



**The International Criminal Court:
Trigger Mechanisms for ICC Jurisdiction**

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

Judge and Second Vice-President of the International Criminal Court

At the international conference
**“Max Planck Conference on
Unity and Diversity of the Judiciary and Law in Iraq”**

Organized by
**Max Planck Institute for
Comparative Public Law and International Law**

Held in
**Arbil, Iraq
26 November 2011**

*Embargoed until 26 November 2011, 2 p.m.
Check against delivery!*

Excellencies,

Ladies and Gentlemen,

On 1 July 2002, nine and a half years ago, this treaty, the Rome Statute of the International Criminal Court (ICC), entered into force. This treaty is nowadays regarded by many as the most important international treaty since the adoption of the UN Charter in 1945. This treaty established the first permanent international criminal court in the history of mankind. This Statute contains for the first time – in articles 6, 7 and 8 – a comprehensive codification of genocide, crimes against humanity, war crimes, and the crime of aggression. I will come back to the crime of aggression in the course of this presentation because we witnessed in June 2010, during the Review Conference of the International Criminal Court, held in Kampala, Uganda a major progress, if not a break-through. All in all, this comprehensive codification is based – and this is significant if not revolutionary – on the free and voluntary consent of the international community.

The ICC is a general, future-oriented international criminal court – that is to say no selective criminal court, also no retroactive criminal court, as the *ad hoc* Tribunals for the former Yugoslavia and for Rwanda, and the so-called hybrid courts for Sierra Leone and Cambodia. Our Court is also – and this is again of fundamental importance – no so-called ‘Victors’ Justice’. The general principle of law, “Equality before the Law, Equal Law for All” and the free and voluntary support and cooperation by the international community – that is to say no obligation to support which was imposed by the UN Security Council or powerful nations – these are the fundamentals of our Court.

At the Rome Conference, Iraq was represented by an active and able delegation, led by H.E. Dr. Sultan Abdulkadir Mahmoud, at the time Ambassador to Italy. In 2005, 2006, after the establishment of the Court in the Hague, high-ranking Iraqi judges and prosecutors visited the Court and informed themselves about its work. Quite recently, on 8 September 2011, Mr. Hoshyar Zebari, the foreign minister, in a meeting with ICC President Song in the Hague showed keen interest in the mandate and current work of our Court. Also my visit here in Arbil, the first visit

ever of a judge in Iraq demonstrates again, that we stand ready to assist in any way possible all those who want to inform themselves about the Court. As this is also for me my first visit in Iraq, this beautiful and resourceful country, it is a particular pleasure for me to contribute to this important conference.

Now, what are the two main hopes of this Judge from the ICC for this conference?

It is my hope, firstly, that after this conference we all may have a better common understanding of the key features and principles on which the ICC is rooted, in particular that the ICC is not undermining state sovereignty but rather supports and complements it.

It is my hope, secondly, and most importantly for this conference, that we all may have after this meeting a better understanding that the ICC and the Rome Statute already now can be regarded as a driving force, as maybe the most important promoter for human rights, international humanitarian law and the rule of law in general, in this somewhat disorderly world.

In my presentation today, I will deal essentially with two sets of questions:

- (1) What are the key features of the ICC, in particular the trigger mechanisms for the ICC jurisdiction?
- (2) What is the current situation of the Court and what criminal cases are now ongoing?

I will conclude with some remarks on current challenges and perspectives of the International Criminal Court.

I. KEY FEATURES AND TRIGGER MECHANISMS FOR ICC JURISDICTION

As a judge of the ICC, I am often asked what is the most important aspect of this new institution which one should be aware of, which one should really know. My answer is always the same.

In order to understand the ICC, it is in my view necessary to be fully aware of the limited reach of the jurisdiction and admissibility regime of this court. The Court's jurisdiction is not universal. It is clearly limited to the well-recognized bases of jurisdiction.

The Court has jurisdiction over:

- Nationals of States Parties.

It is undisputed under international law that each State has the right to prosecute its own nationals when they commit crimes.

- Offences committed on the territory of a State Party.

It is likewise undisputed under international law that each State has the right to prosecute crimes committed on its own territory regardless of the nationality of the perpetrators.

In addition, the Security Council can refer situations to the ICC independent of the nationality of the accused or the location of the crime.

The Security Council also has the power to defer an investigation or prosecution for one year in the interests of maintaining international peace and security.

The ICC is a court of last resort. This is known as the principle of complementarity as contained in article 17 of the Statute. What does it mean?

- In normal circumstances, States will investigate or prosecute offences.

- The Court can only act where States are unwilling or unable genuinely to investigate or prosecute offences. The primary responsibility to investigate and prosecute crimes remains with States.
- Furthermore, cases will only be admissible if they are of sufficient gravity to justify the Court's involvement.

