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The International Criminal Court: From Rome to Kampala, 43 J. Marshall L. Rev. 515 (2010)

Philippe Kirsch

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THE INTERNATIONAL CRIMINAL COURT: FROM ROME TO KAMPALA

JUDGE PHILIPPE KIRSCH, Q.C.*

FORMER PRESIDENT OF THE INTERNATIONAL CRIMINAL COURT

Almost twelve years ago in Rome, a conference of 160 states adopted the statute of a new international criminal court.¹ Four years later, the Statute entered into force, and the Court has now been in operation for seven years. A Review Conference is about to take place in Kampala, Uganda, as mandated by the Rome Statute.²

I. ROME CONFERENCE

Before turning to the achievements, challenges and future of the International Criminal Court (ICC), let us recall what the Rome Conference really tried to achieve.

The basic goal was clear, of course: to create a permanent institution that would dispense with the need to create a special tribunal every time genocide, war crimes or crimes against humanity were committed because the national systems having jurisdiction did not work as they should. Unfortunately, history clearly shows that national systems are least able or willing to play their role when the most serious crimes are committed. You need only think of Nazi Germany, Cambodia, Uganda under Idi Amin, Rwanda, and the former Yugoslavia to illustrate the point.

Over time, the new court would have an effect of prevention by signaling to would-be perpetrators that impunity was no longer guaranteed or acceptable. Ultimately, by the effect of its existence

* Judge Kirsch, Q.C., is currently Judge ad hoc at the International Court of Justice in the case concerning *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*. From 2003 to 2009, he was President of the International Criminal Court and a Judge of its Appeals Chamber. From 1972 to 2003, he worked at the Department of Foreign Affairs and International Trade of Canada where he occupied, in particular, the positions of Ambassador and Deputy Permanent Representative of Canada to the United Nations (1988-1992), Director General of the Bureau of Legal Affairs (1992-1994), Legal Advisor to the Department (1994-1999), and Ambassador to the Kingdom of Sweden (1999-2003).

1. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute]. The Rome Statute entered into force on July 1, 2002.

2. *Id.* art. 123(1).

and action, the court would contribute to the peace, security, and well-being of the world, which were threatened by those crimes, as explicitly recognized in the preamble of the Statute.³ The court would be created by treaty and voluntarily adhered to, to avoid the stigma of imposition by a group of states on another.

In addition, it would only act when the state having jurisdiction could not or would not carry out its own responsibilities. The ICC is an instrument of last resort. This fundamental principle, called complementarity, distinguishes the ICC from the *ad hoc* tribunals established by the United Nations Security Council ("Security Council"), which have priority over national systems. The very phrasing of the relevant article puts the burden of proof on the Court, as it were: "the Court *shall* determine that a case is inadmissible" where national procedures have been undertaken, "unless the State is unwilling or unable genuinely to carry out the investigation or prosecution."⁴ It therefore concedes the primacy of national systems while at the same time assigning an important function to the ICC in determining when these systems have failed to discharge their responsibility to bring perpetrators to justice.

That much was generally granted as the Rome Conference began. But then, what kind of court did states really want? Here things became more complicated. The creation of the Court had become irresistible as a result of the momentum that then had developed behind international justice, but states had very different ideas about some of the basic parameters.

A. Jurisdictional Issues

The vast majority of states wanted a court that was strong, independent and ready to intervene as required without too many constraints. For example, they wanted a Prosecutor who had the power to trigger the jurisdiction of the court. They favoured a jurisdictional formula akin to universal jurisdiction for the court and a limited role for the Security Council. On the other hand, an influential minority wanted the future court to be subject to significant constraints over the exercise of its jurisdiction and some form of political control, preferably the Security Council, with a straitjacket on the Prosecutor's powers. There was a third, smaller but very vocal group of states, which firmly disliked both the prospects of an independent court *and* any role for the Security Council. Those states clamoured for protection of sovereignty and initially objected, for example, to crimes committed in internal conflicts being subject to the jurisdiction of the court.

In the absence of effective negotiation on those issues, the

3. *Id.* pmb1.

4. *Id.* art. 17(1)(a) (emphasis added).

draft statute that was eventually proposed by the Bureau of the Committee of the Whole of the Conference and adopted as the Rome Statute was an attempt to achieve an acceptable balance among all those positions, that is, a system that would not automatically espouse the majority position but seek an equilibrium that would make the court viable.

That is why the ICC does not exercise universal jurisdiction, which was preferred by many states but strongly opposed by some, and only exercises its jurisdiction with the consent of *either* the state of the territory where the crime was committed *or* the state of the nationality of the accused—the two classical and best-accepted grounds for the exercise of criminal jurisdiction everywhere.⁵ That is why the ICC only has jurisdiction over crimes committed after entry into force of the Statute, without any retroactivity.⁶ That is why a referral by the Security Council is not required but possible,⁷ and why the Security Council may also request the ICC to defer proceedings in certain circumstances.⁸ That is why the Prosecutor is empowered to start an investigation in a situation that has not been referred to the Court either by a state or by the Security Council, but only with the authorization of a Pre-Trial Chamber.⁹

B. Crimes

The question of which crimes should be subject to the jurisdiction of the ICC was difficult but more extensively and more constructively negotiated than other jurisdictional issues.¹⁰ Whether the list of crimes included in the Statute was generally acceptable was not entirely certain at the end of the Rome Conference because the Rome Statute was voted on as a package, without separate votes on discrete issues. But that became quite clear when the Elements of Crimes, which contain a detailed description of all crimes, were adopted by consensus by the Preparatory Commission for the International Criminal Court (“Preparatory Commission”)¹¹ in June 2000 and by the Assembly of States Parties (ASP) in September 2002.¹²

5. *Id.* art. 12(2).

