



The ICC of the Future

**Address by Judge Dr. jur. h. c. Hans-Peter Kaul
International Criminal Court**

**At the 6th annual
International Humanitarian Law Dialogues 2012
“Hybrid International Courts: A Tenth Anniversary
Retrospective on the Special Court for Sierra Leone”**

**Chautauqua Institution
Robert H. Jackson Centre
On 28 August 2012**

*Provisional version as actually delivered on Tuesday 28 August 2012 at 1:15 p.m.
(Final version to be edited and published in the forthcoming ASIL publication
“Proceedings of the 6th annual International Humanitarian Law Dialogues 2012”)*

In this 6th Dialogues meeting, again so rich, so substantial, so thoughtful, we have considered together lessons learnt, yes, the legacy emanating from the Special Court for Sierra Leone. I believe that these lessons learnt may also contribute to and strengthen, in many ways, “The ICC of the Future”.

Allow me to start with a basic, but not unimportant question: “When will the US become a State Party of the ICC?”

Well, it is exactly this question which was put to me in an interview by the “Süddeutsche Zeitung” – a German newspaper – published on 28 June of this year, at the tenth anniversary of the entry into force of the Rome Statute. The answer that I gave then is essentially the same as my assumption today: regrettably there is no chance that the US will join the Court in the foreseeable future. But I assume, no, I believe that the US will be a State Party at the latest around the year 2040, almost forty years after the entry into force of the Rome Statute – it took the US also almost forty years to ratify the Genocide Convention.

When this happens it seems quite likely to me that China will already be a member of the Court. I continue to be in regular contact with well-informed Chinese interlocutors. Already in 2003, when then President Kirsch and I were invited to Beijing, the Legal Adviser of the Chinese FM told us: “China, even as a non-State Party, wants to be regarded as a friend of the ICC. We will follow a wait-and-see policy for some time and observe whether the Court will behave as a purely judicial institution or whether it engages in politically motivated prosecutions. If the latter is not the case, the time for Chinese membership may come.” More importantly, in the next decade there will be further profound changes in China, a new leadership replacing the old guard, a more democratic society – these developments may lead to Chinese membership in the ICC system sooner than expected.

I am grateful for the chance to share with you my personal view and hopes on “The ICC of the Future”. For this, I will address three sets of issues.

One: what about the efficiency and administrative culture in the ICC of the future?

Two: what are some possible or likely developments with regard to judicial proceedings or with regard to the applicable criminal law?

Three: what about the relationship between the ICC of the future and State Parties, states in general or the Security Council?

And with regard to this third question, please remember what Hans Corell said yesterday in his impressive keynote speech on “*The Rome Statute and the obligations of states*”. Hans was kind enough last night to slip under my door a copy of this keynote. Having read it again, please permit to put on record already now my full agreement with his comments on the ICC and the obligations of states – and I will come back to this.

It is obvious that when discussion “The ICC of the Future”, I will be bound to set out some assumptions, likely scenarios or other predictions. At the same time, there is a problem with such forecasts and prognostications – as a wise man once said; was it Einstein?: “The problem with prognoses is that they deal with the future”.

We all know that the future is unclear. Incorrect assumptions and errors are always possible. But it is my hope that such a look into the future – maybe at the ICC situation around 2030 – will be interesting, hopefully even a little bit thought-provoking.

Efficiency and Administrative Culture

The work of the ICC of the future will be characterised, in my view, by much more efficiency and a better work culture, this in a quite comprehensive sense – and I will give some examples. Why is this so? Well, not because of control efforts of State Parties but out of sheer necessity which the leadership of the Court will have to recognize or is about to recognize. One major positive factor will be for example more respect for and much better compliance with the “One Court” principle, both internally and in all contacts and communications

with external stakeholders. Forgotten will be the days when admittedly objective observers, including myself, sometimes could have the impression that the Office of the Prosecutor, the Registry and the Chambers were seeking to be separate small organizations or even kingdoms of their own. While these centrifugal tendencies occasionally have done much damage, the Court of the future will appear unified as “One Court”, with the common mission to contribute to effective investigations and judicial proceedings with regard to core crimes, and thus, to the fight against impunity. This presupposes that possible internal differences of views are settled within the Court and that its standing is not negatively affected by the perception of an internal divide at the ICC. Instead, a general atmosphere of mutual trust, confidence and reliability between all elected officials, organs, units and staff of the Court will contribute to more efficiency and a much better work culture.

