering justice to victims, and ensuring individual criminal accountability.

Under the Obama Administration this *pas de deux* continued. The US gradually moved closer to the Court, to the point where it now participates as an active member observer in the Assembly of States Parties of the ICC.

That said, there are certain anti-cooperation provisions in the American Service-Members' Protection Act that remain in place and that require the United States to tiptoe through a rather convoluted, interagency choreography before providing any forms of assistance to the court.

The subsequent unanimous referral of the situation in Libya by the Security Council again signalled a more full-throated support for the role of the court in the face of crimes against humanity and war crimes. This evolution has led David Scheffer to remark in an op-ed, that even in the absence of US ratification, the United States has in essence become a *de facto* member of the court.

As we consider where this relationship now stands, it is important to remember that this *volte-face* would not have occurred but for the tacit acquiescence of the Department of Defence. This is the Department which bears the brunt of the risk of potential US exposure to the Court, in the light of its world-wide troop commitments and the risk that an unaccountable prosecutor would bring a politicised prosecution. The organisers of this panel have convened an impressive group of individuals to discuss the current state of this evolving dance.

Panel: The Role of the United States in International Criminal Justice

John Washburn, Convener, American Non-Governmental Organisations Coalition for the ICC (AMICC)

You will have learned from the introduction that my work has to do with pushing the United States along to the point where it becomes ready to ratify the Rome Statute. The work of my organisation, the AMICC, is basically to build on the relationship, on the positive aspects of it, to deepen and strengthen it while recognising its limitations and its drawbacks, but to keep pushing it on so that it develops over time. We hope it will take not too much time until the level of comfort, security, safety and closeness will reassure the American Department of Defence and others in the Administration who have problems with the Court, that it is safe for the US to join the Court and that there are real national interest aspects to be gained from participating in the Court. You gain influence when you are participating in a permanent, strong, universally respected, international institution devoted to the trial of atrocities.

There is indeed a close interaction which began at the end of the Bush Administration and accelerated enormously in the Obama Administration. There is interaction with the ICC Office of the Prosecutor in the form of information-sharing, views exchanged, satellite information and sanitised intelligence information.

This material is provided case by case because the American Service Members' Protection Act (ASPA) requires that interactions with the Court be on a case-by-case basis. This is a satisfactory way for the United States to get close -but not too close- to the Court.

The United States regularly sends large, powerful expert delegations to the Assembly of States Parties meetings. In doing so and in the conduct of its relations in general, the Administration makes extensive use of the waiver provisions afforded in the American Service Members' Protection Act, which is a curious, self-contradicting piece of legislation. A major obstacle remains, however.

The authorisation legislation for foreign affairs absolutely prevents the provision of money in any form, in any way, by the United States Government to the Court. One step towards an even closer relationship under an Obama Administration might well be a successful effort to get rid of that ban. The ASPA is an obsolete barrier but one that is very difficult to remove. If you remove a piece of negative legislation, it will be taken by many to mean that you are making an affirmative statement. Making such an affirmative statement now -a generalised endorsement of the Court- is an extraordinary thing to do, a difficult thing to do in the current state of American politics.

The United States, if it had its own way, would probably prefer the ICC to use hybrid courts, special chambers, traditional international bodies that are closely related and built around particular situations. The US knows that this is not possible. The Security Council has tribunal fatigue, and the start-up costs of maintaining single-shot, traditional international bodies, whether hybrids or others, are simply too great now for the international community. US satisfaction with its relationship to the ICC is greatly enhanced by the outcome of the review conference in Kampala in June of 2010, where the US got almost exactly what it wanted on the crime of aggression without being a State Party.

The US is likely to support available referrals to the Court and that is a desirable situation. Getting involved in referrals by the Security Council -and I recognise their pluses and minuses- is a useful learning exercise for the United States Government. In trying to move the US forward towards the Court, we find it very useful to capitalise on these experiences.

About the public, for over a decade now, polls in the United States conducted by Pew and the Chicago Council for Foreign Relations and others have shown a consistent 70% support for the Court by respondents. This is encouraging. It is part of my job to turn this public passive support into the kind of active, public opinion that can drive the political process in the direction that we want to go.

Further along, if the Obama Administration feels confident enough, we will hopefully have a reactivation of the signature. All that has to be done to reactivate the signature is another note from the Administration to the UN Secretary General who will then remove an asterisk from the US name on the list of signatories. That reactivation is likely along the way. We may also see, with a self-confident Obama Administration with reasonable support in Congress, a gradual paring down of the ASPA and a restoration of the ability to get money from the Foreign Affairs Appropriation Act.

Just one word on ratification: if I said “ratification” to an American audience under these circumstances, I would be greeted with screams of derision and howls of contempt. It is true that ratification of any treaty in the United States is extraordinarily difficult: our founding fathers made sure of that in our Constitution ... but it is possible if you undertake very careful advance preparation.

My organisation is now producing a guidance sheet to our constituencies about all the different things we have to do, to make sure that when the political moment arrives, we are ready to go with the President in the Senate with what is our best argument, i.e., that now is the time to go with ratification. The US' role in the ICC is not a barrier to an active US role in furthering international criminal justice. The US sees the Court as now being a permanent part of the international landscape. There is no going back to the dream of strangling the baby in the cradle, which was cherished in the early days of the Bush Administration.

We can get this comfort level, if countries continue, tactfully but firmly, to make the United States aware of how important the Court is to their own foreign policy. Yet the greatest responsibility for bringing the US to the Court is of course in the hands of American citizens. That is my work, and I can assure you that it is already well under way.

Panel: The Role of the United States in International Criminal Justice

David Scheffer, Northwestern University School of Law, Chicago (former US Ambassador at Large for War Crimes Issues)

First, I want to talk about a piece that I wrote back in July on the 10th anniversary about what I called provocatively the de facto membership of the United States.

Obviously, what I am trying to do with that term is to wake people up, particularly in the United States. I wanted to make the point that, frankly, we have crossed a certain threshold here in our relationship with the ICC from one that existed in the early part of the last decade, that was shaping public opinion about the Court in the United States, to one now that we need to recognise, needs to continue, needs to shape public opinion, but in a new way in the United States.

The term however completely recognises that we have no financial obligations because we are not a State Party, and we have no strict legal obligations under the Rome Statute because we are not a State Party. Nonetheless, if you work through how money is actually being spent in various ways by the US government, it is being spent in ways that ultimately benefit the International Criminal Court.

One of those in particular is the deployment, almost a year ago -in October 2011- of more that 100 military personnel to Uganda, in co-operation with the Ugandan government, to facilitate the tracking and search for Joseph Kony.

Obviously this is an expenditure funded by the US government, not intended for the Court itself but to sustain that military deployment. And this itself was emblematic of a new effort by the United States to assist the Court in the actual tracking of its indicted fugitives.

There is also an effort under way called the Rewards for Justice Program, which started for the Yugoslav and Rwanda Tribunals while I was in office as the Ambassador at Large for War Crimes Issues in the 1990s. Now it can be tapped for the purpose of providing financial incentives for information leading to the arrest and prosecution of indicted fugitives of the ICC.

It should be noted that the U.S. Government now actively takes advantage of its Observer Status at the Assembly of States Parties. I would just say that this is a very sharp indicator of a return of the United States to the deliberations on the ICC -perhaps, in some of your minds, for better or for worse.

David Scheffer

But I do know that one of the great challenges to sort of stabilize the relationship of the United States with the ICC is to finally resolve some of these lingering issues about the crime of aggression which, despite the very favourable outcome in Kampala, I know was recognised (and very explicitly so!) in Washington. I hope that every step can be taken to resolve some lingering questions about what the interpretation of that result is.

One thing that many of you might not be aware of is the creation recently of the Atrocities Prevention Board by President Obama, overseen by the National Security Council. That came into reality in the spring of 2012. I do want to emphasise here that a major element which is embedded in the discussion about the Atrocities Prevention Board is the matter of how the ICC is to become an element in the prevention exercise. How do we, the United States, use the existence and capabilities of the ICC for atrocity prevention?

There is also the rhetorical validation, as it is very significant to note that Secretary of State Hillary Clinton, US Ambassador to the UN Susan Rice, State Department Legal Adviser Harold Koh, and many individuals in high positions in the US government make statements which are validating statements of the ICC publicly. This marks a very significant shift in how Washington talks about the Court.

Regarding US ratification of the Rome Statute, there are tough issues here. I think it should be recognised that in the State Department there is such a challenge for treaty ratification across the board, and I do not imagine that the Rome Statute will suddenly be at the top of the priority list. You need to be ready for the right moment to push it up the priority list; but there are many other high-priority conventions and treaties that the Obama Administration wants to see ratified by the US Senate. So you have to calculate that, in thinking about when they would politically want to push the Rome Statute forward.

