



## The International Criminal Court – Key Features, Current Situation and Challenges

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

Second Vice-President of the  
International Criminal Court

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

The ICC is a general, future-oriented international criminal court – that is to say no selective criminal court as the *ad-hoc* Tribunals for the former Yugoslavia and for Rwanda, and the so-called hybrid courts for Sierra Leone and Cambodia. Our Court is also – and this is again of fundamental importance – no so-called “Victors’ Justice”. The general principle of law, “Equality before the Law, Equal law for all” and the free and voluntary support and cooperation by the international community – that is to say no support which was imposed by the UN Security Council or powerful nations – these are the fundamentals of our Court. Also in 30 or 50 years and beyond, our Court will – this is my hope and my conviction – ensure that perpetrators of the most serious crimes of concern to the international community will not enjoy immunity but will be investigated and prosecuted according to the Rome Statute.

In this presentation, I will deal with three sets of questions:

- (1) What is the ICC? What are some of its key features?
- (2) What is the current situation of the Court?
- (3) What cases are currently underway and what lessons have so far been learnt from the criminal cases now ongoing?

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

## **I. KEY FEATURES**

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

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

The Court has jurisdiction over:

- Nationals of States Parties;

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

- Offences committed on the territory of a State Party.

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

- In addition, the Security Council can refer situations to the ICC independent of the nationality of the accused or the location of the crime.
- The Security Council also has the power to defer an investigation or prosecution for one year in the interests of maintaining international peace and security.



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

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

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

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

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

The guarantees of a fair trial and protection of the rights of the accused have paramount importance before the ICC. The Statute incorporates the fundamental provisions on the rights of the accused and due process common to national and international legal systems.

With regard to substantive criminal law, the jurisdiction of the International Criminal Court is limited to the most serious crimes of concern to the international community as a whole, namely, genocide, crimes against humanity and war crimes, pursuant to articles 6-8 of the Statute. It is worthwhile to take a personal look at the long list of 5 forms of genocide, 15 forms of crimes against humanity and more than 50 different war crimes. This is the first comprehensive codification of international criminal law which is based on the free consent of the international community (and is not imposed by the Security Council as, for example, the statutes of the ad hoc tribunals).

None of these crimes were 'invented' by the drafters of the Rome Statute. Rather, they all have strong foundations in international law and international humanitarian law, which often go back more than 50 years.

With regard to the crime of aggression, the fourth core crime listed under article 5 of the Rome Statute, the ICC Review Conference adopted on 11 June 2010 a package proposal which will probably provide the ICC after 2017, to some extent, with jurisdiction over future crimes of aggression. As currently we do not have such jurisdiction, I will not deal with the details of this complex compromise which found the consensus of all States present in Kampala. It may suffice that I simply underline the fundamental importance of this development which will clearly enhance further the role of the ICC in the international community.

Another key feature is the fact that the Court is 100% dependent on effective criminal co-operation, on the support of States Parties. As the Court generally has no executive powers and no police force of its own, it is totally dependent on full, effective and timely co-operation from States Parties. This is true in particular with



regard to arrests and surrender of suspects to the Court which must be performed by States Parties, not by ICC personnel. As foreseen and planned by its founders, the Court is characterized by the weakness, structural weakness that it does not have the competencies and means to enforce its own decisions. Also in this respect it was the wish of the Court's creators that States' sovereignty should remain prevailing. Once again, the Rome Statute fully respects the sovereignty of States.

## **II. CURRENT STATE OF THE COURT**

What is the Court's current situation; what progress has been made since its establishment in 2003? Some of the following is quoted from the statement delivered to the United Nations in New York on 28 October 2010 by the current President of the ICC, Judge Song, my colleague from Korea:

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

The Office of the Prosecutor, Pre-Trial, Trial and Appeals Chambers are nowadays all fully functional and cope with a heavy work load. Three "situations" have been referred to the Prosecutor by States Parties (Uganda, the Democratic Republic of the Congo, and the Central African Republic) and one (Darfur/Sudan) has been referred by the UN Security Council (the Prosecutor is currently looking into further situations, including some outside Africa.) The judges have issued 15 arrest warrants and 3 summonses to appear. Three criminal cases are now being heard by the Court against four accused persons currently being detained by the Court. The Pre-Trial Chambers have confirmed charges, Trial Chambers I and II are engaged in ongoing trials against three suspects in the custody of the ICC; Trial

Chamber III is currently pursuing the trial against Jean-Pierre Bemba, the former Vice-President of the Republic of Congo.