Next point: the budget of the ICC. Yes, budget preparation, financial control and proper budget implementation – this matters. In the past decade, those involved had to learn in a difficult process of trial and error that a good budgetary process and proper budgetary means are not self-understood. Even today, the process of the preparation of the Court’s annual draft budget absorbs, year after year, too much work, too much time and often the patience of too many officials, in particular if competing priorities arise.

I am, however, convinced that the ICC of the future will have a proper budget methodology, achieving a “best practice” standardization of the budget elaboration. Such a positive budgetary routine will set free much positive energy, in particular work capacity for the core functions of the Court, namely prosecution activities and judicial proceedings. In addition, more financial means will facilitate the work of the Court as the forthcoming dissolution of the ad hoc and hybrid Courts will leave the ICC as the only international criminal justice mechanism. This will alleviate the burden of the international tax-payer by around 300 to 400 Mio USD per annum.

In the ICC of the future, the Registrar and the Registry will demonstrate consistently a proper understanding of their role; namely that the Registry is not an independent organ of the Court, and that the Registrar is “the principal

administrative officer of the Court, acting under the authority of the President” – not less but also not more. In the future, there will be a work procedure in which the Registry without fail acts as the main service provider to the Judiciary and the Office of the Prosecutor. It will thus be a positive normalcy that all activities of the Registry, including on external relations of the Court, are aligned with the strategic and policy decisions taken by the Judiciary, the President/Presidency and, where appropriate, the Prosecutor.

It is nowadays generally recognised that international Courts need strong and courageous leadership. This is true in particular for the ICC. There is more and more agreement in The Hague that the role of the President/Presidency really goes beyond protocol and representational activities. In the future, it will include – and there is no doubt in my mind – an active approach with regard to all problems and challenges facing the Court, including on difficult issues, such as the budget and the proper administration of the Court. Needless to say, the lead role of the President/Presidency must be exercised in close coordination with the Prosecutor, whose full authority over the management of his or her office shall be respected.

In the future, the Court will have to live up to two other requirements: first, a consistent practice of “trust but verify” that the tasks and challenges arising are indeed addressed. Second, there will have to be more respect for basic work requirements, such as discipline, diligence and punctuality, reliability, respect for deadlines and cost awareness, observance of the working hours and no absence from work without proper notice and permission. Non-compliance with the aforementioned is particularly unfair to all who do their job as usual.

There is, however, a related necessity for the elected officials of the Court, including the Judges: the leadership of the ICC of the future will have a much better understanding, how important it is to motivate the staff, to encourage all concerned. One has to lead by example to take the personnel with you. Experience shows that good work morale and staff feeling appreciated at work is the most important factor for efficiency and performance. This is valid for Google and Apple; it is also valid for the ICC of the future.

There is another development which, quite soon, will foreseeably enhance the work culture and efficiency of the ICC; already in 2015/2016 the ICC will have – and here I use a term coined by Ben Ferencz - its own “Temple of Law”, namely permanent premises which are in full conformity with the functional, organizational, security and other needs of the Court. Maybe I am allowed to mention, in all modesty, that from 2003 to quite recently, I have invested enormous work and efforts to drive this project ahead, the key parameters of the premises, the site, the financing, professional project management and the international architectural competition. Only last Friday, a contract was awarded to the construction company. The ICC will thus be the first international criminal court in the history of mankind which will have its own purpose-built permanent premises, built for generations to come. As this project is currently on track, there is, as usual, no more acknowledgement of my ground-laying role – but I do not mind – maybe they will invite me to the inauguration ceremony.

Judicial Proceedings and Applicable Criminal Law

In this part, the main part of my presentation, I will set out some possible or likely developments which, in their combined effect, will probably make the judicial proceedings at the ICC of the future much more efficient and expeditious.