6. *Id.* art. 11.

7. *Id.* art. 13(b).

8. *Id.* art. 16.

9. *Id.* arts. 13(c), 15.

10. *See id.* arts. 5-8 (concerning the crimes under the jurisdiction of the ICC).

11. The Preparatory Commission was created at the Rome Conference. Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. Doc. A/CONF.183/10/Annex I/Res. F (July 17, 1998) [hereinafter Final Act of the Rome Conference].

12. Rome Statute, *supra* note 1, arts. 9, 112. The Elements of Crimes were

Yet, some crimes proposed by states, which were dear to the hearts of many were not included in the Statute or could not be defined. The crime of aggression was the most important. Many states considered it as “the supreme crime” but could not agree either on its definition or the conditions of exercise of the Court’s jurisdiction over that crime, that is what mechanism should be used for the determination that an act of aggression had been committed by a state against another before the ICC could undertake criminal proceedings against an individual allegedly responsible for a crime of aggression committed in that context. This issue generated considerable divisions among states. Some, notably but not exclusively the permanent members of the Security Council, argued for the exclusive responsibility of the Security Council in determining an act of aggression. Others, however, were concerned that the Security Council tended to avoid making such determinations for political reasons even in clear cases of aggression. They therefore favoured some alternative mechanism in case of inaction of the Security Council. Such a mechanism could take the form, for example, of an advisory opinion of the International Court of Justice (ICJ), a resolution of the United Nations General Assembly or a decision of a Pre-Trial Chamber of the ICC. The crime of aggression was then included among the crimes listed in the Statute, but the ICC could only exercise its jurisdiction once a provision was adopted resolving the pending issues.¹³

The Conference also declined to include terrorism and drug trafficking. As in the case of the crime of aggression, the problem of definition played a major role in the case of terrorism, but there were broader issues as well. Those crimes were seen by most states as being capable of resolution through bilateral or regional cooperation without the need for involvement of an international court. Also, there were questions at the time whether they were of comparable gravity to the “core crimes.” Yet, the matter was not closed for the future. A resolution was adopted recommending that a review conference review those crimes with a view of arriving at an acceptable definition and including that definition in the Statute.¹⁴

A final issue related to crimes was a last minute concession allowing a state to be exempt from the jurisdiction of the Court for war crimes for a period of seven years after entry into force of the Statute for that state. The Statute provided explicitly that the first (and only mandatory) Review Conference would review that provision (Article 124).

adopted by the ASP on Sept. 9, 2002. Int’l Criminal Court [ICC], *Elements of Crimes*, ICC Doc. ICC-ASP/1/3 (Part. II-B) (Sept. 9, 2002).

13. Rome Statute, *supra* note 1, arts. 5(1)(d), 5(2).

14. Final Act of the Rome Conference, *supra* note 11, Annex I/Res. E.

The need to review Article 124 and the list of crimes was the original rationale for a review conference seven years after entry into force of the Statute. While the mandate of the Review Conference is not completely exclusive, the formulation of the relevant provision of the Statute reflects a clear orientation. Not only is the primary purpose of the Conference defined narrowly to “consider any amendments to the Statute,” but its more specific object is unmistakably suggested: “such review may include, but is not limited to the list of crimes contained in article 5.”¹⁵ We will see that subsequent events profoundly altered the goals and nature of the Conference.

C. *Functioning of the Court*

Despite all those differences, there is one principle on which all states agreed: the ICC should be exclusively and strictly judicial. There could be no risk that it might become a political organ. More than that, it should be subject to a detailed set of rules that ensured that it would behave as predictably as possible.

That concern was in part a question of principle, and in part the consequence of the fact that the ICC would be neither comfortably limited to past crimes, nor to well-defined situations or regions. The scope of its activities was entirely unpredictable. States felt that unpredictability in the exercise of jurisdiction should be compensated by high predictability in its behaviour. In addition, some aspects of the system were entirely new and therefore untested at the international level, such as the creation of a Pre-Trial Chamber and the right for victims to participate in proceedings and to receive reparations. Finally, as different legal cultures struggled to develop a coherent, mutually compatible procedural system within a very short time, states tended to err on the side of overabundance of details to ensure everything was covered and minimize the possibilities of clashes. Whether the mix was always adequate, remains to be seen.

For those reasons, states developed a statute that is considerably lengthier, more detailed, and more procedural than that of any special international tribunal. Not content with that, the Statute also gave states the responsibility to draft the Rules of Procedure and Evidence, an exercise which had been left to judges for every other international tribunal. This was part of the mandate of the Preparatory Commission.¹⁶

15. Rome Statute, *supra* note 1, art. 123(1) (stating, “[s]even years after the entry into force of this Statute the Secretary-General of the United Nations shall convene a Review Conference to consider any amendments to this Statute. Such review may include, but is not limited to, the list of crimes contained in article 5.”)