On another note, if the Palestinian Authorities achieve the vote in the UN General Assembly for Non-Member State Observer Status at the UN, and this then catapults it into serious consideration before the Assembly of States Parties for State Party Status in the ICC, we know that there are some issues that will take center stage with the ICC. If Israel reacts very negatively to certain kinds of initiative by a newly recognized State of Palestine at the UN, an Israeli objection to Palestinian efforts to join the ICC will reverberate in some very important circles in the United States and will not help the long-term ratification strategy in the United States. So, I have given a lot of thought to this, on how to manage the Palestinian issue so that it doesn't have an enormously negative blow back in American society. In other words, let's manage it in such a way that it can actually achieve the objectives of the parties. It is something that has to be deeply strategised.

Finally, I just want to make two small points about the major powers. How do you incentivize the major powers, such as Russia, China, Indonesia, India, Pakistan and the United States, to ratify the Rome Statute so that it is prospective with respect to their conduct, and not a retrospective possibility of attack on them. It will never make it for ratification before the US Senate if that risk is there.

My final point is leadership. At some point, the leaders of the States Parties who are influential need to approach governments like my own, the United States, or Russia, or China, and say, "We want a leadership discussion with you about this Court. We need to stimulate your thinking about this, as opposed to just waiting for it to bubble up through your respective bureaucracies."

Panel: The Role of the United States in International Criminal Justice

William Lietzau, Deputy Assistant Secretary of Defence, Rule of Law & Detainee Policy, Pentagon

I want to look at our relationship with the Court through the lens of Nuremberg and also through the broader question of what we think about international criminal justice. We often think in a linear way – or sometimes even a binary way – juxtaposing good and evil as if there are only two options: making progress or regressing. But the issue of international criminal justice does not lend itself to a binary or linear analysis. For instance, there is no one "right" way of addressing the crime of aggression. The answer to the question of whether we should deter aggression is: of course we should. But that does not lead inexorably to the conclusion that a particular formulation of the crime of aggression belongs in the Rome Statute.

Everyone recognises that we want to deter aggression; and everyone also recognises that, formulated the wrong way with the wrong set of circumstances, the offence could be used in some way to politicise the Court. Our goal should be to avoid either of these extremes. And we should recognise that disagreements among parties with regard to the specifics of how best to implement mechanisms for ending impunity and deterring aggression is both a normal and healthy state of affairs.

What I have seen over the years in dealing with this in both the international community and several U.S. presidential administrations – from Clinton to Bush to Obama – is that a lot of people are working hard to deter aggression. But they realize it is not a simple function of having the will to end impunity; this is a complex issue, and they are spending just as much time and energy to get it right. The fact that there is disagreement on the details is to be expected. In fact, I would say it is a good thing. When we step back and look at the broader issue of international criminal justice through a historical lens, it paints a slightly different picture than the one we see when we are immersed in the details of a particular offense, such as aggression, or the means by which the various components that emerged from Kampala are addressed under Article 25 of the Statute.

William Lietzau

Looking at this through the lens of Nuremberg is a way for us to step back and celebrate the relationship the United States has developed with the Court. Looking at that bigger picture helps us to realise that we are in fact on quite the same path; one that is focused on ending impunity and promoting accountability for the most egregious international crimes, but one that also ensures that due process characterizes every prosecution and is unencumbered by the politics of the moment.

Difficult issues always involve the balancing of important and complex interests in order to achieve the optimum result. In this vein, it is a mistake to look at the evolution of the Court and United States policy toward it as moving "forward" or "backward." It is also incorrect to assume that a reluctance by the United States to join the court signifies a reluctance by the United States to promote international criminal justice. The United States wants to end impunity as much as anyone. But we must remember that the Nuremberg principles were not just about ending impunity, as if we have a binary choice: to end impunity or let it rein. The Nuremberg principles were and are about bringing wrongdoers to justice in a way that respects the rule of law, and brings the rule of law to the forefront of everything we do. Justice Robert Jackson said in his opening statement at the Nuremberg trials, "That four great nations, flushed with victory and stung with injury, stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason." That is how he, on the opening day, described the importance of what was happening in Nuremberg.

Despite what some have wrongly suggested regarding the United States' commitment to international justice, I can say quite sincerely that I believe my government has consistently and forcefully adhered to this principle, and to the rule of law more generally, as it has approached all of these issues related to the International Criminal Court. It took Tehran, and then Yalta, and then Potsdam to convince even the small group of leaders to head in the direction of the Nuremberg trials. Beyond that big agreement, we know there were lots of smaller areas of disagreement that took place.

Differences of opinion had to first be worked through before agreement could be reached on the framework for the trials that took place. That should not be something to sadden us, as we look back on it; and similarly, the disagreements that are taking place today should not cause frustration with the march of international criminal justice. When we look at Nuremberg, we must look at those bigger principles. And when we look at the International Criminal Court, we see the same principles being implemented. And I would add that we see the same principles being implemented by my government.

So in this regard, try not to look at each of the dance moves Beth Van Schaak described in her opening statement because from that perspective of someone trying to follow each step, it might get frustrating, and would in fact give someone great concern as to what the next step might be. But move back a short distance and look at it through the lens of Nuremberg and you will see a very steady path – a starting and an ending, a goal that is shared. Sometimes the specific steps might not always appear to head in the same direction; but that is not always a bad thing. *All* these issues we are dealing with are issues of balancing competing interests.

And as the Court moves forward, it is going to have to balance these interests in such a way as to satisfy all of those Nuremberg principles in the best way possible. We had a 40-member delegation in Rome led by Ambassador David Scheffer, and I can tell you that after five weeks of negotiation, no one on that delegation had seen any of the sites of Rome. He worked us day and night, and every weekend. Why? Because we were committed to working on all the different components of that Statute, trying to get international criminal justice right. The goal of my government has always been to ensure that international criminal justice serves the purposes for which it was created and does it in a way that best serves to advance of the rule of law. And I just wanted to make clear that that has *always* been the goal. So again, I think debate is a good thing, and I think that we should view it as a positive aspect of the march of international criminal justice. There is every reason for optimism.

Experiences of Prosecutors in International Criminal Courts and Tribunals

Moderator: Bettina Ambach, Director, Wayamo Communication Foundation, Serge Brammertz, Prosecutor, International Criminal Tribunal for the former Yugoslavia (ICTY), The Hague, Brenda J. Hollis, Prosecutor, Special Court for Sierra Leone (SCSL), The Hague / Freetown, Hassan Bubacar Jallow, Prosecutor, International Criminal Tribunal for Rwanda (ICTR), Arusha, Tanzania

Serge Brammertz, Brenda Hollis, Bettina Ambach, Hassan Jallow

Bettina Ambach: Where do we stand right now with the proceedings at the Special Court for Sierra Leone and the two ad hoc tribunals, the ICTY and ICTR?

Hassan Jallow: The ICTR has now been in operation for something like 18 years. When it was set up as an ad hoc tribunal in 1994, there was no indication of when it should wind up. It was not until 2003 that the Security Council indicated in a resolution that we should adopt a completion strategy. That deadline completion strategy gives the ICTR up to 24 December 2014 to wind up its work.

What have we achieved so far? The trial phase of our own work has been concluded. We have indicted 93 persons to date, people who in our own assessment played a leading role in the genocide. We have had 75 cases concluded at trial, with 64 convictions and some ten acquittals. We have also transferred some cases to national jurisdictions, two to France and six others to Rwanda for trial.

The completion strategy also implies a move towards the establishment of a residual mechanism, which was set by the Security Council in December 2011. The operations comprise the tracking of the three remaining top-level fugitives, managing the archives, transferring these and having them ready to go to the mechanism, as well as dealing with witness-protection issues. So, we do expect that we will be able to wind up the work of the ICTR slightly ahead of the Security Council deadline of 24 December 2014.

Brenda J. Hollis: This year, 2012, the Special Court for Sierra Leone also has its 10th anniversary. We were guided by a very wise revision to our Statute – in contrast to the Statutes of the ad hoc tribunals. The ad hoc tribunal Statutes mandated them to prosecute those responsible for serious violations of International Humanitarian Law. Theoretically, that means thousands of people. So, they had a great challenge when it came to determining whom they would actually charge.