In the ICC of the future, Chambers will have certainty to receive the necessary resources to properly and expeditiously carry out their functions. It is expected that not a single hearing, if necessary simultaneous hearings of Chambers on the same day, will be delayed or adjourned because of lack of courtroom support staff or other necessary resources.

Second, victim’s participation, and the related current practice of the Court, will undergo significant change to a more meaningful participation. The current practice is, in my view, largely characterised by a deplorable lack of genuine victims’ participation. Instead of such genuine participation which may enable victims to see justice being done, with the related potential of healing, there exists a bureaucratic, slow and costly system of victims’ admission, in which

the victims are at best “virtually” present. They are routinely represented by a new sub-category of counsel, the so-called legal representatives of victims, who all too often do not maintain proper contact with the victims represented. In the future, various ways and means will be explored to achieve more proximity, to bring the victims closer to effective participation in the judicial proceedings, in particular:

- through the possibility of collective participation: intervention of elders or community leaders who represent a group of victims throughout the proceedings;
- through more consistent appearance of victims in hearings, also as witnesses;
- through the presence of elders of affected communities or the presence of victims elected as representatives of victims groups in the courtroom or in the gallery; to this end, a network of NGOs could assist the victims and the Court in facilitating the organization of those visits to the Court;
- through *in situ* hearings of Chambers or Judges in which they receive orally and directly “representations” or the “views and concerns” of victims;
- and through the holding of confirmation of charges or trial hearings or parts thereof *in situ*.

These measures could and will be as simple and practical as possible to create real opportunities for the victims to see that their suffering is indeed acknowledged and that serious efforts are being made to prosecute their tormentors.

In the Court of the future, proceedings will be much more expeditious than they are today. In particular, two somehow related problems which have already caused many complications and delays will no longer exist: first, so-called “phased investigations” in which the office of the Prosecutor seemingly seeks to assemble just enough evidence to achieve the next threshold – instead of working full power *ab initio* to achieve evidence “beyond reasonable doubt”. Second, the questionable practice to request time and again

redactions across the board, in hindsight often excessive, inconsistent and unfair to the defence.

With regard to so-called “phased investigations”, there is still an Appeal Chamber decision explicitly allowing the continuation of investigations after the confirmation of charges.¹ Fortunately, there is a recent Appeals decision in the case of the “Prosecutor v. Callixte Mbarushimana” in which the Appeals Chamber clarified its position on this point by specifying that “the investigation should largely be completed at the stage of the confirmation of charges hearing”.² I have argued that it is “risky, if not irresponsible” for the Prosecutor only to gather the minimum amount of evidence needed to move to the next phase of the proceedings,³ and it is my expectation that the quality of investigations will improve as the Court goes forward.

An investigation as focused and effective as possible *ab initio*, with a strong investigation team will also largely eliminate a problem which until now still is plaguing in particular pre-trial proceedings – namely, pervasive, often exaggerated or precautionary redactions, which have often been a major problem. In particular in pre-trial proceedings their consideration has absorbed inordinate time and energy of all concerned. However, if investigations are more advanced or almost complete before cases are commenced, then the need for such extensive redactions can be eliminated. Witnesses in vulnerable locations have time to be moved, disclosure consent forms can be obtained, tactical decisions can be made as to whether using vulnerable witnesses is necessary, etc. Redactions will be used in a limited and much more pragmatic way than they are now.

Therefore, in the future, disclosure – in unredacted form – of all relevant material will probably take place immediately after the confirmation of charges hearing. Trial proceedings will commence two or three months thereafter, that is, after the Defence is afforded a reasonable time to prepare its case.

¹ ICC-01/04-01/06-568, para. 54.

² ICC-01/04-01/10-514, para. 44.

³ ICC-01/09-01/11-373, para. 47 (dissent).