16. Final Act of the Rome Conference, *supra* note 11, Annex I/Res. F5(a). The Rules of Procedure and Evidence were adopted by the ASP on Sept. 9,

The positive aspect of this approach is that states took real ownership of the system and created certainty on the principles to be applied. The downside was the creation of a system which is complex and rigid, not always easy to apply in practice—as evident from the jurisprudence of the Court—and even more difficult to change.¹⁷ As a separate point to which I will return, the whole system also rests on the cooperation of states for anything that is not purely the judicial and administrative functioning of the court.¹⁸

This system has been in existence for a few years now. I would preface the rest of my presentation with a simple statement: the responsibility, indeed the obligation, of the ICC is to apply the Rome Statute and related instruments as they are written, not as the judges, the Prosecutor, states, non-governmental organizations (NGOs), or academia wish they had been written. Of course, given the number of difficulties in interpreting the constitutive instruments, the Court should strive to achieve workable proceedings and reconcile apparent inconsistencies but always within the parameters as defined by the Rome Conference. Pragmatism cannot be at the price of violation or expansion of its mandate. The credibility of international justice largely depends on that. This, of course, does not mean those instruments should not be reviewed and improved in due course.

So far, I have described the decisions made by states. But there were also widespread expectations: for example, that states would refer other states' situations to the Court but not their own; that a referral of a situation by the Security Council would be a rare occurrence; and that the Prosecutor, having been given the hard fought right to trigger the jurisdiction of the Court, would avail himself of that possibility early on. Perhaps also that the ICC would find itself essentially in the position of the Nuremberg tribunal—that it would be seized of situations after a conflict was over, with evidence and witnesses readily available. Any such expectations were disproved by reality.

II. THE FIRST YEARS OF THE COURT

A. *Situations and Cases*

Since 2003, four situations have been referred by the Court: the Democratic Republic of the Congo (DRC), Uganda, The Central African Republic (CAR), and Darfur, Sudan. The Security Council

2002. ICC-ASP, *Rules of Procedure and Evidence*, ICC Doc. ICC-ASP/1/3 (Part.II-A) (Sept. 9, 2002).

17. See Rome Statute, *supra* note 1, arts. 51(2), 121, 122 (describing the procedure for amending the Rome Statute and the Rules of Procedure and Evidence).

18. Rome Statute, *supra* note 1, pts. 9, 10.

referred Darfur to the Court but the other situations were referred not by third-party states but by the states concerned themselves, the so-called self-referrals. As I mentioned in the context of the Rome Conference, self-referrals were not expected. An investigation has now been undertaken in a fifth situation, that of post-election violence in Kenya, following authorization by a Pre-Trial Chamber of a request by the Prosecutor to that effect.¹⁹

Most cases involve warlords and militia leaders. But in the situation of the CAR, the accused is a former senator and vice-president of DRC.²⁰ In the case of Darfur, the accused include a minister of the Sudanese Government and, of course, President Bashir himself.²¹ Thirteen arrest warrants have been issued by pre-trial chambers, but only four have been executed. This is evidently an unsatisfactory situation which will need to be corrected if the Court is to keep its effectiveness and credibility.

In the four situations referred to the Court, a number of charges have been approved by pre-trial chambers. They are limited to conscription and use of child soldiers in the case of Thomas Lubanga and Bosco Ntaganda in the DRC situation,²² but include in all others a combination of war crimes and crimes against humanity: murder, rape, sexual slavery, intentional attacks of civilians, pillaging, destruction of property, exploitation of children, and other violations of humanitarian law. In some cases there are also charges of torture, cruel treatment, inhumane acts, and forced displacement of populations.²³ In the case of President Bashir, the Prosecutor requested a charge of genocide,

19. ICC, *Situation in the Republic of Kenya: Request for authorization of an investigation pursuant to Article 15*, ICC Doc. ICC-01/09-3 (Nov. 26, 2009); ICC, *Situation in the Republic of Kenya: Decision Pursuant to Article 15 of the Rome Statute of the Authorization of an Investigation into the Situation in the Republic of Kenya*, ICC Doc. ICC-01/09-19 (Mar. 31, 2010).

20. Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-1/08-15-tENG, Warrant of Arrest for Jean-Pierre Bemba Gombo replacing the one issued on May 23, 2008 (June 10, 2008).

21. Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb"), Case No. ICC-02/05-01/07-2, Warrant for Arrest for Ahmad Harun (Apr. 27, 2007) [hereinafter Warrant for Harun]; Prosecutor v. Omar Hassan Ahmad Al Bashir ("Omar Al Bashir"), Case No. ICC-02/05-01/09-1, Warrant of Arrest for Omar Al Bashir, (Mar. 4, 2009) [hereinafter Warrant for Al Bashir].

22. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-803-tEN, Decision on the confirmation of charges, (Jan. 29, 2007); Prosecutor v. Bosco Ntaganda, Case No. ICC-01/04-02/06-2-tENG, Warrant of Arrest (Aug. 22, 2006).