Guided by its Statute, the Special Court for Sierra Leone focused on those who bore the greatest responsibility for crimes committed in Sierra Leone between 30 November 1996 and the end of the conflict. That resulted in the indictment of 13 individuals in 2003, comprising of the senior leaders of the three main factions in the conflict in Sierra Leone, as well as Charles Taylor who, at the time of his Indictment, was President of Liberia. In October 2009, the trials were completed through appeal of the senior leaders of the three factions, and in April and May of 2012, the trial judgment was handed down in the Charles Taylor case. He was found guilty of all the counts in the Indictment, based on aiding, abetting and planning the bloody campaign of atrocities in Sierra Leone, and was sentenced to fifty years imprisonment. We are now in the appeal stage of that case.

Serge Brammertz: The ICTY too is moving in the direction of the closure in the context of the completion strategy. Out of the 161 indictments that were issued over the first ten years of the ICTY's existence, proceedings are still ongoing with respect to 35 persons. The latest trials are well known, i.e., those of Karadžić and Mladić.

Today, ours is the only international tribunal with no fugitives left. That may be a sign that nobody can escape justice at the end of the day but I must say that it has taken too long – 16 years – and many missed opportunities. In the ultimate analysis, the arrests took place because the international community had a clear agenda in this regard. For a number of years the US played a major role, e.g., in relation to the arrest of Milošević. Yet over recent years, the European Union has had a clear agenda with the conditionality policy, creating a number of incentives to enable national States to develop their own capacities. There has been a lot of political pressure to have the fugitives arrested.

Charging strategy: In light of problems with lengthy charges, wouldn't it be better to take the "narrow approach"?

Serge Brammertz: One of the most difficult exercises for all international prosecutors is to make a case-selection, so that the indictment reflects the magnitude of the crimes committed and, at the same time, hold a trial which is still manageable.

When I joined the ICTY in 2008, I was fully aware of the criticism that in the early days there had been too many lower- or mid-level perpetrators prosecuted. After having been at the tribunal for almost five years, however, I don't think that this is necessarily a bad thing. It has allowed the tribunal to test its existence and its rules. It has allowed the Court to establish a database of evidence, which has since been used to prosecute higher-level officials. The end result is a great amount of evidence pertaining to command responsibility and many insider witnesses who are still being used in cases.

What we have tried to do over the last few years with Karadžić and Mladić is to reduce the initial indictment by 40 percent, by retaining the broad components, such as ethnic cleansing in the municipalities, the Srebrenica genocide and the siege of Sarajevo, while reducing the scope by 40 percent.

The discussions with the victim organisations proved very difficult, and I had to explain to them that this was somehow the price one had to pay in order to try and keep the trial manageable. In this sense, we have endeavoured to find a compromise.

Brenda Hollis, Hassan Jallow, Ben Ferencz, Serge Brammertz and Fatou Bensouda

Serge Brammertz, Ben Ferencz, Hassan Jallow, Brenda Hollis

Complementarity: What can a Prosecutor's Office do to ensure effective complementarity between national jurisdictions and international courts?

Serge Brammertz: Over recent years, complementarity has been one of our key activities. It is part of the completion strategy that we started to implement in 2004/2005. That was also when 13 cases were transferred to the local judiciaries in Serbia, Croatia and Bosnia, and these have all been the subject of trial proceedings in the meantime.

The chief prosecutors of the countries of the former Yugoslavia expressed a very strong desire to have access to information and to avoid parallel investigations as far as possible. So, we are working on a joint database which is not yet complete. We arranged for the prosecutors in the region to have electronic access to parts of our database and in 2008, once again at the suggestion of the local prosecutors, we integrated liaison prosecutors in our office, one from Serbia, one from Croatia and another from Bosnia.

In the last 12 months alone, 200,000 pages of documents have been copied from our database for use in national proceedings. So I strongly believe that the future of the ICTY is national justice. Only then can we reduce the impunity gap, because what is the point of having one or two people prosecuted at an international level, if 99% of the others are not prosecuted?

In discussions with the ICC, we tell them that they will need a completion strategy too, a completion strategy for each individual situation. Countries where the ICC has worked must be better off after the ICC's intervention. If we agree on the premise that the future of international criminal justice lies with national justice, then there must be an international institution which, in parallel to the ICC's work of prosecuting those who bear the greatest responsibility, is engaged in working in the field and ensuring that the national jurisdictions of situation countries are improving.

Hassan Jallow: Like the ICTY, theoretically speaking the ICTR is not based on complementarity but on primacy, which means that we exercise primary jurisdiction.

Of course, with the completion strategy having been decided upon, we do realise that for practical purposes we cannot try all of these cases ourselves, and that we need to enjoy a good partnership with Member States and have some of them take on some of our cases on transfer from the Tribunal; hence, the operation that has seen two cases being transferred from the ICTR to France and another six to Rwanda.

It has taken a lot of time and effort to be able to transfer cases to Rwanda because, in the initial perception of our judges, the terrain did not afford the opportunity of a fair trial. What this meant was that the OTP, which is the organ primarily interested in transferring the cases, had to engage in a process to get the Rwandans to implement law reform, to make sure that their legal system met the criteria set by the judges in terms of domesticating criminal law, ensuring fair-trial rights and abolishing the death penalty, and also had to undertake capacity-building within the Rwandan legal system to ensure that the actors there were practically able to manage such trials. So we conducted training for prosecutors, investigators and court support staff, and held workshops with the judges.

After some years of effort, this paid off, with the referral of six cases to Kigali by the ICTR.

The reality is that no international court, including the ICC, can actually deal with all the cases that fall within its jurisdiction. Many of these cases have to be dealt with at a national level but one must first prepare the ground at the national level to ensure that these States can take on such cases and prosecute them effectively and fairly.

So, the ICC will have to become engaged in law reform and capacity-building at a national, and perhaps even at a sub-regional or regional level, to make sure that those cases which it cannot handle can be effectively dealt with at these other levels.

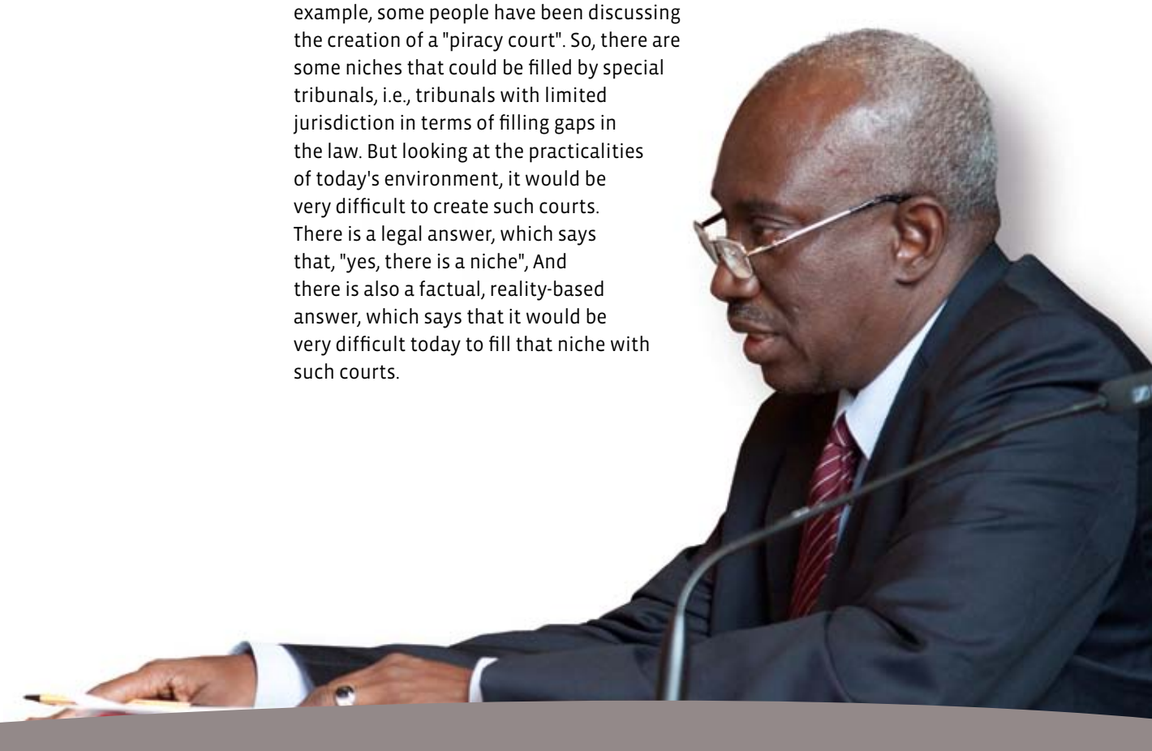
Politics: Does the "shadow of politics" loom large in international criminal courts? The crimes are nearly all political ... when is diplomacy outside the courtroom necessary?