I also foresee much more effective investigations and cooperation work in the Office of the Prosecutor through maybe a doubling of the staff in the Investigation Division (currently 110 positions) and in the Jurisdiction, Complementarity and Cooperation Division (currently 31 positions, only 15 professional positions). There will be, there is already an emerging awareness also among States Parties about the following: with this limited staff for investigations and cooperation necessities – and please do not forget: these ICC staff are also entitled to annual leave, to training, some may need a time-out for legitimate reasons, etc. – how is it possible with around 100 staff to fully cover the investigation and cooperation necessities for eight situations, 14 outstanding arrest warrants, or another eight situations under preliminary examination? Consequently, as an ICC judge now serving for almost a decade, as somebody who knows our Court, also as a former Vice-President, I fully encourage Ms Bensouda, our distinguished Prosecutor, to seek in the years to come such a doubling of your staff in particular in these key areas. The work of Chambers, which are on the “receiving side”, is fully dependent on effective and professional investigations, prosecutions and related cooperation efforts. I am quite confident that also the ASP will approve these OTP staff increases. They will understand this compelling necessity reflected in a picture often used at the Court, namely, that “The Office of the Prosecutor is the engine, professional and effective investigations are the fuel of the Court”. Yes, I believe that the ICC of the future will have more and enough fuel in this regard.

Already the combined effect of all these positive changes on the judicial proceedings will make these proceedings more convincing and more expeditious. Positive change is also possible with regard to the future work of the judges. It is indeed my expectation that a careful pre-selection of the judge candidates through the Advisory Committee on nomination of judges established by last year’s ASP held in New York will increase the chances that only judge candidates, who beyond the necessary formal qualifications, have also a solid inner compass and proven commitment to the cause of international justice may be elected as judges of the ICC of the future.

Improvements are also possible in the work methodology of the Appeals Chamber. The Appeals Chamber of the future should and will in my view leave behind the somewhat minimalistic approach of decisions on appeal, in which all too often a tendency has become obvious to seek an “easy way out”. The Appeals Chamber of the future will hopefully demonstrate a consistent will to consolidate the jurisprudence of the Court with substantial decisions indeed clarifying the complex issues as they arise.

On the basis of these positive developments, which may occur as a result of sheer necessity or more insight and experience, or even both, it is quite likely, at least in my view, that proceedings and trials will be in the future more expeditious. As with many cases at the ICTY, it took ICC Chambers in the two first trials again five to six years to come to a verdict or come close to a formal judgment. Pre-trial proceedings took regrettably around ten to twelve months. In my view, this is unsatisfactory. It will mean significant progress if the duration of the trial of mass crimes can be reduced at the ICC of the future to approximately three years in particular through proper case management. This includes, first and foremost, a strong role and control of the proceedings by the Judges. It means also streamlining and accelerating the disclosure process and dealing expeditiously with the related issue of redactions, to which I have already referred. The overall time for trials could be reduced, however, as well through the use of a single Judge for the preparation of the court proceedings and the use of case managers and legal officers with specialized knowledge on, for example, victims’ participation and protection issues. Likewise it is in my view not impossible to reduce, through focused work of all concerned, the length of pre-trial proceedings maybe to around six months. Here, I would like to refer in particular to my earlier comments on the need to abandon the practice of the so-called “phased investigations”. Needless to say, also in the future there will be many *imponderabilia* and unforeseen developments which may cause delays. The task, however, is clear: as the duration of judicial proceedings is one of the most corrosive factors for the standing of the Court, all must be done to come closer to a trial “without undue delay” as referred to in article 67 of the Statute.

The quality of the judicial proceedings will also be better because Judges, legal support staff and others may have benefited from regular and professional training seminars organised, in particular by the International Academy Nuremberg Principles. The mandate of this new institution will be to promote, to disseminate and to implement the legal and moral legacy of the Nuremberg Trials, and of Robert H. Jackson, Telford Taylor, Whitney Harris, Benjamin Ferencz, H.W. William (Bill) Caming, and others. As some of you have been in Nuremberg on 17 / 18 August 2012, including Stephen J. Rapp and Beth Van Schaack, you are aware that such training seminars for ICC members will probably be one main support activity of this new Academy, which will officially be founded in 2013. Another important support activity of the Academy for the ICC will be customised information work on the objectives and functioning of the Court, tailored to the needs of specific target groups.

