

**Cour  
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**International  
Criminal  
Court**

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**Keynote address on the occasion of the Nuremberg Forum 2017  
“10 years after the Nuremberg Declaration on Peace and Justice:  
‘The Fight against Impunity at a Crossroad’”**

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Madam President of the Advisory Council of the Nuremberg Academy and other esteemed members of the Council,

Mr. Minister,

Excellencies,

Dear colleagues and former colleagues, dear friends,

Ladies and gentlemen,

I would like to thank the Nuremberg Principles Academy for inviting me to give the keynote address today. I am delighted to be here in Nuremberg for several reasons. It was here in the historic courtroom 600 that we held in 2015 the first retreat of the judges of the International Criminal Court to collectively discuss expediting proceedings and improving efficiency; I am grateful to the Academy for hosting that retreat.

And I am indeed very pleased to address you today at the opening of this forum on the occasion of the tenth anniversary of the Nuremberg Declaration on Peace and Justice. I am happy to see many familiar faces with whom I had the privilege of working during these years, including at the time of the drafting of the Nuremberg Declaration.

Ten years have elapsed since more than three hundred practitioners, academics and policymakers gathered here, in Nuremberg, to tackle one of the most critical question of our time: how can justice contribute to ensuring peace in the long term. And how to reconcile peace and justice in the short time, when diplomats and mediators are striving to reach an agreement to cease the violence.

The question of how justice impacts on peace was very much at the centre of the negotiations for the creation of a permanent international criminal court. However, some of the practical implications of this question could be more clearly discerned only a few years later, when the Court started to make “waves” through actual investigations in situations of ongoing violence. Was the Court’s work really contributing to peace, or was it rather the spoiler in an already complex environment? What was a rather rhetorical question during diplomatic discussions became almost existential when the Court became operational.

The initiators of the Declaration sought to combine the knowledge and expertise of many in order to provide some answers to this fundamental question that continues to be highly relevant today.

Ten years after this adoption and after some thirty years of international criminal justice, including fifteen years of operations at the Court, it is an appropriate time to take stock of where we stand and contrast the principles of the Declaration against the experience we have gained.

At the outset, it is useful to recall that the Declaration on Peace and Justice helpfully clarifies that “Peace” is understood as meaning “sustainable” peace, a concept that needs to be distinguished from ceasing the violence in the short term. In this regard, while recognizing the imperative to stop the fighting and end the suffering, the Declaration emphasizes that when attempting to make peace, negotiations must build the foundation for both peace and justice. The Declaration explicitly reminds mediators that they bear a responsibility to contribute creatively to the immediate ending of violence and hostilities while promoting sustainable solutions.

These sustainable solutions are, according to the Declaration, based on the following main principles.

**Firstly,**

The “Complementarity of peace and justice”. This brings as a powerful corollary that “the question can never be whether to pursue justice, but rather when and how”.

**Secondly,**

The obligation of ending impunity “for the most serious crimes of concern to the international community, notably genocide, war crimes, and crimes against humanity”. The Declaration, in clear terms affirms that “the emergence of this principle as a norm under international law has changed the parameters for the pursuit of peace”.

**Thirdly,**

There is an emphasis on the need for a “victim-centred approach” and again as a corollary, the need to allow victims an active role in processes related to peace, justice and reconciliation.

**Fourthly,**

The Declaration underlines the need to ensure local ownership and take duly into account local circumstances and expectations in order to ensure the legitimacy of strategies for pursuing peace and justice.

**Lastly,**

Reconciliation between formerly antagonistic groups entails, inter alia, addressing justice, accountability and, again, the interests of victims.

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Now, let's address these main premises in light of the experience.

As said, the Declaration posits in the first place that peace and justice are complementary and, if properly pursued, promote and sustain one another.

The assumption enshrined in the Declaration is of course not new. The belief that justice is necessary for sustainable peace was indeed the basic rationale for the establishment of international criminal jurisdictions in the last three decades since the establishment of the ad hoc tribunals for Rwanda and the former Yugoslavia in the early nineties.

