



**The International Criminal Court –
Current Challenges and Perspectives**

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This treaty, the Rome Statute, the founding treaty of the International Criminal Court is nowadays regarded by many as the most important treaty since the adoption of the Charter of the United Nations in San Francisco in October 1945.

The Rome Statute, which established the first permanent International Criminal Court in the history of mankind, entered into force on 1 July 2002 with 66 ratifications. Today, nine years later, the Rome Statute has 116 States Parties. The Rome Statute contains a comprehensive codification of genocide, crimes against humanity, war crimes and of the crime of aggression. This comprehensive codification is based – and this is significant if not revolutionary – on the free and voluntary consent of the international community. Our Court will prosecute these crimes if and when national criminal systems fail. 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. You could say that article 17 is, maybe together with article 12, the most important provision of the entire Statute. The ICC is the first permanent, general, future-oriented court that is based on the general principle of law 'equality before the law, equal law for all' and is not imposed by powerful states, or by the Security Council as, for example, the statutes of the ad hoc-tribunals.

Why did I accept to come to Salzburg to provide this key note? Well, there are many good reasons.

I am fully aware, for example, that the Salzburg Law School assembles each year a quite impressive and relevant group of qualified young lawyers, with a special interest in international criminal law and the ICC - and it is a pleasure to meet all of you as it was nice to meet some of you already last night, at the Kolping House.

But there are also other, more personal reasons: this is just such a wonderful opportunity to meet again, to work again with two pioneers, two visionaries, yes, also two heroes of the Rome Conference, namely Ben Ferencz and Otto Triffterer. Ben, I am already looking forward to your speech this afternoon – I am certain it will be inspiring as always. With regard to Professor Triffterer, my appearance here today is also a modest attempt to pay a personal tribute to our gracious host, to honour and acknowledge all what he has done not only for all his students, but also for the cause of international justice and for the International Criminal Court in general. Just an example: the Triffterer “Commentary on the Rome Statute” continues to be a “must” in the bookshelves of all legal support staff and of all judges at our Court.

In this presentation I will deal with three sets of issues:

One: What is the current situation of the Court?

This will be in particular a recapitulation, rather brief, of the situations before the ICC and an overview of the cases which are currently underway.

Two: what are some of the most important challenges which continue to face the Court?

This will be the main part of today’s report. It will distinguish between, at first, internal or work-related challenges and secondly, external challenges or those which are inherent in the ICC system as an international criminal justice system, including political challenges which the Court cannot influence, but simply has to live with.

Finally, I will conclude with some observations on the future perspectives of the Court, in the years to come, but also beyond, in a longer-term perspective.

I. Current situation

What is the Court's current situation; what progress has been made since its establishment in 2003? Some of the following is quoted from the statement delivered to the United Nations in New York on 28 October 2010 by the current President of the ICC, Judge Song, my colleague from Korea. Judge Song presented the ICC's 6th Annual Report to the General Assembly of the United Nations and said inter alia: 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 1100. Five was the size of the Advance Team which I founded in 2002 / 2003, to start the build-up of the Court.

The Office of the Prosecutor, Pre-Trial, Trial and Appeals Chambers are nowadays all fully functional and cope with a heavy work load. Three "situations" have been referred to the Prosecutor by States Parties (Uganda, the Democratic Republic of the Congo, and the Central African Republic), two situations (Darfur/Sudan and Libya) have been referred by the UN Security Council, the Libya situation recently, at the beginning of March 2011, through an unanimous Security Council decision. One investigation (Kenya) was started by the Prosecutor *proprio motu*, at the request in particular of Kofi Anan who mediated an end to the post-election violence in early 2008. The Prosecutor has very recently submitted a request for opening an investigation

in the Ivory Coast, which has been assigned to a new established Pre-Trial Chamber III. The judges have issued 17 arrest warrants and 9 summonses to appear. Pre-Trial Chamber I has recently issued 3 arrest warrants against Muammar Gaddafi and two of his top aides in the Libya situation. Four cases are currently in the Pre-Trial stage. Four other criminal cases are now being heard by the Court in trials against five accused persons currently being detained by the Court, in our own ICC prison or detention centre.