Last night, I had a good exchange on this with David Crane. It was not difficult for us to conclude that the Academy and the Robert H. Jackson Centre may be natural partners for work in the same direction, or even for common work and projects.

With regard to the substantive criminal law applicable before the ICC of the future, one significant development is already generally known:

At the end of this decade the ICC will have, at least to a certain extent, a somewhat symbolic jurisdiction with regard to the “supreme international crime”, the crime of aggression. The necessary 30 ratification of the Kampala amendments and the necessary affirmative vote of at least two thirds of the States Parties will not be difficult to achieve. Germany will ratify the amendments at the latest in 2013.

It is, however, my assumption that the Court may not have yet, even around 2030, a concrete case in which a crime of aggression pursuant to articles 8 *bis* and 15 *bis* and *ter* of the Rome Statute will be prosecuted. Why? Well, experience shows that quite obvious crimes of aggression reaching the high threshold of article 8 *bis* such as, in the past, the Iraqi invasion of Kuwait and

the crimes against peace, such as the German attack on Poland on 1 September 1939, are not committed very often. The existence of ICC jurisdiction with regard to the crime of aggression, even only to a limited extent, will nevertheless have significant positive effects: whenever there is a questionable use of armed force against another State, international commentators or media will raise the question whether the leadership persons in question may have committed a crime of aggression. One can hope that this may reduce or contain, at least to a certain extent, the readiness of political or military leaders to use brutal armed force for their goals.

With regard to crimes against humanity pursuant to article 7 of the Statute, it is my hope that the current majority jurisprudence established in the Kenya cases will have become obsolete and overturned by future ICC decisions. To blur or to do away with the fundamental difference between crimes against humanity and multiple ordinary crimes is in my view simply wrong. A vague formula that any kind of non-state actor may qualify as an “organization” within the meaning of article 7(2)(a) of the Statute, that “has the capability to perform acts which infringe on basic human values” remains totally unconvincing to me. In the future, it will hopefully become clear that this type of jurisprudence, which also brings along the risk of extending ICC jurisdiction indefinitely and beyond its capacity, is not sustainable. In this regard, however, I note with appreciation that more recent ICC decisions have consciously shied away from using the aforementioned formulation.

The jurisdiction of the ICC of the future will continue to be limited to the four core crimes as enumerated in article 5 of the Statute. Further attempts to include terrorist crimes as such and suggestions to include financial crimes in the ICC jurisdiction will go nowhere. Other mechanisms will have to be found to prevent impunity for enormous financial crimes which seemingly continue to be committed almost day by day.

States, the Security Council and the ICC

At the outset, let me recall what Hans Corell said yesterday in his keynote speech.

The ICC of the future – this is the first point - will be stronger and more accepted because around the year 2030 it will probably have around 140 State Parties or more, and not 121 as today.

What is even more important is that there will be a much more positive attitude of the States Parties towards “their” Court. Forgotten will be the current attempts of some State Parties organized in the so-called “G5” or “G6” to impose a “Zero Nominal Growth” (ZNG) policy on the Court – this despite the fact that the work load of the ICC is constantly increasing and also despite the fact that the sums which may be saved through a ZNG policy are ridiculously small. They are indeed irrelevant compared, for example, to the costs of fire brigades in capitals of States Parties or the costs of one single tank. Furthermore, the expected shutting down of the ad hoc-tribunals, of the Special Court for Sierra Leone, of the Lebanon-Tribunal and of the Extraordinary Chambers in the Courts of Cambodia in the near or foreseeable future will dramatically reduce the costs for international criminal Courts and alleviate the budget of ICC State Parties by at least 300 Million Dollars per year. Governments and Finance Ministries of States Parties will gradually understand that henceforth more funds are available and that complementary ICC jurisdiction is soon worldwide the only remaining mechanism to promote more criminal justice. There is therefore good hope that there will be enough breathing space to provide the ICC in the decades to come with a solid financial basis.

