The ICC of the Future

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In this sixth meeting of the International Humanitarian Law Dialogs—once again so rich, so substantial, so thoughtful—we have together considered lessons learned and the legacy emanating from the Special Court for Sierra Leone. I believe that these lessons learned may also in many ways contribute to, and strengthen, the International Criminal Court (ICC) of the future.

Allow me to start with a basic, but not unimportant, question, "When will the United States become a State Party of the ICC?"

It was exactly this question which was put to me in an interview by the *Süddeutsche Zeitung,* a German newspaper, published on June 28 of this year, on the tenth anniversary of the entry into force of the Rome

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Statute.[1] The answer that I gave then is essentially the same as my assumption today: regrettably there is no chance that the United States will join the Court in the foreseeable future. But I assume—no, I believe—that the United States will be a State Party of the Court at the latest by the year 2040, almost forty years after the entry into force of the Rome Statute. It also took the United States almost forty years to ratify the Genocide Convention.[2]

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.[3] Already in 2003, when then-President

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[1] *Wie ein argentinischer Großgrundbesitzer,* SÜDDEUTSCHE ZEITUNG (June 28, 2012), http://www.sueddeutsche.de/politik/richter-kritisiert-internationalen-strafgerichtshof-wie-ein-argentinischer-grossgrundbesitzer-1.1395674.

[2] The text of the Convention for the Prevention and Punishment of the Crime of Genocide was adopted by the U.N. General Assembly on December 9, 1948. After obtaining the requisite twenty ratifications required by article XIII, the Convention entered into force on January 12, 1951. The United States of America ratified the Convention only on November 25, 1988. *See* William A. Schabas, *Convention for the Prevention and Punishment of the Crime of Genocide* UNITED NATIONS AUDIOVISUAL LIBRARY OF INTERNATIONAL LAW (2008), http://untreaty.un.org/cod/avl/pdf/ha/cppcg/cppcg_e.pdf.

[3] *See., e.g., "Implications of the Criminalisation of Aggression."* LI Haopei Lecture Seminar, Judges Hans-Peter Kaul and LIU Daqun FICHL Policy Brief Series No. 2 (2011).

Kirsch and I were invited to Beijing,[4] the Legal Adviser of the Chinese Foreign Ministry said to 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 behaves 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 with a new leadership replacing the old guard and 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 of, and hopes for, "the ICC of the future." I will address three sets of issues. The efficiency and administrative culture in the ICC of the future; possible or likely developments with regard to judicial proceedings or with regard to the applicable criminal law; and the relationship between the ICC of the future and State Parties, states in general and the Security Council. With regard to this third question, please

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http://www.fichl.org/fileadmin/fichl/documents/FICHL_Policy_Brief_Series/FICHL_PB2.pdf

[4] *See* Hans-Peter Kaul, *Germany: Methods and Techniques Used to Deal with Constitutional, Sovereignty and Criminal Law Issues, in* STATES' RESPONSES TO ISSUES ARISING FROM THE ICC STATUTE: CONSTITUTIONAL, SOVEREIGNTY, JUDICIAL COOPERATION AND CRIMINAL LAW 65 (Roy S. Lee ed., 2005).

remember what Hans Corell said yesterday in his impressive keynote speech on the Rome Statute and the obligations of states.[5] Last night, Hans was kind enough to slip a copy of this keynote under my door. Having read it again, please permit me to put on record now my full agreement with his comments on the ICC and the obligations of states. I will come back to this.

It is obvious that when discussing the ICC of the future, I am 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 and hopefully even a little thought-provoking.

Efficiency and Administrative Culture

The work of the ICC of the future will be characterized, in my view, by much more efficiency and

[5] Hans Corell, *Reflections on International Criminal Law over the Past Ten Years,* PROCEEDINGS OF THE SIXTH INTERNATIONAL HUMANITARIAN LAW DIALOGS p. 53 (Elizabeth Andersen & David M. Crane eds., 2013).

a better work culture, in a comprehensive sense. I will give some examples. Why is this so? Not because of the 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,"[6] 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 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

[6] The so-called "One Court" principle was originally mentioned in the Rep. of the Comm. on Budget and Finance, ICC-ASP/3/18, ¶12, during the 3d plenary meeting of the Assembly of States Parties (ASP) in September 2004. The principle has often been recalled, most recently in ASP Resolution ICC-ASP/11/Res.8, 8th plenary meeting, 11th Sess., ICC-ASP/11/20, at ¶ 33 (Nov. 21, 2012).

