



Ten Years International Criminal Court

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At the Experts' Discussion

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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, even as the most important development in international law 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, ten years later, the Rome Statute has 121 States Parties, more to come. 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. We are a court of last resort. The principle of complementarity, as provided for in particular in article 17 of the Rome Statute, is the decisive basis of the ICC system. You could say that article 17 is, maybe together

with article 12 on jurisdiction, 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.

I am grateful for the chance to discuss the «ICC at Ten» during this meeting of the German Council on Foreign Relations. Needless to say, it is a particular pleasure to have you, David, as my partner during this discussion.

By the way, let me mention that Professor Scheffer and I will tomorrow travel to Nuremberg, to attend another, quite important «ICC at Ten» conference, which will be held in historic courtroom 600 of the Nuremberg Palace of Justice, with many distinguished and prominent speakers and participants. This conference is also important because it is organized by the Founding Office of the future Nuremberg Academy Peace through Law. In the years to come, it will be the task of this new institution to promote and

implement the Nuremberg Principles, the legacy of the Nuremberg trials internationally. I am pleased that Anne Rubesame, the current head of the Founding Office for the new Academy is present at this discussion. If you want to know more about this quite important and promising project, you may speak with her today.

Now let me turn back to today's discussion. The text of the invitation raises the question whether, or to what extent, is the ICC a success or a failure. Such a question reflects again, at least in my view, the well-known tension between the high hopes and expectations put into the Court on the one hand, and what the Court actually can achieve in terms of international justice on the other hand. And as one of the first Judges of the ICC, I have learnt to live with this tension. Given this situation, I will address in this short presentation two sets of issues.

One: What are some of the main characteristics, what are some of the inherent limitations and challenges of the ICC system?

In my view, it is necessary to have a proper understanding of these characteristics and inherent limitations to be able to assess this system in a realistic manner.

Two: what is the current situation of the Court?

This will be in particular an explanation of the work of the Court in the last ten years and of the situations and cases which are currently before the ICC.

Finally, I will conclude with some observations on the future perspectives of the Court.

I. Main Characteristics and Limitations

I have already mentioned that the ICC is the first permanent general, future oriented international criminal court. What I want to explain now – and this may sound surprising – is that the ICC is in essence a structurally weak court. Why? The short answer is: the States and future States – Parties, when elaborating the Rome Statute, did not want a strong court. They did not want a court that would be a potential threat to their sovereignty or to the

independence of their national courts. This brings us back to the ICC negotiations in the 1990s and in Rome 1998. There were about fifty court-supportive or like-minded States, indifferent States, court-sceptical States or States such as the US who essentially wanted to create a permanent ad hoc court under the control of the Security Council. There was, however, a common denominator among those four different groups: there was a common fear that the future ICC might be a potential threat to States sovereignty or to the independence of national courts – that it might compete with national courts or even be some kind of appellate court against the decisions of high national courts. This was a common concern seemingly shared by all.

In this situation, one had to develop a legal device, a legal concept which would address this concern. This concept is the principle of complementarity, which found overwhelming support. In simple terms, it means that cases before the ICC are only admissible if and when states which normally have criminal jurisdiction are either unable or unwilling to prosecute the crimes in question. The ICC is

thus only a reserve institution if and when national criminal systems fail. This is the first reason why the ICC is, in essence, a structurally weak court.

There is a second, somewhat similar reason. There was before and in Rome a further general fear, common concern. All States present in Rome agreed that the ICC should have no executive power on the territory of States, in particular not the power to undertake arrest actions on States territory. This was some kind of horror vision for literally all States. Again, States had to develop a legal concept which would address this concern. The result is that the ICC, according to the system of international criminal cooperation as provided for under the Rome Statute, is absolutely, 100% dependent on effective cooperation with States Parties in criminal cases, in particular when it comes to the key issue of arrest and surrender of a suspect. This lack of any form of executive power is another weakness of the Court. It is its Achilles' heel so to speak. The matter is simple: no arrests, no trials.