There is a further area in which a change of the behaviour of States Parties towards the ICC is necessary and likely to come about. This concerns a quite obvious, if not excessive, current tendency of certain States Parties and their delegates to micro-manage, interfere in internal matters of the Court or demand excessively all kinds of written reports on all kinds of complex issues. This problem is compounded by the activities of a significant number, yes,

proliferation of subsidiary bodies for inspection, evaluation and investigation of the Court, concerning its efficiency and economy. Believe it or not, in 2012, there exist some 12 to 15 such bodies, working groups, or subgroups. Needless to say, this imposition of additional work often absorbs almost entirely the working time of senior officials and staff, thus having a detrimental effect on the regular functioning of the Court.

There is, however, light at the end of the tunnel: there are hopeful indications that in the next years it will be possible to (re-)establish a fair balance between the independence of the Court and the legitimate desire of State Parties to provide oversight management as foreseen in the Statute.

A fundamental strengthening of the ICC may also become possible in a crucial, if not decisive area: arrests, arrest actions supported much more vigorously by State Parties or even non-State Parties such as the US. Informed observers note since some time a growing awareness in the international community that the total dependence of the ICC on effective international cooperation, notably with regard to arrest and surrender to the Court, needs to be addressed. Currently, only six warrants of arrest have been executed, 14 remain outstanding. This points to the necessity that States one day will form or make available task forces to arrest suspects for the ICC, just as it is now routine to use such forces against armed criminals domestically. The fact that the US have recently sent a small number of military advisers to Uganda to train forces for the possible arrest of Joseph Kony and his commanders is encouraging, a step into the right direction. Other measures will have to follow, in the well-understood interest not only of the ICC.

For the ICC of the future, there is also room for improvements of its relationship with the Security Council – or even the treatment of the Court in particular by the five permanent members. The ICC is an independent and non-political institution, acting in the interest of the international community – it should not be treated as a political instrument of the Council. To use the Court as a tool of the SC will inevitably politicise it, make it controversial and damage its chances of becoming a universal institution. One must hope

especially that future SC referrals of situations will be decided upon with wisdom and a visible sense of responsibility. In my humble view this means in particular that the responsibility of the Council to support the work and intervention of the ICC does not end with the adoption of the referral resolution under Chapter VII of the UN Charter. Why is it not possible, as Hans Corell suggested yesterday, that the Council may adopt, if necessary, a resolution under Chapter VII ordering the Government of Sudan to arrest and surrender the Sudanese suspects sought with an international ICC warrant of arrest? Furthermore, article 24 of the UN Charter leaves no doubt that the Security Council, when exercising its authority for the maintenance of international peace and security, acts on behalf of the Members of the United Nations. The logical consequence of this is, at least in my view, that the costs for ICC interventions after a SC referral should be borne by the United Nations, and not by ICC States Parties alone.

Perspectives and Outlook

Dear friends,

I would like to conclude with the following:

I believe that in a foreseeable time, around the year 2030, we will see a stronger, more effective ICC, working more successfully in a more favourable international environment.

Yes – and I am prepared to admit this quite openly – there are problems and weaknesses at the current ICC, yes, progress and positive change continue to be difficult, setbacks are possible. Compared with the violent crises in this world, compared with the forces of *Realpolitik* as explained by Cherif Bassiouni, the Court will always be small and weak, more a symbol, more moral authority than real might.

But “The ICC of the Future” is possible, despite so many difficulties. It is encouraging that the abbreviation “ICC” has become, in only ten years, a universally recognised symbol, the Court has become some kind of worldwide

visible lighthouse for the message, that nobody, no President or general, is above the law and that there shall be no impunity for core crimes, regardless of the rank or nationality of the perpetrator. This is the standard-setting message of the ICC and one should not underestimate its impact. It is only logical that this message is not to the liking of those who continue to regard the use of brutal armed force as a possible means for their political objectives.

To conclude, yes, steadfastness and patience, much patience will be necessary to achieve “The ICC of the Future”. And even after 2015, when my office as judge will have ended, I will follow the development of the Court with hope and in good spirit.

And should it happen that the positive changes that I have mentioned take too long, then I may, if necessary, pass away – but still with hope and in good spirit.

So be it!

Thank you very much.