On 26 November 2009, the Prosecutor requested Pre-Trial Chamber II, my own chamber, to authorise the opening of an investigation in the post-electoral violence in Kenya, with 1300 people killed, 5500 maimed or mutilated, and 350,000 persons displaced. Eventually, the majority of the Chamber authorised the opening of the investigation, which is ongoing. I may be allowed to note that I filed a dissenting opinion because I did not see that the requirements of crimes against humanity were met.

On 15 December 2010, roughly one month ago, the Prosecutor submitted two applications for summons to appear against six (6) high-ranking Kenyan nationals suspected of crimes against humanity pursuant to article 7. The Prosecutor also announced that he would seek arrest warrants if the suspects would conspire against the investigation, or intimidate witnesses in Kenya. My Chamber, Pre-Trial Chamber II, is currently examining the Prosecutor's applications.

Between 1 January and 30 April 2010 only, the Judges handed down 269 decisions, with 2376 pages. The Appeals Chamber gave final rulings on fundamental issues regarding the Statute. The Court has processed more than 1599 applications from victims to participate in the proceedings; approximately 700 to 800 victims were granted the right to participate.

In his speech to the United Nations, President Song emphasised the ICC's engagement with victims, which is of unprecedented value and is steadily expanding. He highlighted the respective roles of the ICC's Outreach programme, which communicates with the local population and informs the victims of their rights, and of the Trust Fund for Victims, which is currently providing assistance to more than 40,000 direct beneficiaries.



### III. JUDICIAL PRACTICE TO DATE – FIRST LESSONS

I should now like to provide an overview of the ICC's judicial work to date. Currently 22 actual cases are being prosecuted. When do we call something a case? A matter may not be termed a case until there is an actual court record, in other words when a warrant for the arrest or a summons to appear of a specific, named person has been applied for or been issued by judges. If you agree to this definition, the Criminal Court is currently dealing with:

- Three high-ranking suspect persons from Sudan; Omar Hassan Ahmad al-Bashir, who is currently still in office as the President of Sudan and for whom an arrest warrant was issued on 4 March 2009; Ahmad Muhammad Harun, until recently Minister for Humanitarian Affairs, and Ali Muhammad Al Abd-Al-Rahman ("Ali Kushayb"), a Janjaweed militia leader who goes by the title of "colonel of colonels"; arrest warrants for these two people were issued in May 2007.

Pre-Trial Chamber I issued a summons to appear against Abu Garda, a rebel commander in Darfur, alleged to have attacked and killed 12 African Union Peacekeepers in September 2007. This procedure ended in March 2010 because of lack of evidence. On 8 December 2010, Pre-Trial Chamber I held a hearing on the confirmation of charges of war crimes against two other Sudanese rebel leaders, namely Abdallah Banda Abakaer Nourain (Banda) and Saleh Mohammed Jerbo Jamus (Jerbo).

- Three accused persons from the Democratic Republic of the Congo who are already in the custody of the courts; Thomas Lubanga Dyilo, detained since March 2006; Germain Katanga, detained since 18 October 2007, and Mathieu Ngudjolo Chui, detained since 7 February 2008; one suspect who is not yet in the Court's custody, Bosco Ntaganda.
- Four suspected leaders of the "Lords Resistance Army" from Uganda for whom arrest warrants were issued back in 2005 – and it is distressing to see that Joseph Kony and his commanders have still not been arrested.



- One person suspected of crimes committed in the Central African Republic, Jean-Pierre Bemba Gombo, whose case is currently heard before Trial Chamber III.
- One person suspected of crimes committed in the Democratic Republic of the Congo, Callixte Mbarushimana, Alleged Executive Secretary of the *Forces Démocratiques pour la Libération du Rwanda*, was arrested by the French authorities on 11 October 2010.
- Six suspected high-ranking political and party leaders from Kenya, as mentioned before, among them two former cabinet ministers and Uhuru Kenyatta, Vice-President of Kenya and a son of the founder of this State.

What lessons have we learned from the judicial work performed so far? I would like to mention the following examples, including some self-criticism:

- (1) A particularly serious problem for the Court is the necessary provision of protection to witnesses and victims. Far more so than in other parts of the world, witnesses and victims from African “situation States”, such as the Democratic Republic of the Congo, Uganda or Darfur/Sudan, who are prepared to testify are often at great risk and face huge threats. Their repeated demands for appropriate protection are, in the view of a Court that obviously depends on witnesses and victims who are prepared to testify, both legitimate and understandable. At the same time the States Parties demand on principle that the Court’s action should neither endanger nor harm any witnesses or victims. And this is where the problems start: procedural rules explicitly permit witnesses and victims to be made anonymous through “redaction” – i.e. the blacking out of details, especially their names – or them to be made unrecognizable in submissions and witness statements; however, this also fundamentally threatens the rights of the accused and his defence counsel to a fair trial. Additionally, establishing protection programmes for witnesses and victims in the “situation States” of Africa involves

work, human resources and considerable amounts of money. At present more than 300 witnesses and victims are enrolled in protection programmes planned and managed by the Court at great expenditure in time and human resources terms.