Hassan Jallow: A prosecutor's responsibility is to investigate and prosecute, and this primarily means that he has to select the targets for investigation and prosecution, and take the decision as to whether or not a particular case should go to court, subject to the authority of the judges to confirm the indictments, etc. That process is non-political: it is absolutely non-political, it is a technical process. In our new indictment policy, we have actually spelt out the criteria for the selection of these targets, based essentially on the offender's status, the gravity of the offence and the extent of the person's participation. The evidence is simply evidence, and the law is there. One is guided by whether the evidence falls within the categories that are set down by the law. So politics does not influence the selection of targets or the decision to go to court or not to go to court.

One may of course perform diplomatic duties, e.g., in relation to the tracking of fugitives. That requires a degree of politics and diplomacy. One needs to engage the State concerned, i.e., the one thought to be harbouring the fugitive; one needs to engage neighbouring countries, or other countries which can bring some influence to bear on the non-cooperating state; one needs to engage regional organisations. This is political but it does not compromise one's work in any way. One is merely seeking to bring in political actors as allies to ensure that a particular State lives up to its legal responsibilities.

Usefulness of internationalised courts: Are ad hoc or hybrid courts still necessary? Trial justice is best served where alleged atrocities have taken place but who is going to pay for its having a permanent international court at The Hague?

Brenda J. Hollis: I think there is still a niche for special tribunals or hybrid courts because not everyone is a member of the ICC, not everyone will be referred to the ICC, and some crimes are outside the jurisdiction of the ICC. For example, some people have been discussing the creation of a "piracy court". So, there are some niches that could be filled by special tribunals, i.e., tribunals with limited jurisdiction in terms of filling gaps in the law. But looking at the practicalities of today's environment, it would be very difficult to create such courts. There is a legal answer, which says that, "yes, there is a niche", And there is also a factual, reality-based answer, which says that it would be very difficult today to fill that niche with such courts.



Completion strategies: What are your completion strategies? We may have been successful in establishing tribunals -we must be as successful in ending them.

Hassan Jallow: The residual mechanism was created by the Security Council to address the legacy of the ICTR. We have a responsibility to make sure that the transition from the ICTR to the residual mechanism is smooth. In a situation where one has several convicts serving life sentences, there is a vast amount of very sensitive and confidential archives and there are many protected witnesses all over the place. In closing down the tribunal, one has to ensure that there are proper arrangements in place to attend to these three key areas.

In addition, we are also engaging in a number of legacy projects, e.g., all the ad hoc tribunals and the Special Court for Sierra Leone are now concluding the best practices project. With the manual that will be launched in November 2012 we have tried to capture the do's and don'ts, the successes and challenges that we faced in all aspects of our work, from investigations to tracking, trial, evidence and witness-management. This is an important aspect of our legacy, which for us is a record, but for the ICC and any future practitioner in this field it should be a working tool.

We at the ICTR have also just finished a report on the arrests of the 83 accused who have now been brought to trial. From a best-practices point of view, we have tried to explain the challenges that we faced in each of these arrests and how they were overcome. It is actually very important to ensure that you have a proper arrest strategy.

Another project involves writing the genocide story. There are still allegations of no genocide or two genocides having occurred. These kinds of arguments are still prevalent in some areas. Accordingly, we thought we should write an account of what happened in Rwanda in 1994, based purely on facts as found by the judges at the appellate level, so that it is a story that is beyond dispute, a story based on witness accounts that we have assessed, evaluated and found to be credible.

Legacy: What will your legacy be?

Serge Brammertz: It will be for others to decide what the legacy of our courts will be, but it is clear to me that without the ICTY those who have been prosecuted and convicted would not have been prosecuted. So it was really a condition for these countries to move forward. Without those prosecutions, today the national judiciary would not be in a position to take over the remaining cases. What we have seen in this regard is that international justice can really bring about change: in the early years of our tribunal's existence we were the only providers of justice, yet now the national authorities can really take over.

Bettina Ambach, Hassan Jallow, Serge Brammertz

At The Hague, we also have this very important database on the judicial truth. We still see a lot of denial today: a lot of people ask us, "In addition to having prosecuted a number of people, what is your impact on reconciliation?" I think that we are an important part of the reconciliation process but at the end of the day we need partners. The success or failure of the ICTY will also depend on how the courts of Yugoslavia, and Serbia in particular, will be able to deal with the remaining 700-800 cases in the years to come.

In addition, we are working on the Best Practices Manual, in which we are very honest about admitting what did not go well. We all agree that putting an investigation team together was different in the early days of the Tribunal. We would do it differently today: we now know how important it is to make sure that the evidence one is collecting survives in the courtroom. Here, we have to put our experiences together and are very much hoping that the ICC will join this exercise. The ICC will make new mistakes but let's hope at least that it will not make the same mistakes as our tribunals did in the past.

Brenda J. Hollis: Our main legacy will be one that is often overlooked when one talks about the legacy of the international courts, i.e., that we did our job as a criminal court; that's what we are, nothing more and nothing less. We had a focused mandate to prosecute those who bear the greatest responsibility for the crimes committed, and that's what we did. Achieving this mandate will be our most important legacy.

In Sierra Leone this represents a very important legacy because the people of Sierra Leone are precluded from prosecuting anyone other than the small handful whom we indicted. They cannot do this for any of the crimes committed during the conflict, at least up to July 1999, because under the Lomé Peace Agreement, blanket amnesty was given for all crimes committed up to that point, and possibly through until the end of the conflict. I am never in favour of these kinds of amnesties and in this case it certainly has prevented the Sierra Leone Government from prosecuting others who deserve to undergo a criminal accountability process for their involvement in these crimes.

Yet we have also left a legacy in that, not only did we determine accountability for these individuals, but we did it in accordance with the rule of law, and we brought them to account for crimes that were either not part of national laws or not that strong under the national laws. As a result of our work, legislation has been passed that would make it criminal to enlist, recruit or use child soldiers. Moreover, gender justice legislation has been strengthened. This is a direct result of the SCSL's work.

In the process of achieving our objective - our mandate as a criminal court – we also added to jurisprudence. We were the first court to indict, prosecute and render judgement against individuals for the use, recruitment or enlistment of child soldiers and for attacks against peacekeepers, and we also helped develop the law on sexual violence by refining the law, and adding to sexual slavery law by ruling that forced marriage is an other inhumane criminal act. We did this in the very country where the crimes had occurred. Not all courts can do that but, luckily for us, we were able to do it in Sierra Leone, and this too will be our legacy.

Finally, we had an exceptional outreach programme, developed by the Registry. From the very beginning, the Office of the Prosecutor was very intimately involved, and indeed I am still involved in that programme. So, we also brought justice to the people, explained to them what the process was and, just as importantly, gave them the opportunity to comment to us about what we were doing, about what they liked or didn't like, and to ask questions about that. Hence, the people on whose behalf the court was created were actually brought into the process.

Panel: The principle of Complementarity and its Effects on Domestic Prosecution in Uganda, Kenya and Libya.

Fredrick Ruhindi, Deputy Attorney General & State Minister for Justice, Uganda

Fredrick Ruhindi (r)

Uganda is a good example of the application of the complementarity principle as enshrined in the Rome Statute of the ICC. In fact, this has been a guiding principle that has enabled Uganda to develop the relevant legal framework to ensure the proper investigation, prosecution and punishment of persons suspected of having committed crimes envisaged under the Statute.

Even before the Rome Statute was incorporated into national legislation in 2010 (known as the ICC Act), the International Crimes Division of the High Court of Uganda had already been created in 2008, thus marking a significant step towards fulfilling the complementarity principle. The ICD has jurisdiction to:

"try any offence relating to genocide, crimes against humanity, war crimes and trans-boundary international terrorism, human trafficking, piracy and any other crimes under international law as may be provided under the Penal Code Act of Uganda, the Geneva Conventions Act of 1964 and the International Criminal Court Act of 2010, as well as international customary law."

Since the ICD's establishment, Uganda has adopted several measures to ensure that it is effectively "able" to pursue prosecution of perpetrators of war crimes and other serious violations of international law. Five judges have been appointed and provided specialised training in the application of international criminal law and international humanitarian law. Court staff, including the ICD registrar, clerks and interpreters, have been put in place and given specialised training.

The ICD premises is complete, with a separate independent structure housing the Court, the registry and the war crimes prosecution unit. Procedurally, the ICD is developing its own rules of procedure and evidence, which will integrate international practice and rules, including those applied by the ICC or other international criminal tribunals. Furthermore, Uganda is in the process of adopting legislative and policy measures for the adequate protection and support of witnesses expected to participate in criminal proceedings.