The development of international criminal justice in these years was based on the premise that certain crimes are a threat to peace and that justice is an effective deterrence against crimes and ultimately a means to achieve sustainable peace and security.

Both ad hoc tribunals were created by the Security Council under Chapter VII of the Charter, therefore as an action to deal with a threat to peace and security. In addition, as clearly spelled out in the relevant constituting resolutions, the UN Security Council set up the ICTY and the ICTR based on the belief that an international tribunal could contribute to ensuring that the crimes committed in the former Yugoslavia and in Rwanda would be halted and effectively redressed and thus *"contribute to the restoration and maintenance of peace"*.

The same underlying objectives guided in 1998 the drafters of the Rome Statute, which gave birth to the International Criminal Court. This time, it was not only the Security Council but the international community as a whole that endorsed the premise that justice is necessary for sustainable peace. The Rome Statute acknowledges in its preamble that grave crimes such as those which marked the twentieth century, threaten the peace, security and well-being of the world. Correlatively, justice is regarded therein as a means to contribute to the prevention of such crimes.

A further indication of the assumption that accountability is part of peace can be found in the provisions of the Rome Statute that recognize the powers of the UN Security Council to refer a situation to the Prosecutor under Chapter VII of the UN Charter as well as the more controversial power to defer an investigation or prosecution before the Court.

The two situations referred to the ICC Prosecutor by the Security Council – Darfur in 2005 and Libya in 2011 – were explicitly deemed in the respective resolutions to constitute a threat to international peace and security.

The Security Council followed the same rationale when supporting the creation of a Special Court for Sierra Leone by special agreement between Sierra Leone and the United Nations. In the relevant resolution, the Council reiterated that that ending impunity *"would contribute to the process of national reconciliation and to the restoration and maintenance of peace"*.

And beyond the Security Council, the recent establishment of the Mechanism for Syria by the UN General Assembly was also premised on the correlation between “accountability, reconciliation and sustainable peace”

In sum, the establishment of international criminal jurisdictions clearly evidences a belief on the part of the international community that accountability is an integral part of conflict resolution and prevention. The Nuremberg Declaration spells out this belief.

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But, in practice, does justice really contribute to peace? *Has* justice contributed to peace by deterring crimes?

Deterrence of further crimes is empirically difficult to demonstrate, whether it is in a particular situation or at the global level. While some recent case studies seek to assess the impact of international criminal efforts in the prevention of violence, proving the “negative” is always a difficult, often impossible proposition.

The consolidation of international criminal justice, including through the establishment of the ICC may be considered as one of the biggest achievements of the last three decades. However, when looking at the appalling violence against civilians in ongoing conflicts, one may rightly wonder whether international criminal justice efforts have indeed helped to prevent mass crimes.

Unfortunately, it is too early to answer these questions and we must continue to work for justice based on our beliefs that justice is a moral imperative and also a concrete and necessary tool to contribute to sustainable peace.

It is indeed premature to assess the impact of justice on peace efforts. As impressive as three decades of international criminal justice efforts may be, we are far from having achieved a consistent *pattern* of accountability.

However, what has been achieved for sure is that in the last thirty years the concept of accountability has been put firmly in the global agenda. There is now an *expectation* that there will be accountability for the most serious crimes and the conviction that this is necessary for sustainable peace. The Declaration indeed got it right when it says that the question is not any more whether to pursue justice, but rather when and how. Impunity for certain crimes is simply *not* an option any more. Impunity is not an option as matter of law. It is not an option as a matter of policy.

However, in practice, accountability continues to be the exception rather than the rule. There are huge gaps where impunity continues to flourish. These gaps result from two particular weaknesses in the current system of international criminal justice. One of these is the nature of international crimes, and the other one is the lack of universality of justice efforts.

Firstly, **the nature of the crimes**. International crimes often involve multiple perpetrators and thousands or hundreds of thousands of victims. It is unavoidable that justice will need to be selective regardless of whether it is applied at the international or national level. That is why, prosecutorial discretion for this type of crimes is typically very broad. At the international level in particular, prosecutorial efforts will normally focus on carefully selected events and perpetrators.