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 all matter. In the past decade, those involved had to learn through 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 takes up, year after year, too much work, too much time, and often the patience of too many officials, especially when 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 free up 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.[7] This will alleviate[8] the burden of the

[7] The Mechanism for International Criminal Tribunals (MICT) was established by the U.N. Security Council on December 22, 2010 to carry out a number of essential functions of the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY) after the completion of their respective mandates. *See* http://www.unmict.org.

international tax-payer by around 300 million U.S. dollars per annum.[9]

In the ICC of the future, the Registrar and the Registry will consistently demonstrate 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"[10]—no less but also no more. In the future, there will be a work procedure in which the Registry acts without fail 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 the Court's external relations, are aligned with the strategic and policy decisions taken by the Judiciary, the Presidency, and, where appropriate, the Prosecutor.

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[8] See the analysis by Stuart Ford, *How Leadership in International Criminal Law is Shifting from the United States, to Europe and Asia: An Analysis of Spending on and Contributions to International Criminal Courts,* 55 ST. LOUIS U.L.J. 953, 956, 961 (2011).

[9] As approved by the Assembly of States Parties (ASP), the ICC's 2013 budget totals €115,120,300, http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ASP11/ICC-ASP-11-Res1-ENG.pdf.

[10] Article 43 (2) of the Rome Statute of the ICC states, "The Registry shall be headed by the Registrar, who shall be the principal administrative officer of the Court. The Registrar shall exercise his or her functions under the authority of the President of the Court."

It is nowadays generally recognized 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 Presidency really goes beyond protocol and representational activities. There is no doubt in my mind that in the future, it will include an active approach to all problems and challenges facing the Court, including difficult issues, such as the budget and the proper administration of the Court. Needless to say, the lead role of the 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 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 of how important it is to motivate the staff and to encourage all concerned. One has to lead by example and take the personnel with you. Experience shows that good work morale and staff that feel appreciated at work are the most important factors 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 will enhance the work culture and efficiency of the ICC quite soon; by 2015/2016 the ICC will already have—and here I use a term coined by Ben Ferencz—its own "temple of law,"[11] namely a permanent premises which are in full conformity with the functional, organizational, security, and related needs of the Court. Perhaps I may mention, in all modesty, that from 2003 until quite recently, I have invested an enormous amount of work and effort to drive this project ahead, which involved determining the key parameters of the premises, the site, the financing, and conducting professional project management and organizing an international architectural competition. A contract was only awarded to a construction company on August 24, 2012. The ICC will thus be the first international criminal court in the history of mankind to have its own permanent premises, built specifically for its purposes 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.

[11] Hans-Peter Kaul, *Über Hoffnung und Gerechtigkeit, in* FAKULTÄTSSPIEGEL DER KÖLNER JURISTISCHEN FAKULTÄT 83, 91 (Verein zur Förderung der Rechtswissenschaft an der Kölner Juristischen Fakultät ed., 2008/2009).

Judicial Proceedings and Applicable Criminal Law

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

Second, victim's participation[12] and the related current practices of the Court will undergo significant change so to entail more meaningful participation.[13] The

[12] There are numerous articles on victims' participation. *See, e.g.*, Elisabeth Baumgartner, *Aspects of Victim Participation in the Proceedings of the International Criminal Court*, 90 INT'L REV. RED CROSS 409 (2008); Mariana Pena, *Victim Participation at the International Criminal Court: Achievements Made and Challenges Lying Ahead*, 16 ILSA J. INT'L & COMP. L. 497 (2010).

[13] The ICC's Trial Chamber V recently issued a decision which promotes a modified understanding of the application process for victims who wish to participate in the proceedings. *See* Prosecutor v. Muthaura and Kenyatta, Case No. ICC-01/09-02/11 Decision on Victims' Representation and Participation (Int'l Crim. Ct. Oct. 3, 2012).

current practice is, in my view, largely characterized by a deplorable lack of genuine victims' participation. Instead of such genuine participation which may enable victims to see justice done and enjoy the related potential for healing, there is a bureaucratic, slow, and costly system of victims' admission, in which the victims are, at best, "virtually" present.

Victims are routinely represented by a new sub-category of counsel, the so-called legal representatives of victims,[14] 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: the intervention of elders or community leaders who represent a group of victims throughout the proceedings;
- Through the 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

[14] *See* Article 68 (3) of the Rome Statute and Rules 89–91 of the ICC's Rules of Procedure and Evidence.