Around the end of this year 2011 we will probably have the first final judgments, in the case of Thomas Lubanga, with the cases of Germain Katanga and Chui and the case of Jean-Pierre Bemba to follow soon afterwards. This will also mean that after these judgments the issue of victim's reparations will be – for the first time - to be decided by the Trial chambers of the Court. Until 1 April 2011, out of more than 4700 victim applications, roughly 50%, namely 2317 victims were authorised by the respective Chambers to participate in the proceedings.

In December of this year six new judges and – most important - a new Prosecutor, the successor of Luis Moreno Ocampo, will be elected in New York – this will mean a new phase in the life of our Court.

II. Challenges facing the Court

Nine years after the Rome Statute came into force, it is obvious that the Court continues to face difficult, ongoing tasks and challenges which, to make matters worse, all need to be dealt with simultaneously.

First: There are many areas where the Court must improve and make its own work more efficient. This includes areas of an administrative nature, such as our IT system, but also judicial work.

Second: The Court needs greater international recognition and more members than the current 116 States Parties; it is, however, especially gratifying that Tunisia recently became the 116th State Party, more to follow.

Third: The Office of the Prosecutor, above all, must develop in an effective body for prosecuting international crimes.

In this respect, let me share with you a saying, which I have picked up from the young people at our Court. They say – and you can hear this quite often - “the Office of the Prosecutor is the engine; systematic efforts for professional investigations and effective cooperation are the fuel for the entire Court!”

One fundamental demand from Chambers to the Prosecutor is obvious: the Office of the Prosecutor should not take steps to initiate pre-trial or trial proceedings, until there is certainty, real certainty that the cases are based on sufficient evidence. It would be ideal, for example, if investigations were almost completed during the pre-trial proceedings so that the focus shifted from investigations to prosecution. This would have the consequence that the Pre-Trial Chambers have the ability to complete all preparatory work of the cases: the accused are informed of all facts, the evidence has been collected, and the Pre-Trial Chamber has ruled on protective measures. It must also be possible that trials commence shortly after the decision confirming the charges without a time gap of another year in which trial proceedings are prepared anew inside the Office of the Prosecutor. While judges do not have insight in the Office of the Prosecutor, there is an impression that there is still some room for improvement with regard to general work methodology in investigations, ensuring cooperation as well as efficient structures and the efforts to have highly qualified prosecutorial staff. Nine years after the

establishment of the Court, there is, in my personal view, also in the Office of the Prosecutor no more room for improvisation or muddling through – once again: the Court needs a highly professional prosecutorial engine.

But it would be unfair not to mention that also the judges have to cope in their work with a number of problems and challenges—and this must include some self-criticism:

- (1) The role of the Pre-Trial Chambers and their relationship with the Trial Chambers as set forth in the Rome Statute have not yet been definitively clarified by the judges. How can we achieve a sensible division of labour between pre-trial and trial proceedings? How far can the Trial Chamber utilize the findings of the Pre-Trial Chamber in order to avoid repetition when taking evidence?

- (2) A particularly serious problem for the Court is the necessary provision of protection to witnesses and victims. Far more so than in central Europe, witnesses and victims from African “situation States”, such as Kenya, the Democratic Republic of the Congo, Uganda or Darfur/Sudan, who are prepared to testify are often at great risk and face concrete threats. And this is where the problems start: procedural rules explicitly permit witnesses and victims to be made anonymous through “redactions” – i.e. the blacking out of details, especially their names – and to make them unrecognizable in submissions and witness statements; however, this also fundamentally threatens the rights of the accused to a fair trial. In general, the system and excessive practice of thousands of such “redactions” has, in my view become, a huge problem both for the Prosecutor’s staff as for Chambers. But it is difficult, so difficult to change this, in particular if tactical advantages can be gained there from.