First Criminal Trial by the International Crimes Division

Uganda embarked on its first war crimes trial in 2011 in the case of Mr. Thomas Kwoyelo. Kwoyelo's indictment is based upon violations of international humanitarian law and Uganda's national law committed in Amuru District from January 1992 to December 2005. The process has since stalled, due to a constitutional challenge that has ended up before the Supreme Court of Uganda and has yet to be resolved. In short, the challenge involved an allegation of discrimination for not granting Mr. Kwoyelo an amnesty certificate, as had been granted to all those before him. The Directorate of Public Prosecutions raised issues of the unconstitutionality of the Amnesty Act and its non-conformity with international law obligations. The Constitutional Court ruled that the Amnesty Act did not contravene the Constitution or international law, and that Mr. Kwoyelo was entitled to amnesty under the 2000 Amnesty Act. The DPP subsequently appealed the decision to the Supreme Court of Uganda, which has yet to consider the matter.

This is an important case because it will determine the Ugandan judiciary's ability to prosecute and punish war criminals. While the relevant legal and institutional framework has been adopted to prosecute war crimes, the issue of blanket amnesty as described here has been an obstacle to achieving this goal.

Challenges in the application of the Rome Statute / ICC Act in Uganda

One of the key challenges that Uganda faces in terms of pursuing justice against individuals for war crimes is the fact that many crimes and mass violations during the conflict were committed before 2010, the date when Uganda domesticated the Rome Statute. Owing to this temporal limitation, we must explore other possibilities and develop our capacity, knowledge base, skills in applying customary international law and other principles that would allow for the effective prosecution and punishment by Uganda of war crimes committed before it became bound under the Rome Statute. The Geneva Conventions Act, the Laws of Uganda and the International Covenant on Civil and Political Rights are relevant in this respect.

Transitional Justice Policy and Process in Uganda

In short, Uganda has taken a number of steps to operationalise the complementarity principle, and I am confident that we are equipped to take forward war crimes prosecutions as per international standards. As the saying goes, justice is done when it is seen to be done; thus, by allowing the ICD to do its work, this will send a strong message to the nation and contribute to the fight against impunity and prevention, in the future.

This notwithstanding, securing justice for mass crimes through the formal court structure has its limitations, as we all know. In this case, Uganda is developing a national transitional-justice policy which seeks to be comprehensive and holistic in nature. It provides for criminal prosecutions but also emphasises the role of national truth-seeking, reparations, and the use of traditional justice mechanisms to foster reconciliation and social reintegration of war-affected persons and communities. While retributive justice plays a key role in the fight against impunity and strengthening the rule of law, we must, however, increasingly consider and support the role of alternative justice mechanisms, so as to seek to achieve a more holistic sense of justice for victims of mass crimes.

Bettina Ambach with speakers from the conference at media encounter.

Panel: The principle of Complementarity and its Effects on Domestic Prosecution in Uganda, Kenya and Libya.

Githu Muigai, Attorney General of the Republic of Kenya

Githu Muigai

Kenya's engagement with the Court has a long history, going back to the Diplomatic Conference in Rome in 1998. Kenya was one of the first State Parties to adhere to the Rome Statute, when she signed the treaty in 1999 and deposited the ratification instruments in March 2005. We incorporated the Rome Statute into our domestic law in January 2009.

It is against this background that I want to talk about how Kenya came to find itself before the ICC. The Commission of Inquiry which was set up after the post-election violence of 2007/2008 recommended that Kenya establish a domestic tribunal to address the offences committed during that time. Unfortunately, for many reasons the politics of reconstruction – if I may put it that way– did not allow for the formation of this tribunal. A number of efforts were made in Parliament and I myself lobbied for this mechanism, but regrettably the motion was rejected.

One of the compromises agreed upon was that, if there was no Special Tribunal, Kenya itself would refer the matter to the ICC. There had long been discussions between Kenya and the Office of the Prosecutor but, tragically and unfortunately, it never became possible for this to happen, and so in November of 2009 the Court swung into action, assigning the situation in Kenya to Pre-Trial Chamber II.

Since then, the ICC in its wisdom has handed down two indictments against two groups of Kenyans. I came into office in August 2011 and have since done everything within my power to co-operate with the Court.

I need to emphasise something about the special nature of the Kenyan case. In Kenya, there was never any breakdown of law and order on a scale where the State lost its ability to govern. The second point is that the people who were managing the State in Kenya in 2007/2008 are still alive and well and in government. Hence, it is not a situation where the victors have brought the vanquished to court: it is a far more complicated and nuanced problem.

My own experience in trying to deal with the Court has not been an easy one. During the tenure of the first Prosecutor, Mr. Moreno Ocampo, I found that it was not possible to sustain a professional dialogue with the Court. Indeed, I found the Court patronising; in their response, the organs of the Court tended to treat the State Party, Kenya, with suspicion.

In Kenya, poll after poll has shown that the Kenyan people support the Court. It is thus of the utmost importance that this support for the Court should be met by "reciprocity", i.e., by the Court itself conducting its affairs in a professional and independent manner. It is my hope that with the present prosecutor, our co-operation will see some "repair work".

Domestically we have tried to deal with the post-election violence cases that did not get to The Hague. I brought together a ministerial task force to assess the nature and scope of the cases. We found that there were 5,000 criminal cases; of these, the Director of Public Prosecutions closed 3,500 because they were without merit, because the files and the evidence were incomplete, and the persons who reported the cases had abandoned them; there have been two convictions of post-election violence and 1,500 cases are still being pursued.

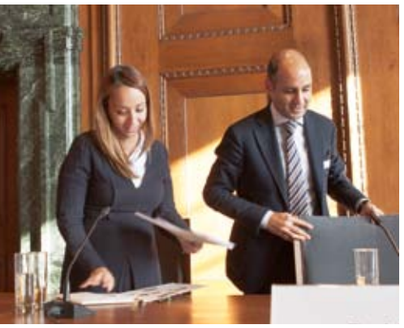
Regarding the future of the ICC and how to strengthen it, we must also think about the necessity of strengthening local capacity. The Court was never intended to have original jurisdiction, even where grave international offences had been committed. It was intended to have secondary jurisdiction and to step in those cases where States Parties were either unwilling or unable to prosecute. Strengthening domestic capacity is part of the process of ensuring the success of the Court itself.

In Kenya we have done a tremendous amount of work to deal with the internally displaced persons, one of the terrible consequences of the post-election violence in 2007/2008. This does not capture newspaper headlines yet it is the sort of work we do every day, returning people to their homes or resettling them on new farms. This is an important part of justice; indeed, it may very well be as important as having a person standing in the dock.

Let me finish with an observation about the United Nations Security Council. The position of the Security Council is always going to be problematic. We have key countries in the Security Council that are saying to the rest of the world, "The ICC is such a good and important court, such a pillar of international justice, that it is very good for YOU to join the court, but it is not good for us." That will always be a problematic political message and we have to confront it as such.

Panel: The principle of Complementarity and its Effects on Domestic Prosecution in Uganda, Kenya and Libya.

Presentation by Elham Saudi, Director, Lawyers for Justice in Libya



Elham Saudi

I am speaking as a member of civil society, so my main focus is the impact of complementarity on the public, and particularly on victims. Unfortunately a lot that was done, and not done, by the Libyan government and the ICC, has led to a genuine lack of faith in the process at the public level in Libya, and has gone from our singing songs about the ICC and painting graffiti about Ocampo to not mentioning the ICC at all.

We first have to ask ourselves about the level of willingness and ability to act. The question of whether Libya is willing to prosecute Saif Al-Islam was quickly answered by Libyans themselves because they really wanted to do it as a people; the question of ability is more difficult to answer, however, since Saif is in the custody, not of the Libyan central government but of the Zintanis.

If the ICC finds that the admissibility challenge fails, how is the Court going to enforce its decision? The ICC would be relying on a State that has outsourced the custody issue to the Zintanis. An additional problem resides in the fact that the Zintanis are still very heavily armed, comprise an extremely powerful group and have a very personal stake in holding onto Saif, and so there is an argument of peace versus justice for the Libyan government.

The second point is the question of whether our judicial system is ready to prosecute Saif Al-Islam and Abdullah al-Senussi. We interviewed over 70 lawyers and judges to get their views on whether they could handle a trial, and the answer was consistent, namely, "We can do this, we just need time. We need time to make sure that we and the witnesses are safe. We need to make sure that we have all the crimes that we need to try available within our legal systems, and we need to have the legal capacity to do this." Hence, there is a genuine desire to prove that we can do this as a legal profession. Even so, humility lies in the fact that we have been without a structure for 40 years yet have the talent to proceed with this.