The principle of complementarity, as provided for in particular in article 17 of the Rome Statute, is the decisive basis of the entire ICC system. Once more, complementarity entails that judicial proceedings before the ICC are only admissible if and when States which normally would have jurisdiction are either unwilling or unable genuinely to exercise their jurisdiction. The Rome Statute recognizes the primacy of national prosecutions. It thus reaffirms state sovereignty and especially the sovereign and primary right of States to exercise criminal jurisdiction.

Numerous safeguards in the Statute also ensure that politically-motivated prosecutions will not take place. As you are aware, the so-called risk, alleged risk of politically motivated prosecutions was one of the main criticisms of the hostile campaign of the Bush administration against the Court, which took place between 2002 and 2006.

The Pre-Trial Chamber is one example of such a safeguard and also an important innovation in this regard. The basic principle is that generally the Prosecutor is under the control of the Pre-Trial judges. In particular before launching an investigation on his own initiative, the Prosecutor must first obtain authorization from the Pre-Trial Chamber.

With regard to substantive criminal law, the jurisdiction of the International Criminal Court is limited to the most serious crimes of concern to the international community as a whole, namely, genocide, crimes against humanity and war crimes, pursuant to articles 6-8 of the Statute. It is worthwhile to take a personal look at the long list of 5 forms of genocide, 15 forms of crimes against humanity and more than 50 different war crimes. This is the first comprehensive codification

of international criminal law which is based on the free consent of the international community (and is not imposed by the Security Council as, for example, the statutes of the *ad hoc* tribunals).

With regard to the crime of aggression, the fourth core crime listed under article 5 of the Rome Statute, the ICC Review Conference adopted on 11 June 2010 a package proposal which will probably provide the ICC after 2017, to some extent, with jurisdiction over future crimes of aggression. As currently we do not have such jurisdiction, I will not deal with the details of this complex compromise which found the consensus of all States present in Kampala. It may suffice that I simply underline the fundamental importance of this development which will clearly enhance further the role of the ICC in the international community. We all know – and the people of Iraq are certainly aware of it – that aggressive war-making, the ruthless use of brutal military force is the greatest threat to human rights as it inevitably leads to multiple war crimes. On the other side, the absence of war, the prevention of armed conflict is the best guarantee that human rights will not be violated.

Another key feature is the fact that the Court is 100% dependent on effective criminal co-operation, on the support of States Parties. As the Court generally has no executive powers and no police force of its own, it is totally dependent on full, effective and timely co-operation from States Parties. This is true in particular with regard to arrests and surrender of suspects to the Court which must be performed by States Parties, not by ICC personnel. As foreseen and planned by its founders, the Court is characterized by the weakness, structural weakness that it does not have the competencies and means to enforce its own decisions. Also in this respect it was the wish of the Court's creators that States' sovereignty should remain prevailing. Once again, the Rome Statute fully respects the sovereignty of States.

Trigger Mechanisms for ICC Jurisdiction

At the outset, let me explain that the way in which the ICC jurisdiction over a particular situation can be triggered was a very sensitive issue during the drafting of the Rome Statute. There are now three different trigger mechanisms for the exercise of the ICC jurisdiction set out in Article 13 of the Rome Statute:

- (1) referral by a State Party;
- (2) investigation *proprio motu* by the ICC Prosecutor and
- (3) referral by the UN Security Council.

A State Party can refer a situation to the Prosecutor or a Prosecutor can initiate investigation *proprio motu* only if the crimes within the jurisdiction of the Court appear to have been committed by a national of a State Party or on a territory of a State Party. I mentioned already that the Security Council can refer situations to the ICC independent of the nationality of the accused or the location of the crime.

Those three trigger mechanisms have been under close scrutiny; especially the United States have expressed fears that there might be politically motivated prosecutions or that there may be an uncontrolled prosecutor with a hidden political agenda. In year 10 of the Court's existence, it is obvious that all these allegations have turned out to be unfounded.

On the other side, it may be interesting to recall what the United States wanted to achieve in Rome. It is well-known that the Americans wanted to create essentially a "permanent ad-hoc tribunal" under the control of the Security Council. What is meant by this? Well, this would have meant a permanent court which normally would be non-active but could be activated by a Security Council resolution under Chapter VII if there was a situation in a specific country where genocide, crimes against humanity or war crimes were committed.

It is now clear that such a permanent ad-hoc tribunal under the control of the permanent members of the Security Council would have been the ideal solution for

the Americans. They could then have activated the Court against a certain country if they so wished; at the same time the United States themselves and their allies would have been immune from prosecution because the Americans could have blocked the activity of the Court with their veto power.

At the same time, this would have created a two-tier Court, with two classes of states:

- First class: permanent members and their allies, protected against any prosecution
- Second class: the large majority of normal UN member states exposed to the risk that the Security Council would activate the ICC against them.

It was clear that such a two-class Court, with built-in double standards was not acceptable to the overwhelming majority of UN member states. This explains why the US proposals were so clearly defeated on 17 July 1998 when the Rome Statute was adopted.