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 oral and direct "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[15] can and will be as simple and practical as possible to create real opportunities for the victims to see that their suffering is 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 related problems that have caused many complications and delays will no longer exist. First, there will be no more "phased investigations" in which the Office of the Prosecutor seemingly seeks to assemble just enough

[15] The various ways and means to ensure effective participation of victims in the judicial proceedings as set out above are based on existing provisions of the Rome Statute and do not require, in the view of the author, any amendment of the present provisions of the Statute or of the Rules of Procedure and Evidence. It should be noted, however, that some experts are of the view that the Rome Statute's system of victims' participation is essentially "irreparable" and thus structurally unable to form a basis for any effective and meaningful participation of victims of core crimes.

evidence to reach the next threshold, instead of working full power *ab initio* to achieve evidence "beyond reasonable doubt."[16] Second, there is the questionable prosecutorial practice of requesting across the board redactions, which in hindsight are often recognized as excessive, inconsistent, and unfair to the defense.

With regard to so-called "phased investigations," there is still an Appeals Chamber decision explicitly allowing the continuation of investigations after the confirmation of charges.[17] Fortunately, there is a recent Appeals decision in *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."[18] I have argued

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[16] Regarding the question of evidence "beyond reasonable doubt," see also the ICC Trial Chamber II's most recent judgment in Prosecutor v. Mathieu Ngudjolo Chui, *Case No.* ICC-01/04-02/12, Judgment Pursuant to Article 74 of the Statute (Int'l Crim. Ct. Dec. 18, 2012).

[17] Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Judgment on the Prosecutor's Appeal Against the Decision of Pre-Trial Chamber I Entitled "Decision Establishing General Principles Governing Applications to Restrict Disclosure Pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence," ¶ 54 (Int'l Crim. Ct. Oct. 13, 2006).

[18] Prosecutor v. Callixte Mbarushimana, Case No. ICC-01/04-01/10, Judgment on the Appeal of the Prosecutor Against the Decision of Pre-Trial Chamber I of 16 December 2011 Entitled "Decision on the Confirmation of Charges," ¶ 44 (Int'l Crim. Ct. May 30, 2012).

that it is "risky, if not irresponsible"[19] for the Prosecutor to only gather the minimum amount of evidence needed to move to the next phase of the proceedings,[20] 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 continues to plague particular pre-trial proceedings, namely, pervasive, often exaggerated or precautionary redactions, which have often been a major problem. In particular their consideration in pre-trial proceedings has absorbed an inordinate amount of 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. There is time to move witnesses in vulnerable locations, disclosure consent forms can be obtained, and tactical decisions can be made as to whether using vulnerable witnesses is necessary. Redactions will be used in a

[19] For further comments on this issue, see AMERICAN UNIVERSITY COLLEGE OF LAW WAR CRIMES RESEARCH OFFICE, INVESTIGATIVE MANAGEMENT, STRATEGIES, AND TECHNIQUES OF THE INTERNATIONAL CRIMINAL COURT'S OFFICE OF THE PROSECUTOR 64 (2012).

[20] Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, Case. No. ICC-01/09-01/11, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute," ¶ 47 (Int'l Crim. Ct. Jan. 23, 2012) (Kaul, J., dissenting).

limited and much more pragmatic way than they are now.

Therefore, in the future, unredacted disclosure 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 defense is afforded a reasonable time to prepare its case.

I also foresee much more effective investigations and cooperation work in the Office of the Prosecutor (OTP) through perhaps a doubling of the staff in the Investigation Division (currently 111 positions) and in the Jurisdiction, Complementarity and Co-operation Division (currently 32 positions, only 15 professional positions).[21] There is already an emerging awareness among States Parties that the limited staff for investigations and cooperation is problematic—and please do not forget that ICC staff are also entitled to annual leave, to training, and some may need time off for legitimate reasons. How is it possible with around 100 staff to fully cover the investigation and cooperation necessities for eight situations, 14 outstanding arrest warrants, and another eight situations under preliminary examination?

[21] The approved Programme Budget of the ICC for 2013 foresees 111 positions (including 79 professional staff) in the Investigation Division and 32 positions (including 15 professional staff) in the Jurisdiction, Complementarity and Co-operation Division.

Consequently, as an ICC judge that has served now for almost a decade, as somebody who knows our Court, and 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 her staff, particularly in these key areas. The work of Chambers, which is on the "receiving side," is fully dependent on effective and professional investigations, prosecutions, and related cooperation efforts. I am also quite confident that the Assembly of States Parties (ASP) will approve these OTP staff increases. They will understand this compelling necessity reflected in a metaphor 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." I believe that the ICC of the future will have more than enough fuel in this regard.