How does this impact on the personalities -the three figures- that are involved, i.e., the Prosecutor's office, the Libyan authorities and, to a lesser degree, the defence? The relationship started with a prosecutor who was very keen on having a swan song and making Libya his victory, and so went in "full steam ahead". Libya was this new girl on the block and was quite excited by all this attention, and so also went "full steam ahead" with this new relationship. Then, however, one got to the point where that initial infatuation was not working and the impartiality of the Prosecutor's office was being questioned. Statements have been made that should not have been made by a prosecutor investigating both sides to a conflict. The investigations still really focus solely on the Gaddafi forces and not on the revolutionary forces.

The Libyan authorities too have a fundamental problem right across the board. There is no rule of law: what there is in Libya is revolutionary legitimacy. Every single person gets his/her credit and credentials from being a revolutionary or having something to do with the revolution, to the point where even the laws that are currently being passed are drafted in this context. Hence, the amnesty laws are drafted according to the nature of the perpetrator instead of the nature of the crime; and the basis on which these trials are being held is "who did it?" rather than "what was done?" Consequently, there is this presumption of guilt for anyone from the Gaddafi regime who was involved and a presumption of innocence for the revolutionaries. Insofar as the laws that existed prior to the revolution can be considered a problem, this is the same or worse in the case of the laws that have since been brought into play to protect the revolution.

Complementarity: the biggest problem here is the lack of engagement between the Court and the Libyan population. When Ocampo and the Libyan courts originally got involved, there were grand proclamations about how we were involved in this revolution and that this was about justice, about the rule of law, about victims. Yet, there has been no information targeting the public in Libya since the indictments. I told the previous prosecutor, "This is really unfortunate because when this started, your name was graffitied all over Tripoli and now people feel as though you have let them down." His response was, "Did you take a photo' of the graffiti?" ... which is all you need to know about that conversation. Positive complementarity which he so heavily marketed at us, comes down to an "either-or" situation, in that either Libya gets it or the ICC gets it.

To my mind, there is a call to be more creative, and actually to be more pro-active from the courts' perspective. A lot of the crimes that are being scrutinised on both sides are neither similar nor even the same, and so there is the possibility of having a sequencing approach, whereby some cases can be taken to The Hague on the understanding that Libya can try others. This could give the Libyan judiciary room to grow, or indeed the ability to feel that it will address the issues that genuinely concern it and mostly arose before February 2011. There is an option for the court to hold trials in situ, which means that this does not have to be done at the Hague and thereby ensures the access to justice that is so crucial to the process. Furthermore, there is the possibility of a hybrid court, with a mixed panel of Libyan and ICC judges. Looking at all these different possibilities, I come to the conclusion that there is definitively a lack of creativity in the process.

To me, complementarity is a balance between furthering justice for victims, holding the perpetrators of grave crimes accountable and the need to develop the local justice system to the point where the ICC becomes redundant in the future. There is one serious impediment which will inevitably arise, in the form of the death penalty in Libya. This is the real dilemma underlying this process: for the court, the question is whether it should be working to improve the fairness of a trial even if this culminates in a death penalty, or if it should take a principled decision and step away from the whole case because of the risk of such a penalty.

Panel: The principle of Complementarity and its Effects on Domestic Prosecution in Uganda, Kenya and Libya.

Rod Rastan, Legal Advisor, Office of the Prosecutor, ICC [1]

Elham Saudi, Rod Rastan, Mark Kersten

Complementarity under the Rome Statute can be understood in two ways: as an admissibility principle governing case allocation between competing jurisdictions, and as a burden sharing principle for the consensual distribution of caseloads. Complementarity as admissibility posits the relationship between the ICC and States as a contest, leading one forum to exercise jurisdiction to the exclusion of the other. This is because the framework is case-specific: two forums cannot try the same case at once. Complementarity as burden-sharing embraces a broader concept that promotes the concurrent assumption of jurisdiction by different forums. This is complementarity set against the problem of mass criminality, where the fear is not that the same person will be tried twice, but that the many will not be tried at all. It seeks to address the impunity gap created as a consequence of insufficient judicial coverage. If admissibility focuses internally on the cases before the ICC, burden-sharing looks outward towards effecting universal compliance. Both dimensions are necessary: limiting complementarity to a contest paradigm will prevent the realisation of the statutory goal to put an end to impunity and thereby contribute to the prevention of crimes.

The concept of burden sharing is of course not new. It served as the model after World War II by which the Allies divided caseloads between the leadership at the international level while leaving the bulk of cases to be processed through military or criminal tribunals established in the territory where the crime occurred. We would no doubt find it difficult today to accept that responsibility of the international community in response to the atrocities of WWII would have been discharged by charging only 24 persons in Nuremburg and 28 persons in Tokyo had there not been any complementary proceedings at the national level.

Looking at the problem of mass criminality a managerial approach recognises that the response of the international community will need to be multifaceted and complementary. It acknowledges the concurrent responsibilities of both national and international actors: the latter asserting jurisdiction only where appropriate and with the primary burden residing at the domestic level. Referring to this challenge, the ICC Prosecutor's Office stated early on that it would adopt a policy to encourage and assist national investigations and prosecutions.[2] The stated objective was not to compete for case allocation with national courts, but to ensure that the most serious crimes did not go unpunished through adoption of a policy of coordinated action between the ICC and national authorities. This approach, labelled 'positive complementarity', has been described by the Prosecutor's Office as meaning that it "encourages genuine national proceedings where possible; relies on national and international networks; and participates in a system of international cooperation". At the same time it has recalled that "according to the Statute national states have the primary responsibility for preventing and punishing atrocities" and that "[a] Court based on the principle of complementarity ensures the international rule of law by creating an interdependent, mutually reinforcing system of justice".[3]

As part of its approach to positive complementarity, the Office of the Prosecutor has also stated that it recognises the role of justice processes other than those performed by criminal trials. In line with the goal of developing comprehensive strategies to combat impunity, it has taken a position that it "fully endorses the complementary role that can be played by domestic prosecutions, truth seeking, reparations programs, institutional reform and traditional justice mechanisms in the pursuit of a broader justice".[4] Such complementarity between punitive and reparative processes is notably located in the Statute itself since, in addition to determining criminal responsibility, the Court may issue orders against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.

Turning to the issue of complementarity as admissibility, where there is a concurrent exercise of jurisdiction at the international and national level the judges of the ICC will be required to assess which forum should hear a particular case. Although there is a wealth of commentary analysing the manner in which the Court should engage in its assessment of whether a State is unwilling or unable to genuinely proceed with a case, the Court has only had limited resort to cases of contested jurisdiction. Among judicial determinations to date, the Appeals Chamber has held that an admissibility challenge determination in fact follows a two-step inquiry, namely, (1) the existence of national investigations and/or prosecution in relation to the case at hand (inactivity), and (2) where such proceedings exist, whether they are vitiated by an unwillingness or inability to carry them out genuinely (genuineness).

The Court has also indicated that an admissibility assessment can only be made in the light of proceedings that actually exist at the national level. The assessment cannot be made in the light of possible, hypothetical proceedings that may or may not take place in the future. The admissibility assessment must therefore be made on the basis of the underlying facts as they exist at the time, and is subject to revision based on any change to those facts. The party challenging admissibility, moreover, bears the burden of proof to demonstrate that the case is inadmissible on a standard of a "balance of probabilities".

The admissibility determination is by definition case specific. This requires an examination of whether the national proceedings encompass the same person for the same conduct as that which forms the subject of the case before the Court. To establish whether there is an ongoing domestic case, the Court must be satisfied that concrete investigative steps have been taken towards ascertaining whether the individual concerned is responsible for that conduct, e.g. by interviewing witnesses or suspects, collecting documentary evidence, or carrying out forensic analyses. An applicant must provide, as the Appeals Chamber has stated, "evidence of a sufficient degree of specificity and probative value that demonstrate that it is indeed investigating the case".

The contours of complementarity as an admissibility principle continues evolve in the case law of the Court. The latest challenge brought in the Libya situation, as well as those brought earlier by Kenya, demonstrate that the relationship between the Court and States in the allocation of cases will remain one of the key themes for future litigation. At the same time, looking beyond admissibility, implementing complementary approaches to combatting impunity combining national and international efforts will represent one of the major challenges to the international community as a whole in its effort to end impunity.