23. Warrant for Al Bashir, *supra* note 21, at 6; Warrant for Harun, *supra* note 21, at 7; Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen, Case No. ICC-02/04-01/05-53, Warrant of Arrest for Joseph Kony issued on 8th July 2005 as amended on 27th September 2005, ¶ 19 (Sept. 27, 2005).

which was not approved by the Pre-Trial Chamber.²⁴ The Appeals Chamber overturned that decision on the grounds that the standard of evidence used by the Pre-Trial Chamber was too high.²⁵ The Appeals Chamber made no finding of genocide itself but directed the Pre-Trial Chamber to review the issue using a different standard.

B. Prosecutor Proprio Motu Powers

As mentioned earlier, the Prosecutor has so far used his *proprio motu* power to start an investigation subject to the authorisation of a Pre-Trial Chamber once, in the case of post-election violence in Kenya.

However, the Prosecutor has been receiving thousands of communications containing requests to start investigations in a number of other situations.²⁶ Most communications were dismissed as failing to meet the requirements of the Statute, for example, allegations of crimes not included in the Rome Statute, allegations relating to events that took place before July 2002, or situations where the Court did not have the consent of either the state of nationality of the accused or the state of the territory of the crime.

Yet, the Prosecutor has been analyzing other situations. In 2006, in two such situations, he announced his decision *not* to start an investigation. In the cases of allegations of war crimes against British soldiers in Iraq, he concluded that there was only a reasonable basis to believe that there were four to twelve victims of willful killing and a limited number of victims of inhuman treatment, totaling less than twenty in all, that the gravity of the allegations was too low to justify ICC intervention, and that national proceedings had been commenced in each instance.²⁷ In the case of Venezuela, he similarly concluded that the alleged crimes fell short of the threshold of crimes against humanity.²⁸ In

24. Prosecutor v. Omar Hassan Ahmad Al Bashir ("Omar Al Bashir"), Case No. ICC-02/05-01/09-2-Conf, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ¶ 22 (Mar. 4, 2009). A public redacted version was filed under the number ICC-02/05-01/09-3.

25. Prosecutor v. Omar Hassan Ahmad Al Bashir ("Omar Al Bashir"), Case No. ICC-02/05-01/09-73, Judgment on the appeal of the Prosecutor against the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir," ¶ 10 (Feb. 3, 2010).

26. See Rome Statute, *supra* note 1, art. 15 (describing the powers of the Prosecutor).

27. ICC, *OTP response to communication received concerning Iraq*, at 8-9 (Feb. 9, 2006).

28. ICC, *OTP response to communication received concerning Venezuela*, at 4 (Sept. 2, 2006).

other situations, he has continued to analyze the information received and has been in contact with various states and other entities. This is the case of situations in Afghanistan, Colombia, Georgia, Palestine, and Guinea. The main objective of the Prosecutor appears to be less about bringing new situations to the Court and more about encouraging and, if possible, assisting the beginning of national proceedings, consistent with the basic principle that the first responsibility for the repression of any crimes belongs to states.²⁹

C. Conduct of Proceedings

In those first years, the Court conducted a great number of proceedings. The majority has been at the pre-trial level and in the form of interlocutory appeals, but it also started two trials, those of Lubanga and Katanga-Ngudjolo in DRC and is expecting another, that of Bemba in the CAR situation. Many proceedings so far concerned procedural issues such as victims' participation and disclosure of evidence. Were those proceedings fair? Were they efficient?

1. Fairness

There is little question that in all those cases, the ICC has strictly adhered to the mandate that it was given in Rome, and particularly that it has conducted itself with great concern for due process and, in particular, the rights of the accused. There are many illustrations of this.

A well known example occurred at the beginning of the Lubanga trial. In 2008, the Prosecutor was unable to release before the Trial Chamber information obtained in confidence from certain sources and containing exonerating evidence he was obliged to divulge.³⁰ This problem led to a stay of proceedings and to a decision by the Trial Chamber to release Mr. Lubanga unconditionally, which were respectively confirmed and quashed by the Appeals Chamber.³¹ Eventually, the problem was resolved

29. Rome Statute, *supra* note 1, art. 17(1)(a) (stating that a case is inadmissible when it is being "investigated or prosecuted by a State which has jurisdiction over it").

30. See Rome Statute, *supra* note 1, art. 54(3)(e) (stating that the Prosecutor may not disclose information for the purpose or generating new evidence); see also *id.* art. 67(2) (stating that the Prosecutor shall disclose evidence that shows innocence or mitigates the guilt of the accused).

31. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-1401, Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, ¶¶ 92-97 (June 13, 2008); Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-1418, Prosecution's Appeal against "Decision on the release of Thomas Lubanga Dyilo" and Urgent

and the trial began. At the time, that situation understandably caused considerable concern, but it also showed that the judges would fully ensure the Court's obligation to respect due process and the rights of the accused.

Another illustration is that a number of charges have not been accepted in different cases, showing the judges of the Pre-Trial Chamber are fulfilling this screening function. In the case of Abu Garda, who was accused of certain war crimes committed during an attack against the African Union Mission in Sudan (AMIS), the charges were dismissed entirely.³²

On the basis of my six years on the Appeals Chamber of the ICC, I can testify first-hand that the judges there were extremely careful to avoid any possibility that a procedural issue might turn out to be detrimental to the accused or, generally, the fairness of the process, and that remains true today.