The combined effect of all these positive changes on 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 judicial candidates through the Advisory Committee on nomination of judges,[22] established by last year's ASP in

[22] Resolution ICC-ASP/10/Res.5, 9th plenary meeting, at ¶ 19. The paragraph reads as follows: "Welcomes the report, adopted by the Bureau pursuant to paragraph 25 of resolution ICC-ASP/9/Res.3, decides to adopt the recommendations contained therein, and requests the Bureau to start the process of preparing the election, by the Assembly of States Parties, of the members of the Advisory Committee on nominations of judges of the International Criminal Court in accordance with the terms of reference annexed to the report."

New York, will increase the chances that only candidates who, beyond the necessary formal qualifications, also have a solid inner compass and proven commitment to the cause of international justice, may be elected as judges of the ICC of the future.[23]

Improvements are also possible in the 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 the tendency has obviously become 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 clarifying complex issues as they arise.

On the basis of these positive developments—which may occur as a result of sheer necessity, more insight and experience, or even both—it is quite likely, at least in my view, that proceedings and trials will be more expeditious in the future. As with many cases at the ICTY, it took ICC Chambers in the two first trials five to six years to come to a verdict or a formal judgment. Pre-trial proceedings regrettably took around ten to twelve months. In my view, this is unsatisfactory.

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[23] *Id.* at par. 20, which reads as follows: "Emphasizes the importance of nominating and electing the most highly qualified judges in accordance with article 36 of the Rome Statute; for this purpose encourages States Parties to conduct thorough and transparent processes to identify the best candidates..."

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 through proper case management. This includes, first and foremost, a strong role for the judges and their control of the proceedings. It also means 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, as well, through the use of a single judge[24] for the preparation of the court proceedings and the use of case managers and legal officers with specialized knowledge, for example, on victims' participation and protection issues.

Likewise, it is in my view not impossible to reduce, through the focused work of all concerned, the length of pre-trial proceedings 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, in the future, there will also 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

[24] *See* Articles 39(2)(b)(iii) and 57(2)(b) of the Rome Statute, Rules 7 and 132 *bis* of the Rules of Procedure and Evidence, and Regulation 47 of the Regulations of the Court. The Rules of Procedure and Evidence were amended through Resolution ICC-ASP/11/Res.2, 8th plenary meeting (Nov. 21, 2012) by including Rule 132 *bis* which allows for the designation of a single judge for the purpose of preparing the trial.

"without undue delay" as referred to in Article 67 of the Statute.[25]

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 organized, in particular by the International Nuremberg Principles Academy.[26] 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 Caming, and others. As some of you were in Nuremberg on August 17 and 18, 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 hopefully may be officially founded by 2014. Another important support activity of the Academy for the ICC will be customized information work on the objectives and

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[25] Article 67 (1) of the Rome Statute provides: "In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality: ... (c) To be tried without undue delay."

[26] The International Nuremberg Principles Academy (INPA) is a project based on the German Government's Coalition Agreement of October 26, 2009, Chapter V, Item 6, Protecting Human Rights – Promoting the Rule of Law. The city of Nuremberg acts as a leading partner. For more information see http://www.museums.nuremberg.de/academy/index.html

functioning of the Court, tailored to the needs of specific target groups.

Last night, I had a good exchange with David Crane about this. It was not difficult for us to conclude that the Academy and the Robert H. Jackson Center 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.[27] The necessary ratifications of the Kampala Amendments by 30 countries 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.[28]

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[27] *See* Articles 5 (d), 8 *bis*, 15 *bis* and *ter* of the Rome Statute.

[28] On November 29, 2012 the German Parliament (Bundestag) in its final reading unanimously approved the ratification bill on the amendment of the Rome Statute in order to include the Crime of Aggression. This step enabled German Foreign Minister Guido Westerwelle to deposit on June 3, 2013 the instrument of ratification at the United Nations in New York, in the presence of the author.

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 overt crimes of aggression reaching the high threshold of article 8 *bis,* such as the Iraqi invasion of Kuwait and the crimes against peace or the German attack on Poland on September 1, 1939, are not committed very often. The existence of ICC jurisdiction with regard to the crime of aggression, even to only 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 individual leaders 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[29] 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

[29] Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, Case No. ICC-01/09-01/11, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute (Int'l Crim. Ct. Jan. 23, 2012).