Some international tribunals have been explicitly mandated to focus on those who bear the greatest responsibility. The statute for the Special Court for Sierra Leone, for example, limited the Court's jurisdiction to those who bore the greatest responsibility for the crimes committed on the territory of Sierra Leone. As part of their downsizing, the ICTY and the ICTR were specifically requested by the Security Council to focus their efforts on leaders suspected to bear the greatest responsibility.

In addition to the limited number of individuals selected for prosecution, the scope of conduct that is charged is often far narrower than the actual universe of the crimes committed. While the selection may be unavoidable it may result in impunity for many serious crimes and no redress for victims.

In sum, international cases only embrace a handful of the crimes committed in a given area during a given period. Certain crimes, which would also deserve prosecution, are inevitably left aside. There may be different valid reasons for this such as lack of sufficient evidence or the need to expedite both the investigation and the judicial proceedings.

But this narrow selection can cause problems, and we have seen it at the ICC, in particular for the first cases. The Prosecution's strategy in the *Lubanga* case – the first case tried before the ICC – attracted criticism from victims for not being adequately comprehensive. Mr Lubanga was tried exclusively for crimes against child soldiers while there were allegations of other crimes having been committed against the civilian population in eastern Democratic Republic of the Congo. We see a different approach in the recent *Ongwen* case, related to alleged crimes committed by the Lord's Resistance Army in northern Uganda. The Prosecution expanded the earlier selection of charges and brought seventy charges against Mr Ongwen in relation to a large array of crimes, including murder, torture, rape, sexual enslavement and pillaging.

Notwithstanding these efforts to broaden the approach, we must recognise that international criminal jurisdictions can only deal with a limited portion of acts committed.

The Declaration is thus right in emphasizing that each State has the primary responsibility to prevent, investigate and prosecute such crimes. International and regional jurisdictions can only supplement but never replace the actions of states.

The International Criminal Court has been explicitly created as complementary, last resort mechanism, intended to address only situations in which the relevant states fail to act. As a positive result of this complementary system, an increasing number of States have updated their national legislation to be able to investigate and prosecute international crimes at the domestic level. Others have also established specialized units within their justice system in order to deal with these type of crimes.

All these initiatives are commendable as only through the combined efforts of all jurisdictions – national, regional and international – can we truly hope to reduce the impunity gap and establish an effective system of global justice. As reaffirmed by the Declaration: “Justice may be delivered by local, national and international actors.”

That is why it is important to deploy all efforts to enhance national capacity to investigate and prosecute massive crimes. This is even more important taking into account that efforts at the international level are not only narrow in scope, they are also not yet universal.

This **lack of universality** is the second fundamental weakness of international criminal justice. Attention to situations continues to be essentially *ad hoc*. And agreements for justice mechanisms are not reached for all situations – the example of Syria is a striking illustration.

The Rome Statute of the ICC has a global aspiration but the Court has no universal jurisdiction and the treaty, with 124 States Parties, has not yet attained universal participation. Promoting the universal participation in the Rome Statute is of fundamental importance in order to enhance the effectiveness and the legitimacy of the institution and, ultimately, its capacity to contribute to sustainable peace in the world.

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As said, the Declaration emphasizes the importance of having a victims-centred approach to peace and justice and therefore the need to take into account the interests of victims and affected communities in any strategy for peace, justice and reconciliation.

Experience shows that engaging victims fully in criminal proceedings, while being crucial, is in fact particularly difficult for international tribunals. International tribunals are, by definition, detached from national systems and societies and need to proceed, most times, at large distance from them. A particular effort is thus required at the international level to reach out to victims, listen to them and ensure among them sufficient ownership of the justice efforts.

The Rome Statute recognizes this problem and contains, for the first time, some elements intended to engage victims at all stages of the proceedings as participants in their own right, and not merely as witnesses of the crimes. The Rome Statute allows victims to provide information to the Prosecutor and to participate in the judicial proceedings to express their views and concerns. This participation has taken various forms in our proceedings such as making submissions at the critical junctures, examining Prosecution and Defence witnesses, and presenting evidence.