- (3) There is still dispute between the Court's chambers about the role that victims of crimes (and their organizations) can play in the various stages of the proceedings. The dilemma is clear: yes, we want victim participation as envisaged by the Statute — but how to achieve this without affecting the proceedings? The current system of victim participation is, in my view, not satisfactory. It is symbolic at best and has also been distorted, at times, by certain practices of legal representatives of victims. There is, for example, the phenomenon that lawyers collect mandates from African victims; with these documents they apply to be admitted as legal representatives of victims and to obtain legal assistance funds from the Court, which are quite generous - and it is often unclear whether, afterwards, they still inform and seek the views of the victims concerned. This is, in my view, untenable - we must give the victims a genuine and authentic participation — why not through the appearance of Elders or self-chosen representatives of African villages affected by the crimes in question?

Beyond these challenges related to judicial work and to the internal functioning of the Court let me now recall some of the inherent limitations and continuing challenges that the Court has simply to live with and that even the Presidency cannot change however much we would like to.

One: It has become more known in the last years that the ICC is absolutely, one hundred percent, dependent on effective cooperation with States Parties in preparing criminal cases, in particular when it comes to the key issue of arrest and surrender of the accused; this lack of any form of executive power is another weakness of the Court, its Achilles' heel, so to speak. The matter is simple: no arrests, no trials.

Two: Another limiting factor in that is the unprecedented, indeed gigantic difficulty the Court faces, in order to obtain the evidence required, it has to conduct the necessary, complex investigations in regions thousands of kilometres away from The Hague, regions where travel is difficult, the security situation is volatile and it may be difficult to collect the evidence.

Three: Genocide, crimes against humanity and war crimes are usually committed during armed conflict as a result of orders “from the top” issued by all kinds of rulers, who at the same time make every effort to cover up their responsibility for the crimes. In pursuing its task, therefore, the Court will almost inevitably be caught between the poles of brutal power politics on the one hand and law and human rights on the other. Consequently, the work of the Court will often continue to be hampered by adverse political winds or indeed political reproach of every colour – and we have seen this in particular in the Darfur situation.

Four: Since 2007 it has become particularly noticeable that certain States Parties are trying to restrict funding for the Court. This is apparent above all in persistent, mantra-like repetitions of a somewhat irrational demand for zero nominal growth – when quite often the same States make sweeping demands for, for example, more outreach or victims work of the Court or more situations, more work are referred to the Court.

Five: There is a further phenomenon, a further challenging reality which can affect the Court’s international position or make its work the subject of international debate or even controversy: this concerns the temptation for some States, including powerful States and permanent members of the Security Council to somehow instrumentalise the Court, to use it for their

political purposes and interests. As a former German Ambassador, who is now a Judge and Vice-President of the ICC I am neither blind nor naïve in this regard.

Already the so-called self-referrals of some African States Parties as Uganda and Democratic Republic of Congo have led to comments that leaders of those States used the ICC against political opponents - I have often heard arguments to this effect. But as a legal, as a judicial institution governed by the Rome Statute we have to apply its articles - and there is no doubt that there were State Party referrals under article 13(a) of the Statute – and there is also no doubt that terrible mass crimes have been committed in Uganda and the DRC which the ICC had to investigate and prosecute.

It is well-known that the referral of crimes committed in Darfur/Sudan through Security Council resolution 1593 in 2005 and the subsequent ICC activities including the arrest warrant against President Bashir led to considerable international debate. A further noteworthy case is obviously the recent referral of the Libya situation through SC Resolution 1970 in March of this year. From the ICC perspective it was positive that the decision of the Security Council, the highest authority of the United Nations, was this time unanimous. There were also positive editorials and comments, underlining “This Security Council decision demonstrates very clearly, yes, the ICC is nowadays part of the international reality.”

So far, so good. There are also other, less positive elements and circumstances which have to be considered—I limit myself to mention three: first, the entire financial burden of the Libya investigation and ICC work was again put on the ICC, its States Parties and not on the UN – and you can imagine how this has affected our budgetary planning for 2011/2012.

Second, nationals of Non-States Parties, for example US nationals, were exempted from ICC jurisdiction, with exactly the same provisions, as used in SC resolutions adopted during the Bush Administration. Finally the Court, its Presidency was not consulted at all, was not even informed as a courtesy measure before this referral — and we will have to come back to this and are encouraged to do so for example also by Kofi Annan.