2. *Efficiency*

Efficiency (or expeditiousness) has been more problematic. The ICC is widely and correctly seen as operating more slowly than special tribunals. This situation is due to several factors. Strategic decisions by parties and less than efficient working methods have certainly played a role and need to be reviewed and corrected. Yet, the ICC is also in a very special situation that has created its own obstacles, at least for now.

To begin with, the system is complicated and cumbersome. The ICC does not inherit tailor-made situations. First, it has the obligation to determine whether any new situation from scratch meets the requirements of jurisdiction and admissibility. Then, it has the double requirement of pre-trial and trial phases, which, in the view of a number of observers, have involved not only a pre-trial phase which is too long and elaborate, but also a degree of overlapping and duplication between the two phases. Victims' participation is entirely new and has raised any number of issues at all levels.

Other reasons are external. The ICC has yet to receive a situation that would be comparable to Nuremberg or even to the various special tribunals that have been established since the

Application for Suspensive Effect (July 2, 2008); Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-1486, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008", ¶¶ 42-56 (Oct. 21, 2008).

32. Prosecutor v. Bahar Idriss Abu Garda, Case No. ICC-02/05-02/09-243-Red, Public Redacted Version—Decision of the Confirmation of Charges, ¶ 236 (Feb. 8, 2010).

early nineties. The ICC has been mostly operating in situations of ongoing conflicts, where logistics and security raise inordinate problems. Many of the issues of disclosure of evidence that have come up are the result of the dual obligation of the ICC to respect the rights of the defendant and to protect the security of victims and witnesses.

In sum, responsibilities are shared. On the one hand, the ICC has a lot to learn in becoming more efficient. It clearly should continuously review its working methods and the length of decisions, for example. It is to be hoped that the development of its jurisprudence and working improvements will gradually eliminate obstacles and lead the way to solutions that are both legally sound and practical. On the other hand, whatever the ICC does, it is essential to keep in mind at all times that for the system to be viable the two pillars of the ICC system, court and states, must each do their part.

D. Support

Adherence to the Rome Statute has increased faster than anyone anticipated in Rome. One hundred eleven states have now ratified or acceded to the Rome Statute, within a few years of its adoption in 1998. As a point of comparison, only sixty-six states have accepted as compulsory the jurisdiction of the ICJ after more than sixty years of existence. This remarkable speed is the result in part of wide acceptance of the need for an ICC and in part of demonstration by the Court of strictly judicial conduct. Nevertheless, acceptance of the ICC is regionally uneven. The Middle East and Asia in particular are insufficiently represented. Moving beyond purely regional concerns, three of the five permanent members of the Security Council still have not ratified the Rome Statute; nor have two important nuclear-weapons States: India and Pakistan. Over time, that situation will need to be corrected if the ICC is to have the global reach it has been created for and avoid perceptions of selectivity.

The need for practical support for the ICC and the importance of state cooperation has been reiterated by State Parties every year, at the Assembly of States Parties (ASP) and at the UN. Yet, support in practice is uneven and fragile. The ICC's dependence on states in the difficult circumstances in which it operates makes it vulnerable. The small number of arrests actually executed is a case in point, as is the small number of those essential agreements on relocation of victims and witnesses and enforcement of sentences, without mentioning the paucity of implementing legislation or agreements on privileges and immunities. This raises two fundamental issues for the future of the Court to which I will return in the context of the Kampala Conference: cooperation and complementarity.

E. A Judicial Institution in a Political Environment

Before turning to the Kampala Conference and the future, there remains one issue which is a very difficult problem facing the Court: the fact that it operates in a political environment.

Broadly speaking, the ICC is better accepted today than at the time of its creation, largely because it has proven itself as a judicial institution. I already mentioned the rapid development of ratifications, but it is also cooperating with non-state parties and those contacts are increasing.

The United States' (US's) position was mentioned in the call for this Conference. I will leave it to others to elaborate on that but I would simply signal here a couple of points. One is that the US's initial outright opposition to the ICC began to diminish a few years ago, long before the current administration came into play. There are various reasons for this, but certainly one of them was that as the Court developed it became clear that stated apprehensions that it would act in a political manner, let alone target deliberately certain states or regions, had no foundation. A decision to ratify the Statute or not is a sovereign decision that belongs to the US. But I hope and believe that at the very least there is now firm ground for development of cooperation on the part of this country. Recent statements by the US Ambassador-at-Large for War Crimes Issue are encouraging in this regard.³³

More broadly, the reality of the situations in which the ICC is involved has shown that the challenges it faces go far beyond practical difficulties. As in the case of other international tribunals, it carries out its activities in implementing its mandate in the context of past or present conflicts, domestic or international, which are very fresh in people's minds or even ongoing and are all linked to national or regional political issues. In other words, the ICC is a judicial institution operating in a political environment. This has led to important fluctuations in the support the ICC has received, both at the national and the international level. It challenges the growing conviction at the roots of international criminal justice that there can be no lasting peace without justice. Indeed international justice, which does not pick its moment, is sometimes seen or presented as an impediment to an ongoing peace or reconciliation process. The ICC has faced this problem several times. This can result in divisions among states and an occasionally ambivalent attitude, even amongst those who have provided principled and practical support to international justice.