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"[30] remains totally unconvincing to me. In the future, it will hopefully become clear that this type of jurisprudence, which also carries 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.[31]

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 and suggestions to include financial crimes within 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.

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[30] *Id.* at 184.

[31] Situation in the Republic of Côte d'Ivoire, ICC-02/11, Corrigendum to "Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire," ¶ 46 (Int'l Crim. Ct. Nov. 15, 2011); Prosecutor v. Bosco Ntaganda, Case No. ICC-01/04-02/06, Decision on the Prosecutor's Application under Article 58, ¶ 24 (Int'l Crim. Ct, July 13, 2012).

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 will be stronger and more accepted around the year 2030. By then, it will probably have around 140 States Parties or more and not 121 as it has today.[32]

Even more important, there will be a much more positive attitude of the States Parties towards "their" Court. Forgotten will be the current attempts of some States Parties organized in the so-called "G5"[33] or "G6"[34] to impose a "Zero Nominal Growth" (ZNG) policy on the Court—this despite the fact that the

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[32] There are currently 138 Signatory States and 122 States Parties to the Rome Statute. For the current status of statute ratification, see http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=XVIII-10&chapter=18&lang=en.

[33] During the budget preparations for the ICC draft budget for 2012, the United Kingdom in early autumn 2011 took the initiative to establish an informal group of five major contributors ("G5") to the ICC budget, consisting of the United Kingdom, Japan, Italy, France and Germany. On October 28, 2011 this newly founded G5-group submitted a quite critical and restrictive paper on the 2012 ICC Budget entitled "Zero Nominal Growth Approach" demanding far reaching and drastic budget reductions of more than 20 million Euros. Objective observers were particularly astonished that Germany, which had until then regularly supported the draft budget of the ICC, joined this group.

[34] In 2012 Canada joined the group of the G5 whose overall aim continued to be to limit the ICC budget.

workload of the ICC is constantly increasing and 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 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 States Parties by at least 300 million U.S. dollars per year. Governments and Finance Ministries of States Parties will gradually understand that henceforth more funds are available and that complementary ICC jurisdiction will soon be the only remaining mechanism to promote more criminal justice worldwide. There is therefore good hope that there will be enough breathing space to provide the ICC with a solid financial basis in the decades to come.

There is a further area in which a change of States Party behavior 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 excessively demand all kinds of written reports on complex issues. This problem is compounded by the proliferation of subsidiary bodies for inspection, evaluation, and investigation of the Court, concerning its efficiency and economy. Believe it or not, in 2012, there were some 12 to 15 such bodies, working

groups, or subgroups.[35] Needless to say, this imposition of additional work often absorbs almost all of 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 States 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: arrest actions may be much more vigorously supported by States Parties or even non-States Parties such as the United States. Informed observers have noted for some time a growing awareness in the international

[35] According to an informal document dated May 23, 2012 put together by the Ambassador of Switzerland to the Netherlands, The Hague Working Group consists of the following sub-groups: Victims and Affected Communities and Trust Fund for Victims, Independent Oversight Mechanism, Complementarity, Strategic Planning Process, Cooperation, Legal Aid, Budget, Reparations, Study Group on Governance, Increasing the Efficiency of the Criminal Process, and Budgetary Process. Furthermore, the New York Working Group consists of the following sub-groups: Peace and Justice, Geographical Representation and Gender Balance in the Recruitment of Staff of the Court, Arrears, Plan of Action for Achieving the Universality and Full Implementation of the Rome Statute.

community regarding the total dependence of the ICC on effective international cooperation, notably with regard to arrest and surrender to the Court, which needs to be addressed. Currently, only six arrest warrants 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 domestically against armed criminals. The fact that the United States 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 in 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 improvement in its relationship with the U.N. Security Council or even with respect to the treatment of the Court 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 Security Council will inevitably politicize it, make it controversial, and damage its chances of becoming a universal institution.

One must especially hope that future Security Council 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 U.N. 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 U.N. 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, at least in my view, is that the costs for ICC interventions after a Security Council referral should be borne by the United Nations, and not by ICC States Parties alone.

Perspectives and Outlook

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 favorable 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, and 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-recognized 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 ICC's standard-setting message, 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, steadfastness and patience, much patience, will be necessary to achieve the ICC of the future. And even after 2015, when my tenure as judge will have ended, I will follow the development of the Court with hope and in good spirits. And should it happen that the positive changes that I have mentioned take too long, then I may, if necessary, pass away—still with hope and in good spirit—so be it!