Let me raise another question: is it true, is it really true, as some in the US continue to maintain, that this Rome Statute, that the ICC is a threat, a violation of the sovereignty of states and other principles?

Well, on this point, I can be quite brief:

As demonstrated through the 10 years of existence of the Court, through 10 years of work closely followed by the international community this argument is simply without any basis. Otherwise, why would already as many as 119 States from all regions of the world, including four members of the League of Arab States: Jordan, Djibouti, the Comoros and Tunisia, be members of the ICC?

Is it reasonable to assume that for example Tunisia, which joined the Court some months ago, would consciously accept a violation of their sovereignty? I leave the answer to the audience.

II. CURRENT STATE OF THE COURT

Excellencies,

Ladies and Gentlemen,

I hope you will now allow me to make some brief remarks as to the significant progress, the enormous progress that has been achieved in the development of the ICC in all key areas since its establishment in 2003, and also in particular in the last year. In this respect, only a month ago, on 26 October 2011, the current President of the ICC, Judge Song, my colleague from Korea, presented the Court's seventh annual report to the UN General Assembly, which is also available in Arabic. He also mentioned that Qatar, another direct neighbour of Iraq, hosted in May of this year an important ICC conference for Arab States.

So, what is the Court's current situation?

The International Criminal Court has come a long way since 2003. The complete administrative infrastructure of the Chambers, the Office of the Prosecutor and the Registry had to be developed from scratch. Five "field offices" and a UN liaison office in New York were opened. In the past few years the focus of activity has steadily shifted from establishing the Court to concrete action in prosecution and judicial proceedings. Employee numbers have grown from 5 to almost 1100.

The Office of the Prosecutor, Pre-Trial, Trial and Appeals Chambers are nowadays all fully functional and cope with a heavy work load. Let me illustrate this by an example: between 1 January and 30 September 2011 only, the Judges handed down 601 decisions, orders or judgments.

The Court is currently seized of seven situations. To make a reference to the previously discussed trigger mechanisms, let me explain that out of those seven situations:

- three have been referred to the Prosecutor by States Parties (Uganda, the Democratic Republic of the Congo, and the Central African Republic);

- two have been referred by the UN Security Council: (Darfur (Sudan), Libya);
- and two investigations have been initiated *proprio motu* by the Prosecutor (Kenya, Côte d'Ivoire).

The judges have issued 18 arrest warrants and 9 summonses to appear. Trial is currently ongoing in four criminal cases against Thomas Lubanga Dyilo, Germain Katanga, Mathieu Ngudjolo Chui and Jean-Pierre Bemba Gombo, all four in custody of the ICC. In September 2011, the Pre-Trial Chambers I and II have held confirmation of charges hearings against additional seven suspects; the decisions are expected soon. Many other suspects unfortunately still remain at large. This is also because the Court is absolutely, one hundred percent dependent on effective cooperation with States Parties, in particular when it comes to the key issue of arrest and surrender of the persons sought. The matter is simple: no arrest, no trial.

III. CHALLENGES AND PERSPECTIVES

Although the International Criminal Court has come a long way since its establishment, it is still a young, developing institution. The Court continues to face difficult, ongoing tasks and challenges which, to make matters worse, all need to be dealt with simultaneously. It is important to give the ICC enough time and the chance to become an effective and acknowledged international court.

However, we should, for a good while still, be quite sober and realistic, maybe even modest about the future prospects of the ICC. In particular, we should avoid exaggerated expectations – which only will backfire on the ICC if they cannot be fulfilled. It is obvious: the ICC is no panacea for all the evils and crimes of this world. It will not be able to prosecute all the perpetrators of all crimes committed anywhere in the world, only a few of those, who bear the greatest responsibility. In general, the ICC will always have a rather limited capacity and will be small, more a symbol for the rule of law and a court of last resort.

Finally, I would like to make an appeal which I have already repeatedly made, in other conferences, in many fora:

The Court needs greater international recognition and more members than the current 119 States Parties. To demonstrate its truly international nature and, more importantly, to ensure efficient functioning of the Court, diverse legal and religious traditions as well as many different constitutional systems should be represented among its members. Tunisia has presented a distinguished judge candidate for the next judge elections which will be held in New York already next month. And I, together with my judge colleagues, thus look forward to the time when we will have, hopefully, the first Arab judge on the bench of the ICC, bringing with him the culture and wisdom of this region of the world.

Iraq is already a State Party to many important international conventions relating to the work of the ICC, for example all four Geneva Conventions, codifying international humanitarian law, and the Convention on Prevention and Punishment of the Crime of Genocide. By joining the Rome Statute, Iraq would build on this record in an impressive way. But let us be clear: it is solely the sovereign decision of each nation whether to join the ICC or not. Therefore, this is a matter which the people, the Government and the Parliament of Iraq must decide for themselves, after careful consideration and in full sovereignty.

Thank you very much.