33. See Interview by Christiane Amanpour with Stephen Rapp, US Ambassador-at-Large for War Crimes Issues (Mar. 24, 2010) available at <http://archives.cnn.com/TRANSCRIPTS/1003/24/ampr.01.html> (discussing the US's increased cooperation and engagement with the ICC).

An illustration of this at the national level was in Uganda. The arrest warrants issued by the ICC largely contributed to lead the self-described Lord's Resistance Army (LRA) to negotiations for a peace settlement with the Government of Uganda, which was immediately accompanied by a drop in the commission of crimes. Later on, however, the LRA kept abandoning the peace process ostensibly on the grounds that the ICC would not withdraw its arrest warrants. The ICC, being a court, obviously could not withdraw arrest warrants for reasons of convenience. This led to a lasting argument in Uganda as to whether the ICC's intervention had a positive or negative effect on the situation on the ground. The question of the relationship between peace and justice found itself in other situations as well.

At the international level, the most flagrant clash between politics and international justice has been in the Darfur situation. The arrest warrant issued against President Al Bashir of Sudan has proved to be very controversial. The controversy is not really about the findings or the reasoning of the Court. Those are largely being avoided in discussions. It ranges from concerns that the arrest warrant may compromise efforts to reach peace and reconciliation in Darfur to allegations made against the Court on various political grounds. The African Union (AU) called upon its member states last summer to refrain from cooperating with the ICC in this particular situation, after failing to obtain from the Security Council a request to the Court to suspend its proceedings.³⁴

Such situations are inevitably accompanied by the temptation, or even a deliberate attempt, to paint international justice in political colours. No international court has been able to escape that entirely—not the tribunals for the former Yugoslavia and Rwanda, not the ICC. Paradoxically, many arguments against the ICC amount to suggesting that its judges somehow should take into account extra-legal considerations in deciding on matters of law. That is exactly what the drafters of the Rome Statute, including states engaged in the current controversy, were so determined to avoid, as I mentioned at the beginning of my intervention.

Be that as it may, this problem has resulted in divisions among states and an occasionally ambivalent attitude, even amongst those who have provided principled and practical support to international justice. The issue of the relationship between peace and justice will be examined at the Kampala Conference, as

34. Assembly of the African Union[AU], Thirteenth Ordinary Session, Sirte, Great Socialist People's Libyan Arab Jamahiriya, *Decision on the Report of the Commission on the Meeting of African States Parties to the Rome Statute of the International Criminal Tribunal (ICC)*, AU Doc. Assembly/AU/13 (XIII) (July 3, 2009).

well as the broader question of the impact of the ICC on local populations.

III. KAMPALA CONFERENCE

What can we expect from the Kampala Conference regarding the issues we have discussed so far?

The situation is such that the Kampala Conference will be very different from what was anticipated in Rome. It will to some extent deal with its original mandate, but will also address other issues that have emerged in the cold light of the reality of the first years of the Court.

A. Crimes and Other Proposals

We have seen that a Review Conference was mandated by the Rome Conference seven years after entry into force of the Statute. As already mentioned, strictly speaking, the primary purpose of the Conference was narrow: to “consider any amendments to [the] Statute.”³⁵ “Such review may include, but is not limited to the list of crimes contained in article 5.”³⁶ Its only legally mandatory task is to review Article 124, which gives a state the possibility to reject the jurisdiction of the Court over war crimes for seven years after entry into force of the statute for that state. The resolution convening the Review Conference includes a proposal to delete Article 124 altogether.³⁷

The second issue Kampala will need to deal with is the crime of aggression. Neither Article 5 of the Rome Statute nor the relevant resolution adopted by the Rome Conference specifically requires that aggression should be reviewed at *the first* Review Conference,³⁸ but it is necessary to do so, given the profile of the issue.³⁹ The crime of aggression was of enormous importance in Rome for many states, which felt it was the cause of most other crimes. The Preparatory Commission, which was required to work on it, made very little progress. The ASP took the matter over and fared better. A draft definition of the crime is attached to the resolution adopted at the last session of the ASP as well as a series

35. Rome Statute, *supra* note 1, art. 123(1).

36. *Id.*

37. ICC-ASP Eighth Session, Res. ICC-ASP/8/Res.6, Annex I (Nov. 26, 2009) [hereinafter ASP Resolution 6].

38. Final Act of Rome Conference, *supra* note 11, Annex I/Res. F(7) (“The Commission shall prepare proposals for a provision on aggression . . . The Commission shall submit such proposals to the Assembly of States Parties at a Review Conference, with a view to arriving at an acceptable provision on the crime of aggression for inclusion in this Statute.”) (emphasis added).