The possibility for victims to participate can now be said to form an integral part of the international criminal justice system. Since the ICC was established, victims' participation has been incorporated in the legal framework of the Extraordinary Chambers in the Courts of Cambodia, that of the Special Tribunal for Lebanon as well as in that of the Kosovo Specialist Chambers.

In practice, the participation of sometimes thousands of victims in criminal proceedings raises a number of legal and operational challenges as their participation must be genuine and meaningful without affecting the right of the accused to a fair and expeditious trial.

Almost 13,000 victims are currently participating in the various ICC's proceedings through legal representatives, including more than 4,000 victims in the latest Ongwen trial. The ever growing number of victims willing to participate demonstrates both the success of the Court in improving the access of victims to justice as well as the huge task ahead. As victims participate through legal representations, one particular challenge is to ensure a genuine channelling of victims' voices through legal counsel. Different chambers have so far tried different systems but this is obviously work in progress and more reflection will be needed in this regard.

In order to engage fully with victims, the Court has taken stock of past experiences and is making great efforts to enhance public communication and outreach strategies in situation countries. In the most recent *Ongwen* case, for instance, proceedings are broadcasted regularly in the affected communities. questions and answers sessions are also held to help victims understand the way justice works in The Hague.

Due to heightened security risks for all involved, including victims willing to attend the hearings, we have not yet been able to hold proceedings on site, close to where crimes were allegedly committed, but we hope to be able to do so in a near future.

While participation in criminal proceedings is very important, reparations for the harm suffered are also crucial in order to contribute to peace and reconciliation. The Nuremberg Declaration refers to restitution, compensation and rehabilitation as being essential components of justice. The Rome Statute is the first instrument of its kind to provide for the possibility of ordering reparations to victims in case of conviction. Reparations can be individual or collective, or a combination of both.

Reparations are currently being considered in four cases before the ICC, following convictions.

Considering that international criminal justice can only address and repair a handful of cases, it is important that it be complemented by broader assistance to victims in situations investigated by the Court, beyond the confines of a particular case.

As part of the reparations system, States Parties to the Rome Statute have established a Trust Fund for Victims, funded by voluntary donations from States and other donors. The Trust Fund may contribute financially to implementing reparations orders in case the convicted person is indigent, but also may provide broader assistance to victims of crimes in affected communities. In northern Uganda, for instance, the Trust Fund has been active for ten years now, working with local NGOs on projects aimed at rehabilitating victims of crimes mentally and physically.

Again, the system confronts a number of difficult challenges, including the need to ensure sufficient funds to provide meaningful reparations to victims.

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Ladies and gentlemen,

To conclude, it can be said that the experience gained in all these years has in no way undermined the validity of the concepts and principles of the Nuremberg Declaration. On the contrary, it is my view that the principles contained in the Declaration continue to provide relevant and accurate guidance on what is required to ensure justice and peace in practice.

Now we understand better the enormous political and practical difficulties of implementing the principles. Peace and Justice are not easy to attain.

Unfortunately, in our increasingly troubled world, difficulties of all kind multiply and even some of the underlying essential values and beliefs seem to be put in question. When we look up at the enormous challenges, it is sometimes difficult to maintain optimism and our resolve intact. On occasions, we cannot but wonder whether we will manage not even to strengthen but just to maintain the important achievements attained in the area of justice and rule of law after so much effort.

However, I am convinced that notwithstanding the difficulties, we should not lose historical perspective. We have much to celebrate in this tenth anniversary of the Nuremberg Declaration for Peace and Justice.

Indeed, much has been done and achieved in three decades of international criminal justice. Only twenty years ago we were wondering whether the creation of the International Criminal Court would be possible. And it was. It was possible, thanks to the unwavering commitment of many states and individuals, including many of you here. The Court is not perfect but it is working, it has matured, and it is delivering. Many initiatives are under way to ensure that it continues to improve its performance and enhance cooperation and support. Efforts to bring perpetrators of international crimes before justice also continue to develop through national, regional or hybrid mechanisms.

Justice for international crimes has proved to be possible. Together we must continue to ensure that it is strengthened so that it can make a contribution to sustainable peace.

Thank you.

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