- (2) There are differences of view between the Court's chambers about the role that victims of crime (and their organizations) can play in the various stages of the proceedings: on the one hand this role should satisfy the laudable demand of the Statute to allow the victims to participate in the proceedings; on the other hand, too liberal an interpretation of these rights would not only jeopardize the success of participation but also run the risk of paralyzing the proceedings.

Taking all these phenomena together, it is easier to understand why proceedings before international courts like the ICC take such a long time.

#### **IV. PERSPECTIVES AND OUTLOOK**

In the ninth (9<sup>th</sup>) year after the Rome Statute came into force, it is obvious that the Court continues to face difficult, ongoing tasks and challenges which, to make matters worse, all need to be dealt with simultaneously.

- First: There are many areas where the Court must improve and make its own work more efficient.
- Second: Above all, the Office of the Prosecutor must develop into an even more effective organ for investigating and prosecuting crimes.
- Third: The Court needs greater international recognition and more members than the current 114 States Parties; it is, however, especially gratifying that Japan, the world's second largest economic power, joined on 1st October 2007 and that Bangladesh became a State Party on 1 June 2010. We all are aware that Thailand is a signatory of the Rome Statute. We are aware that Thailand has already



elaborated a proper translation of the Rome Statute into the Thai language and that this will enable all interested parties in Thailand to study for themselves our founding treaty, maybe as a first step on the road to accession of Thailand.

Fourth: The Court must continue to demonstrate, unemotionally and undeterred, that it is a purely judicial, neutral, objective institution and that there is no reason to fear that the Court would ever pursue political aims or allow itself to be misused.

Please permit me to include in this report on the work of the International Criminal Court a simple statement, which perhaps sounds like a complaint; it is not however a complaint, simply an expression of what my experience has been so far:

It remains incredibly difficult to turn our institution, which is wholly dependent on the support of the States Parties, into a truly functioning, universally recognized world court. Many people will need to continue making enormous efforts and be very patient.

Why is that so? There are many reasons. Perhaps at the conclusion of this report I can once again point to some of the characteristics and limitations inherent in the system that the Court simply has to live with, and which even its leading representatives cannot alter, however much they might like to.

First: The Criminal Court is absolutely, one hundred percent dependent on effective cooperation with States Parties, in particular when it comes to the key issue of arrest and surrender of the persons sought with an arrest warrant; this lack of any form of executive power is a decisive weakness of the Court, its Achilles' heel, so to speak. Indeed the unsolved problem facing the Court lies in the issue of who conducts arrests and transfers on behalf of the International Criminal Court. The matter is simple: no arrest, no trial.

Perhaps you will be interested to hear what I recently said in an interview on this topic – in an attempt to call a spade a spade. On 9 December 2008 for example I declared:

“I totally agree with Prosecutor Moreno-Ocampo that the States must give us much more effective support by actively working towards the arrest of suspects. The States did not want the International Criminal Court to have its own powers of arrest. Therefore, they must form, or make available, task forces to arrest suspects for our Court, just as it has been more or less a routine for some time now to use such forces against armed criminals domestically.”

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

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

I shall content myself with these pointers for now. They are – I repeat – not intended as a complaint and certainly not as a sign that the judge speaking to you is in any way disheartened. I am more concerned to give you a “reality check”, so that we all have the same idea, as far as possible, of the conditions in which the International Criminal Court is required to work now, and in future.



Furthermore, allow me to reiterate a warning that I have often given on something I feel very strongly about:

Compared with the problems and violent crises in this world, the Court will always be small and weak, more symbol than might. If only for reasons of cost and capacity, the Court will never be able to do more than conduct a few, exemplary trials.

But we have come a long way. In the nineties of the last Century, twelve (12) years ago an International Criminal Court seemed to be some kind of utopia, a dream. Today the Court is a functioning reality. Even your meeting here with this Judge from the ICC is somehow part of this reality. It is my hope that also some of you may become well-informed supporters of the Court, even advocates for the key message of the ICC. What is this message? The message of the ICC is powerful, indeed:

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

So, to the best of our abilities – and our abilities are greater than many think, at least that is my experience – let us all be bold and optimistic in continuing this work in progress for greater justice in the world.

Thank you very much.