39. See *supra* Part I.B. (discussing the lack of definition for the crime of aggression).

of options for the conditions of exercise of the Court's jurisdiction.⁴⁰ *En clair*, as already mentioned,⁴¹ those options reflect a deep difference between those states that consider that the Court can exercise its jurisdiction over the crime of aggression only if the Security Council has determined there was an act of aggression and those that feel there should be alternative triggers, such as a resolution of the UN General Assembly, an advisory opinion of the ICJ, or a determination made by a Pre-Trial Chamber of the ICC. Proposals, options, and draft elements of crimes are included in the resolution convening the Review Conference as a proposal by Lichtenstein.⁴²

With respect to other crimes, a number of proposals have been made by states: adding chemical and biological weapons and anti-personnel mines to the list of prohibited weapons and extending certain existing prohibitions to non-international conflicts such as poisonous weapons (Belgium and other sponsors);⁴³ including the use or threat of use of nuclear weapons as a war crime (Mexico);⁴⁴ inclusion of the crime of terrorism in Article 5, subject to its definition, along the lines of the crime of aggression (Netherlands);⁴⁵ and including the crime of international drug trafficking in Article 5 (Trinidad and Tobago).⁴⁶

Different kinds of proposals were also made. Norway made a proposal extending to an international or regional organisation, arrangement, or agency the possibility of making a prison facility available to the Court.⁴⁷ Finally, a proposal was made by the AU, to amend Article 16 of the Rome Statute in order to allow the UN General Assembly to defer cases for one year in the case where the Security Council would have failed to make a decision within a specified timeframe.⁴⁸

Faced with all those proposals, the ASP has taken a cautious approach to the Kampala Conference. It decided that for an issue to be submitted to the Conference, it should have been subject to

40. ICC-ASP Eighth Session, *Report of the Bureau on the Review Conference-Addendum*, ICC Doc. ICC-ASP/8/43/Add.1, Annex II (Nov. 10, 2009) [hereinafter *Report of the Bureau on the Review Conference-Addendum*]; ASP Resolution 6, *supra* note 37, Annex II.

41. *See supra* Part I.B. (discussing states' differing opinions regarding the crime of aggression).

42. ASP Resolution 6, *supra* note 37, Annex II. The Permanent Representative of Lichtenstein to the United Nations, currently President of the ASP, chaired the ASP Special Working Group on the crime of aggression.

43. *Report of the Bureau on the Review Conference-Addendum*, *supra* note 40, Annex I.

44. *Id.* Annex III.

45. *Id.* Annex IV.

46. *Id.* Annex VI.

47. *Id.* Annex V.

48. ICC-ASP Eighth Session, *Official Records*, ICC Doc. ICC-ASP/8/20, Annex II, App. VI.

intensive preparations and should have a good chance to attract consensus.⁴⁹ As a result, the proposal made by the AU and all proposals for inclusion of new crimes have been eliminated because they raised controversial issues, with the exception of a Belgian proposal aimed at including a prohibition of poisonous and other weapons in non-international conflicts, similar to that already existing in international conflicts.⁵⁰ The Norwegian proposal has been modified into a proposed draft resolution as it was considered an amendment that was unnecessary⁵¹

The decision of the ASP to postpone a number of issues beyond Kampala is causing no harm. Any session of the ASP can take up and deal with an amendment without any need to convene another review conference.⁵² Indeed, that decision is probably wise. The experience of the first few years of the Court clearly shows that other priorities have emerged that were not anticipated at the time of the Rome Conference.

B. The Functioning of the Court

The original purpose of a review conference being so curtailed, the Kampala Conference then must turn its attention to subjects that were not anticipated in Rome. An obvious candidate should be the functioning of the Court. More specifically, what are the lessons that can be learned at this stage on the parts of the system established by constitutive instruments that work satisfactorily and those parts that should be reviewed? But that cannot be fully done either, because the Court has developed more slowly than anticipated and, not having completed a full cycle of proceedings including final appeals, is not in a position to make itself a considered assessment. This in itself is not fatal since the ASP can launch such a consideration at any time. Indeed, it is probably preferable not to rush into attempts to bring formal modifications to the constitutive instruments. As I mentioned earlier, both the Rome Statute and the Rules of Procedure and Evidence are difficult to amend and most amendments, even if adopted, would take an enormous amount of time to enter into force. If other ways can be found to improve the system, so much the better.

49. ICC-ASP Eighth Session, *Report of the Bureau on the Review Conference*, ¶ 2, ICC Doc. ICC-ASP/8/43 (Nov. 15, 2009).

50. ASP Resolution 6, *supra* note 37, Annex III; ICC-ASP Eighth Session, *Resolution on the Review Conference*, ¶ 9 and Annex VIII, ICC Doc. ICC-ASP/8/Res.9 (Mar. 25, 2010) [hereinafter *Resolution on the Review Conference*].

51. Report of the Bureau on the Review Conference-Addendum, *supra* note 40, Annex V; *Resolution on the Review Conference*, *supra* note 50, ¶ 7 and Annex V.

52. Rome Statute, *supra* note 1, art. 121(1)(2)(3).

C. Stocktaking

The ASP then decided that, in addition to a general debate, there would be an exercise of stocktaking that would focus on four themes: complementarity, cooperation, impact of the Court, and the major issue of the relationship between peace and justice, with special reference to the need to take into account “aspects regarding universality, implementation and lessons learned, in order to enhance the work of the Court.”⁵³ The ASP is currently preparing for the Review Conference in all those areas.⁵⁴

All those issues are important. Complementarity and cooperation touch directly on relations between the ICC and states and the functioning of the Court. Outstanding issues to be dealt with in those areas have been well identified over the past few years without being resolved. The impact of the Court on victims and affected communities and the relationship between peace and justice in many ways go beyond the ICC itself to reach international justice more generally and need to be addressed thoroughly.