These are, in essence, the two main and specific factors which make the ICC a structurally weak institution. Beyond this, there is a more general mechanism which is well known: success and efficiency of any international organisation is entirely dependent, yes it stands and falls with the support from States and the international community as a whole. This is true for all UN and other international organisation; as the ICC is also an international organisation, why should this be different for our court?

Beyond this structural weakness, let me also recall some other inherent limitations and continuing challenges that the Court has simply to live with, and that we cannot change, however much we would like to.

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

Two: 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. We have seen this in particular in the Darfur situation in which the Sudanese Government of President Al Bashir has organised a quite effective campaign to discredit the Court as allegedly “anti-African”.

Three: Since 2009, 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. It is astonishing and even irritating that Germany, with its key role in the establishment of the Court, joined in autumn 2011 a British

initiative of five major States Parties requesting zero nominal growth and imposing millions in euros of budget cuts.

Four: 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.

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.

II. Current situation

What is the Court's current situation, what progress has been made since its establishment in 2003?

Admittedly, the ICC's first ten years have not been easy. When the first Judges of the ICC arrived in The Hague in 2003 – I was the first Judge to be called to serve full time – we were quite concerned about the future of the Court. We seriously wondered whether it would survive the hostility it was then facing from many sides, in particular the United States during the Bush Administration. In the last ten years, however, we managed to turn the ICC from a court on paper into a fully functioning world criminal court, into a leading actor in the field of international criminal justice.

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 concerning prosecution and judicial proceedings. Employee numbers have grown from 5 to around 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.

The ICC is currently dealing with international crimes allegedly committed in eight countries – the Democratic Republic of the Congo, Uganda, the Central African Republic, Sudan, Kenya, Libya, the Ivory Coast and Mali. Four “situations” have been referred to the Prosecutor by States Parties. Two “situations”, Darfur, Sudan and Libya have been referred by the UN Security Council; the Libya situation at the beginning of March 2011 through a unanimous Security Council decision. The investigation in Kenya was started by the Prosecutor *proprio motu* at the request, in particular, of Kofi Annan who mediated an end to the post-election violence in early 2008. The Ivory Coast, a non State-Party, has accepted the jurisdiction of the Court; my Chamber is currently preparing the hearing to confirm the charges of crimes against humanity against Laurent Gbagbo, the former President of the Ivory Coast. All-in-all, the Judges have issued 20 arrest

warrants and nine (9) summonses to appear. Four cases are currently at the pre-trial stage including proceedings against Saïf Al-Islam Gaddafi, the son of Muammar Gaddafi.

Six other cases are currently at the trial stage, including the cases against five accused persons currently detained by the Court in our own ICC detention centre.

In March 2012, there was a particularly significant development: we had the first final judgement in the case of Thomas Lubanga. In the first judgement of the ICC the accused was convicted for the war crime of recruiting children and of using them in hostilities.

Three months ago, on 14 June 2012, Fatou Bensouda took office as the new Prosecutor of the Court, as successor of Luis Moreno-Ocampo. There is general agreement that this has opened a new chapter in the life of our Court. And next month, we will probably have the second final judgement in the case of Germain Katanga and Mathieu N'gudjulu Chui.

III. Perspectives and Outlooks

Dear friends,

I would like to conclude with the following:

Yes – and I am prepared to admit this quite openly – there are problems and weaknesses at the current ICC, yes, the necessary political and other support from States Parties is not always forthcoming; yes, setbacks are possible. Compared with the violent crises in this world, compared with the forces of *Realpolitik* and power politics, often ruthless and aggressive, the Court will always be small and weak, more a symbol, more moral authority than real might.

But a reasonably performing ICC is possible, despite so many difficulties. It is also 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.

In light of all this, it would be simply wrong, at least in my view, to regard the «ICC at Ten» as a failure. On the other hand – and again I admit this quite frankly – it is not, at least not yet, a really successful international court. The ICC system will be a full success only when we achieve universal membership and when the States Parties support their court fully and reliably.

In the end, the ICC is one element, but an important one, in the never-ending struggle between traditional power politics and indispensable efforts to strengthen the rule of law in international relations. In the end, this means that the ICC is essentially work in progress.