[1] *The text below is based on the publication R. Rastan "Complementarity – contest or collaboration?" in Morten Bergsmo (ed.), Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes, FICHL Publication Series No. 7 (2010), 83-132, and is reproduced with the publisher's permission.*

[2] *Policy Paper (ICC-OTP 2003), pp.2-3, 5*

[3] *Report on Prosecutorial Strategy (14 September 2006), p.5. See also Policy Paper (ICC-OTP 2003), p.3*

[4] *Policy Paper on the Interests of Justice (OTP-ICC 2007), p.8.*

Presentation from media workshop: The crime of aggression

Christian Wenaweser, Permanent Representative of the Principality of Liechtenstein to the United Nations

The Crime of Aggression under the Rome Statute of the International Criminal Court
The Ambassador of Liechtenstein to the United Nations in New York, Christian Wenaweser, served as the President of the Assembly of States Parties from 2008-2011 and presided over the ICC Review Conference in Kampala in 2010, which achieved a consensus on the amendments on the crime of aggression.

Christian Wenaweser

The crime of aggression is one of the four crimes over which the International Criminal Court has jurisdiction in accordance with the Rome Statute. On 11 June 2010, States Parties to the Rome Statute adopted a definition of the crime. In essence, a crime of aggression is committed when a person in a leadership position in a State illegally uses force against another State. The planning, preparation, initiation or execution of such an act must by its character, gravity and scale constitute a manifest violation of the United Nations Charter. From 2017 onwards, the ICC will be able to prosecute crimes of aggression, provided that a number of jurisdictional conditions are fulfilled. Since the Nuremberg and the Tokyo Trials, the ICC will therefore be the first international court to hold individuals accountable for what has been called the "supreme crime" under international law. The name of the city of Nuremberg is inextricably linked to the crime of aggression due to the Nuremberg Trials of 1945-49. The trials of the former leading members of the Nazi regime play a central role in the history of international criminal law and all discussions concerning aggression until this day.

Historical Background: the Charter of the United Nations and the Nuremberg Trials
Even before World War II, there were efforts to prohibit and criminalize illegal war-making. But it was only within the framework of the Nuremberg Trials that leading figures of former Nazi Germany were prosecuted for "crimes against peace", as the crime of aggression was called at the time. As the next step, the United Nations Charter established a collective system for the maintenance of international peace and security. Article 2(4) of the Charter of the United Nations prohibits the "threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations". The use of force is only permitted for the purpose of individual or collective self-defense or upon authorization by the Security Council. However, the Charter does not define the term "aggression", nor does it provide for individual criminal accountability for perpetrators of the crime.

Subsequent to the Nuremberg Trials (1945-49), the UN General Assembly affirmed the principles of the Nuremberg Charter and of the Nuremberg Tribunal's judgment in Resolution 95(I) in 1946. In 1950, the International Law Commission codified these important rules in the famous Nuremberg Principles. The definition of an act of aggression was, however, still not agreed upon; i.e. a definition of the state act, which would constitute a violation of the Charter – the precondition for any individual criminal responsibility. Following decades of negotiations, in December 1974, the UN General Assembly adopted Resolution 3314 (XXIX) containing such an agreed definition. The purpose of the definition of aggression annexed to the resolution was to give guidance to the Security Council in its determination of the existence of an act of aggression. Notably, the definition deals with the State act of aggression and does therefore not address the question of individual criminal responsibility.

Diplomatic Conference in Rome (1998)
In 1998, a diplomatic conference was convened in Rome that led to the adoption of the Rome Statute of the International Criminal Court. The question, whether the crime of aggression should be part of the statute, and, if yes, how it should be defined, turned out to be one of the central disputes. Delegates were unable to agree on a definition of the crime of aggression, as some only wanted "wars of aggression" to be covered, whereas others insisted on the use of an arguably broader notion of "acts of aggression" contained in the 1974 GA definition. Even more difficult was the question, whether the ICC should only prosecute crimes of aggression once the Security Council has determined the existence of an act of aggression by a State. As part of the final compromise, the crime of aggression was included in the list of crimes under the jurisdiction of the Court, but the definition and the conditions for the exercise of jurisdiction (including the question of the role of the Security Council) were deferred for consideration by a Review Conference. Later, it was decided to hold this conference in 2010 in Kampala, Uganda.

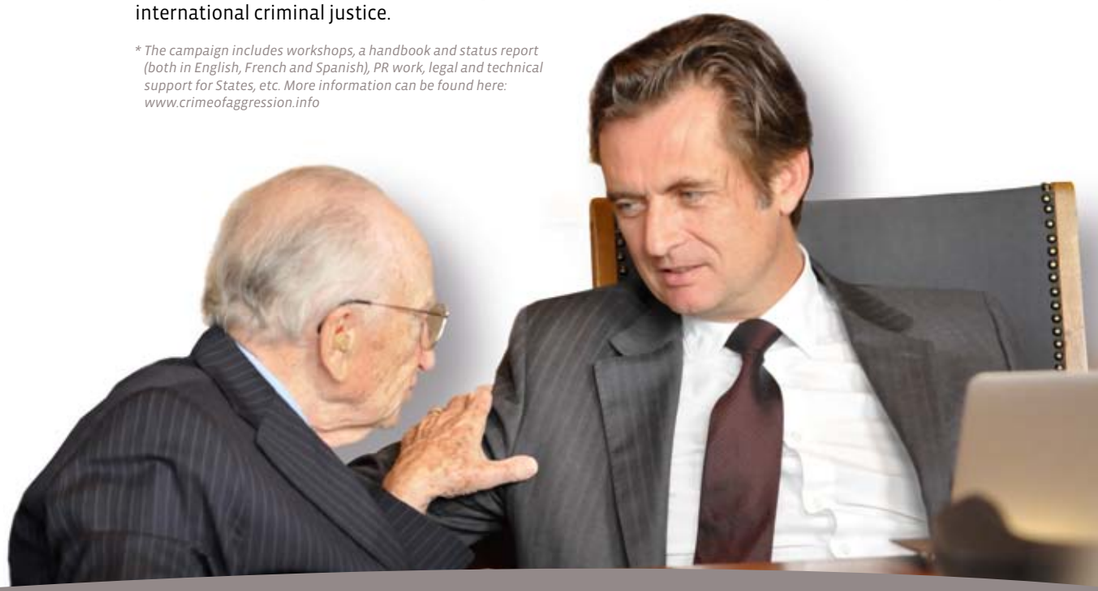
Historic Agreement in Kampala (2010)
Following the 1998 Rome Conference, the Preparatory Commission for the ICC (PrepComm, 1999-2002) and later the Special Working Group on the Crime of Aggression (SWGCA, 2003-2009) continued negotiations on the outstanding issues regarding the crime of aggression. Due to the overloaded agendas at the meetings of the Assembly of States Parties, the substantive work on the content was done in informal meetings at the Liechtenstein Institute on Self-Determination (LISD) at Princeton University ("Princeton Process"). The Special Working Group successfully concluded its work in February 2009 by reaching a consensual agreement on the definition of the crime of aggression.

The 2010 Kampala Review Conference could thus focus on other outstanding issues, i.e. the "conditions for the exercise of jurisdiction", in particular the role of the Security Council. States Parties seized the historic opportunity and adopted Resolution RC/Res.6 by consensus. The resolution amended the Rome Statute to include, inter alia, new article 8 bis containing a definition of the crime of aggression and new articles 15 bis and 15 ter, containing provisions on the conditions for the exercise of jurisdiction. The primary competence of the Security Council to determine acts of aggression (according to Article 39 of the UN Charter) was maintained, but in the case of a divided Security Council, the ICC may nevertheless become active with the authorization of the Pre-Trial Division. The compromise solution also provided that the ICC will only deal with crimes of aggression from 2017 onwards, provided that at least 30 States Parties have ratified the Kampala amendments. In addition, the Assembly of States Parties must activate the jurisdiction with a onetime two-thirds majority decision.

From Kampala to the Activation in 2017
On 8 May, 2012, Liechtenstein became the first State to ratify the Kampala Amendments on the Crime of Aggression. The date was chosen to commemorate the anniversary of the end of World War II in Europe. In the summer of 2012, Liechtenstein launched a global campaign for the ratification and implementation of the Kampala amendments. The campaign is organised in conjunction with the "Global Institute for the Prevention of Aggression" (GIPA), founded by Donald Ferencz, son of the former chief prosecutor at the Nuremberg Einsatzgruppen Trial, Benjamin Ferencz.*

Progress in the Process of Ratification and Implementation
The years 2012 and 2013 brought major progress in the ratification and implementation process. Up until July 2013, seven States have ratified the amendments: Liechtenstein, Samoa, Trinidad & Tobago, Luxembourg, Estonia, Germany and Botswana. Numerous other States have expressed their commitment to ratify and embarked upon their national ratification process, which means that the goal of 30 ratifications by 2017 is within reach. However, major efforts will still be necessary to ensure that the most important legacy of the Nuremberg Trials becomes an integral part of the system of present-day international criminal justice.