Ultimately, the Kampala Conference will be a success if two conditions are met. First, the Conference should not be seen as an end in itself. Whatever may be achieved at the Conference, it will be most important that it also provide proper directions for the future. Second, whatever the formal outcome of discussions of the four issues grouped under “stocktaking,” such as conference resolutions, should not be allowed to remain *pro forma* results, but otherwise remain dead letter. Follow-up is essential. Weaknesses in the area of cooperation, for example, are well known and should be addressed in practice, not only recognized once again.

IV. CONCLUSION

International justice has made enormous advances in the past fifteen years, advances that many countries and regions have welcomed and benefited from. At the level of principle, the principle that heinous crimes must be punished has gained widespread acceptance. The debate now is largely about timing of

53. ASP Resolution 6, *supra* note 37, ¶ 5 and Annex IV; Resolution on the Review Conference, *supra* note 50, ¶ 3, 4, and 8 and Annexes I-IV and VI-VII.

54. See generally ICC-ASP Resumed Eighth Session, *Report of the Bureau on stocktaking: Complementarity: Taking stock of the principle of complementarity: bridging the impunity gap*, ICC Doc. ICC-ASP/8/51 (Mar. 18, 2010); ICC-ASP Resumed Eighth Session, *Report of the Bureau on stocktaking: Cooperation, Background paper and proposals for outcome*, ICC Doc. ICC-ASP/8/50 (Mar. 18, 2010); ICC-ASP Resumed Eighth Session, *Report of the Bureau on stocktaking: The impact of the Rome Statute system on victims and affected communities*, ICC-ASP/8/49 (Mar. 18, 2010); ICC-ASP Resumed Eighth Session, *Report on the Bureau on stocktaking: Peace and Justice*, ICC-ASP/8/52 (Mar. 20, 2010).

justice, not defense of impunity. Institutionally, the establishment of the ICC has finally provided a permanent instrument which was long needed. There is no question that the system could be improved, but its success depends more on a proper environment than on technical improvements.

Some benefits of international justice can now be seen. One is a measure of prevention, still limited but observable empirically, not merely theoretical. It can be seen in some of the situations that have been referred to the Court, for example, in a reduction of the commission of certain crimes such as child recruitment in some areas. It can also be seen in the number of references made around the world not only to the ICC but to international justice generally, starting with international humanitarian law.

That leads me again to the fundamental principle of complementarity.⁵⁵ One of the benefits of international justice has been to encourage the development of national justice. International justice, including the ICC, will never be able to deal with more than a few situations at a time—and a few cases within those situations. The rest will have to be done domestically, and for that national systems need to function. The ICC Prosecutor has clearly engaged into a process of encouraging the development and action of effective national justice, through what he calls positive complementarity. Some organisations, intergovernmental and non-governmental, are working in the same direction, but this is a massive exercise that should be much more widely shared.

Yet, there are cases where international justice itself needs to be resorted to. Indeed, it is necessary that the ICC in particular does not content itself to exist without acting, lest the impact it has had on prevention of crimes and improvements in national systems be eroded absent any pressure. We have learned from the experience of the ICC and its predecessors what some of the practical challenges are in exercising their responsibilities. In addition, as I have also mentioned, we need to be aware of the difficulties stemming from the volatile political environment in which these organizations operate. They do not operate in a vacuum but rather depend on the political environment for support, as well as non-interference with the judicial process.

These two pillars of the international system, the political and the judicial, will have their best effects if they are in sync. One of the remaining challenges to harmonizing these pillars is that international justice is still poorly known and understood. It has remained so far, to a large extent, a world of specialists from governments, NGOs, legal practitioners, and academia. To realise

55. See Rome Statute, *supra* note 1 (stating that a case is inadmissible in the Court when it is being prosecuted or investigated by a state that has jurisdiction).

its full potential, indeed to receive the support it requires, it needs to be streamlined and mainstreamed into other discourses of international law and politics. The ICC and issues of international justice more broadly are still not always on the radar of states and international organizations. There have been some positive developments, for example, significant attention was given to issues of international justice in a UN handbook for those involved in peace negotiations.⁵⁶ International justice is now better recognized than in the past, but it is not always well understood. The substance of international criminal law—what it requires, its limitations and the limitations of its institutions—is not sufficiently known. In that connection, there persists great confusion between the political and the judicial, blaming international justice for not assuming a role that belongs to political organs, notably the Security Council.

It took a long time to create international justice; it will take a long time for international justice to play its role fully. In the meantime, we can work collectively to develop the best possible understanding of its capacity and limits, and contribute to its knowledge and dissemination. Constructive criticism is necessary but not sufficient. It needs to be supplemented by a true commitment to make international justice work. States in particular must remember that international justice, and the ICC system in particular, is their own creation, and that they will need to take genuine ownership for it to develop and bring about the benefits it was intended to bring to future generations.

56. See generally U.N. Office for the Coordination of Humanitarian Affairs [OCHA], *Humanitarian Negotiations with Armed Groups* (Jan. 2006) (prepared by G. McHugh and M. Bessler).