What I want to say through this is simple but important: what States, powerful States or the Security Council decide with regard the ICC cannot be held against the Court. In such a situation, we are on the receiving side, just as any other international organisation. States, the Security Council — they continue to be the masters of the game. At the same time — and we know this from experience — lack of support or political moves by States which make the role of the ICC questionable or even controversial may lead to misunderstandings or even criticisms to which the Court, as a purely judicial, neutral and non-political institution, cannot really respond.

Finally, there is another challenge: all possible ways and means must be exhausted to ensure that the ICC will have, after 2017, to the extent possible, jurisdiction with regard to the crime of aggression. This is a task essentially for the States Parties which have to ratify, support and implement the crime of aggression amendments adopted in a historic breakthrough, in a consensus decision, in Kampala in June of last year.

This afternoon we will have together the privilege to hear Professor Ferencz who is since decades the world's foremost advocate for the criminalisation of aggression, in the fight against illegal war-making. The consensus decision on the crime of aggression amendments adopted in Kampala has, also in my view, provided a historic opportunity, a unique chance to criminalise illegal war-making, once and for all.. Like Professor Ferencz, I am painfully aware of

the experience, confirmed already in Nuremberg, that aggressive war-making, war in general, regularly begets, regularly leads to massive war crimes and crimes against humanity. There is no war without war crimes; war crimes and crimes against humanity are the inescapable, odious consequence of the ruthless use of armed force. As an ICC Judge, I have seen this in practically all African situation States with which the ICC is currently seized.

So far, Austria, Bolivia, Botswana, Brazil, Estonia, Germany, Liechtenstein, the Netherlands, Peru, Spain, South Africa, Switzerland Trinidad and Tobago have made concrete commitments to early ratification. Early ratification by as many States Parties as possible is also the best protection against possible attempts to reopen the Kampala compromise.

However, more efforts are necessary to make the criminalisation of aggression a reality.

III. Perspectives and Outlook

In this last, concluding part of this contribution I will try to sum up where we stand today, in August 2011 and where we may hopefully will go, in the years to come.

In the preceding part you have been made aware again of many limitations, many ongoing tasks and many challenges that the Court has to cope with, also in the future. This is necessary for a “reality check“ so that we all have together a realistic idea of the conditions in which the International Criminal Court will have to work, now and in the future.

In all likelihood there will always be a tension between the high hopes and expectations put into the Court on the one side, and what the Court can

actually achieve in terms of more international justice on the other. Compared with the problems and violent crises in this world, the Court will always be small and weak, more symbol, more moral authority than real might. The main responsibility to prosecute international crimes must remain with the States. If only for reasons of capacity the Court will never be able to do more than conduct a few, exemplary trials.

But we have come a long way. When I first joined the ICC negotiations at the UN in New York in 1996, there were myriads of unresolved issues; the whole idea of a future world court for international crimes seemed to be some kind of utopia, a dream. It is worthwhile to recall what was achieved since then:

One: Today the Court is a functioning reality, an internationally accepted and respected guardian or watchtower against core crimes when justice cannot be delivered at the national level.

Two: The successful establishment of the Court since 2003, against so many odds, is a huge achievement. It illustrates this achievement in a very concrete way, that in 2015 the ICC will move into its new permanent premises- built for the next 50 to 100 years.

Given these achievements, given these advances and this progress there is little doubt in my mind: in a few decades - let us say in 2030 or in 2040 - when I will be no more - the International Criminal Court will have many more States Parties, will be even more accepted, more respected – but, but it will still be necessary, for prevention and deterrence against the excesses of ruthless power politics. And one fundamental reality, one truth which I have experienced since 2003 time and again will still be the same: the ICC system

can and will be only so strong, effective and credible as the States Parties and the international community will make it.

When you get your certificates on 18 August, after such an interesting program, such a high class program of the Salzburg Law School, it is my hope that you will be even better informed supporters of the Court, maybe even advocates for its key message. What is this message? The message of the ICC is powerful, indeed:

All men are equal before the law. Nobody is above the law. More men and women in this world are united by the conviction that genocide, crimes against humanity, war crimes and the crime of aggression cannot go unpunished – regardless of the nationality and the rank of the perpetrators.

Thank you very much.