** The campaign includes workshops, a handbook and status report (both in English, French and Spanish), PR work, legal and technical support for States, etc. More information can be found here: www.crimeofaggression.info*



Final Session: Outlook

Tiina Intelmann, ASP

As we celebrate the 10th anniversary of the establishment of the International Criminal Court ("ICC"), there is much debate about how successful the Court has been or how it failed to fulfil some expectations. I believe this celebration is giving us an opportunity to look at what we have achieved in terms of the global fight against impunity for the most heinous crimes.

Firstly, I would like to add my thoughts to the discussions on the ICC and Africa. The relationship between Africa and the ICC is remarkable; but no relationship is without difficulties – and this one is no exception. Africa and the ICC share the fundamental value of fighting impunity for the perpetrators of the most serious crimes of concern to the international community. The fact that so many countries resorted to the court of their own accord means that there is a need for this court. Moreover, it is a sign of confidence in this new institution coming from Africa.

I have visited Addis Ababa, the seat of the African Union, twice so far and intend to return soon. Many advised me against going out there, and somehow it never seemed to be the right time. Nevertheless, I am determined to pay these visits because it is important to listen to concerns and clarify misunderstandings; and I am pleased to be able to inform you that my visits to Addis Ababa are actually appreciated by officials of the African Union and by African State Parties. There is agreement that dialogue is important and should be maintained.

Secondly, in terms of the ICC system, it is critical to explain precisely what the complementarity principle is and when it comes into play. In its capacity as a Court of last resort, the ICC will act only if the State with primary jurisdiction over the alleged crime proves unable or unwilling to conduct a genuine investigation or prosecution. This is known as the complementarity principle and is the bedrock of the Rome Statute system. In many cases, including Africa, this aspect of the system requires further strengthening, be it in terms of the legislative framework for prosecution of such crimes, expertise with investigations, judicial-system resources, effective national witness-protection programmes or sentence enforcement.

Thirdly, we need to work with members of the African Union just as we need to do with other regional organisations and their members, such as the European Union, Organisation of American States, ASEAN, International Organisation of La Francophonie and the Commonwealth, among others. We should engage more closely with regional organisations to promote universal ratification of the Rome Statute. I am, however, not only talking to regional organisations but also conducting meetings with individual States in my efforts to create consolidated support for the Court.

From the standpoint of the Rome Statute and how the Court works, it is essential for domestic capacity to be in place in all State Parties, so as to ensure that the Court need act in only very exceptional circumstances, exactly as envisaged under the Rome Statute. Domestic implementation of Rome Statute crimes, together with the steady rise in the numbers of State Parties as we move towards the universality of the Statute, will serve as a strong deterrent and prevent atrocity crimes from happening in the future. If one had one wish and the guarantee that it would come true, then one should wish for the universality of the Rome Statute right now. This would solve a lot of problems, especially with regard to the issue of Security Council referrals. There are a many challenges and aspects calling for improvement in the years to come, including changes to the rules of procedure in order for the Court to become more efficient. Another crucial issue is co-operation and the execution of outstanding arrest warrants.

Indeed, and most importantly, the ICC system requires the strong and proactive support of State Parties at the highest political and diplomatic level. The success of the Court depends in equal measure on everyday co-operation on the one hand and the political support of States on the other.

State Parties to the Rome Statute should fulfil their obligations and co-operate with the Court when requested. Furthermore, we should continue to work together with non-State Parties, the ICC, civil society and all possible stakeholders to support the work of the Court.

Final Session: Outlook

Bill Schabas, Middlesex University in London

There is a terrible malaise within Africa with regard to the International Criminal Court. Africa was once the bastion of support for the Court. In the years following the Rome Conference, Africans joined the Court enthusiastically. It had not been expected. The Arab world too is expressing the concern that the justice is still uneven, that it serves the powerful States that dominate the Security Council of the United Nations.

The biggest challenge to the court is its political direction: I do not even want to say "independence" because I am not sure that is the right word. It is a subject that many friends of the Court do not like to discuss because they labour under the myth that the Court is not influenced by politics, or at least that the objective should be to remove political influence. To the extent that this is a dream, it is an unrealistic one. International justice institutions are inherently political. The question is, whose politics are in charge?

The Americans are now great supporters of the International Criminal Court. How different was it ten years ago? If we had a panel here ten years ago, in 2002, one speaker after another would have taken the microphone to condemn the United States and the Security Council resolution which had just been adopted. Then, the Americans twisted everybody's arm until it broke. If Africa was represented, its delegates would have insisted on faithful, principled respect for the Rome Statute. That has changed so much. Now it is the Africans who are wary and the Americans who are the keenest fans of the Court. I liked it better when the Africans loved the Court and the Americans were nervous but that is my own political vision of the world.

Court politics is not mainly about the judges: it is about the Prosecutor, the person charged with selecting the situations for the institution's attention. Some Nuremberg commentators used the term "victors' justice" when they were speaking about this courtroom and the great trial that took place here in 1945 and 1946. I have never agreed with the use of such a term. It is true, of course, that the Nuremberg trial was selective justice. It did not prosecute all the crimes that had taken place during the war. Nevertheless, it prosecuted those who bore the greatest responsibility for the greatest misery the world had ever seen. It was the right thing to do and, had it been done differently, we would not be celebrating here in the same way; the Nuremberg trial would not have left the same legacy.

Bill Schabas

In contemporary international justice, at the International Criminal Court in particular, similar choices about the priorities of international justice are being made. The problem facing the Court is that it has not made the best choices. It has proven to be an institution that is far too deferential to powerful States in the north, and the permanent members of the Security Council in particular. The inevitable result is that African states and others from the south have become disenchanted.

Many of us at this conference will recall the dynamism and excitement of the Rome Conference. But even there, many supporters had a vision of the way the Court would grow, which did not turn out to be very accurate. Many people at the Rome conference thought that the Court would be created by a handful of countries in the north, and that it would then go out and inflict justice on the south. Of course, we have 121 States Parties now, but if anyone had predicted this in 1998, we would have asked what they were smoking. Then, in 1999 and 2000, all of these ratifications from Africa started pouring in. It was really quite stunning. The Africans were thirsty for new international organisations that could deal with the problems of peace and justice that plagued their continent. They were, naturally, dissatisfied with the existing institutions, notably the United Nations and the Security Council.

I was saddened to hear the remarks of the Kenyan Attorney General at this conference. He complained about the manner in which the Court dealt with Kenya. I can recall trembling at statements of the former prosecutor because it seemed that, when he was speaking to Africans, he used shorter sentences and smaller words. His remarks often had a patronising ring about them. Of course his successor, Fatou Bensouda, will speak to African interlocutors in an appropriate way but it will take more than a charming, dignified African prosecutor, to improve the way Africans view the Court. Policy orientations will have to change.

The issue of Palestinian statehood is another example of the Court's choices. Shortly before the end of his mandate, the former prosecutor of the International Criminal Court, finally said, after three years of discussion and examination, "Oh, it's not for me to decide." He said that it was a matter for the General Assembly or, perhaps, for the Assembly of States Parties.

My own view is that neither the Assembly of States Parties nor the United Nations General Assembly is the place for the issue of Palestinian statehood to be decided. This is, initially, a task for the Prosecutor, and then for the judges of the Pre-Trial Chamber, the Trial Chamber and, ultimately, the Appeals Chamber. Whether or not an entity that makes a declaration under Article 12(3) of the Rome Statute is actually a State or whether it is something else is a jurisdictional fact to be decided like many others. The prosecutor backed off from Palestine because he, personally, had no inclination to tackle the daunting issues in that part of the world. I can understand the arguments on both sides. But a prosecutor who thought it was politically important to deal with Palestine would have moved forward instead of backing away.

During this conference, it was said that, if the Court were actually to take on the Palestine issue, this would set back the agenda of getting the United States to ratify the statute. I accept that. The United States would be mortified by a prosecutor who thought the Court might deal with some of the issues arising from Israel's occupation of Palestinian territory. Yet getting the United States to ratify the Rome Statute is not the first thing on my list of important things that should happen in the world. My priority is to convince the Arabs and the Africans that the Court is a truly independent judicial institution, capable of addressing difficult problems that threaten the mighty, and not just easy cases that come within the comfort zone of the powerful.

One of the things we love about Nuremberg is not merely the fact that it was a trial of bad, evil people who had committed atrocities, but rather that it was a trial of people who had aspired to rule the world and who might have succeeded in their ambition. We want to see a Court that can take on the most powerful, and not only isolated warlords in Africa. This is a big test for the Court. It is one that involves political decisions, mainly by the Prosecutor but also by States Parties. That is more the kind of court I want to see.

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