

INTERNATIONAL CRIMINAL COURT-CENTRED INTERNATIONAL CRIMINAL JUSTICE AND ITS CHALLENGES

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I INTRODUCTION

May I begin by thanking the University of Melbourne Law Faculty for inviting me and my wife back to this top educational institution. I am also honoured to give a lecture at the prestigious programme in honour of Sir Ninian Stephen.

I will be talking quite a lot about the International Criminal Court, which goes by the abbreviation ‘ICC’. Let me immediately apologise to all cricket fans in the audience for any confusion that this may cause!

The 2011 World Development Report states ‘the average cost of civil war is equivalent to more than 30 years of GDP growth for a medium-size developing country’ and ‘[t]rade levels after major episodes of violence take 20 years to recover’.¹ Wars and mass atrocities tear communities apart, inflicting terrible physical and mental suffering, destroying moral norms and wrecking public institutions and infrastructure.

I speak from personal experience. Sixty-six years ago, an armed conflict broke out in my country, Korea. For three months during the Battle for Seoul

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¹ World Bank, *World Development Report 2011: Conflict, Security, and Development* (2011) 5–6.

City my family had to hide in a hot and humid underground bunker. It was my sole task to find food. To do this, the nine-year-old had to walk about 16 kilometres every day. When warplanes appeared in the sky and started dropping bombs, I had to run for cover, dropping all the groceries just collected. To this day, I can precisely remember hundreds of dead bodies lying on the streets and the horrible stench of the decomposing corpses in those hot summer days. I never forget Australia, which was one of the 16 nations dispatching foot soldiers in accordance with the United Nations Security Council resolution;² Korean people are deeply grateful to Australia for their sacrifice of young lives to defend our freedom.

II DEVELOPMENT OF INTERNATIONAL CRIMINAL JUSTICE SINCE WORLD WAR II

After World War II, a fundamental overhaul of international structures took place with the creation of the United Nations and the International Court of Justice or 'ICJ'. In 1948, the *Universal Declaration of Human Rights* was pronounced.³

International military tribunals were set up in Nuremberg and Tokyo to try the architects of the shocking atrocities. Shortly afterwards, the *Convention on the Prevention and Punishment of the Crime of Genocide*⁴ and the four *Geneva Conventions* of 1949 were adopted.⁵

Common to all these post-World War II developments was the notion that the protection of peace and basic human dignity is a matter of common concern to humankind.

First, the *Charter of the United Nations* ('UN Charter') prohibited aggressive warfare and charged the UN Security Council with matters of international peace and security. Along with this, the ICJ was mandated with the settlement of interstate disputes related to international law and treaties.

Second, international human rights law emerged as an expression of the new notion that states have a responsibility to respect and to protect the human rights of their own nationals and other individuals in their territory.

Third, the law of armed conflict progressed into international humanitarian law with an increased focus on the protection of vulnerable individuals in times of war.

² SC Res 83, UN SCOR, 5th sess, 474th mtg, UN Doc S/RES/83 (27 June 1950).

³ *Universal Declaration of Human Rights*, GA Res 217A, UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948).

⁴ *Convention on the Prevention and Punishment of the Crime of Genocide*, opened for signature 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951).

⁵ See *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950); *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950); *Geneva Convention Relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950); *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950).

And fourth, the seeds of international criminal law were planted in Nuremberg with the recognition that individuals responsible for mass atrocities must be held accountable regardless of their official position.

Sadly, during the ensuing Cold War rivalry the violent use of armed force continued.

After the end of the Cold War, the project of international criminal justice gained a new momentum through the creation of the ad hoc international criminal tribunals for the former Yugoslavia ('ICTY') in 1993 and Rwanda ('ICTR') in 1994, and renewed efforts by lawyers, diplomats and civil society to create a permanent international criminal court.

These aspirations came to a concrete conclusion in Rome in July 1998. After the necessary 60 state ratifications, the *Rome Statute of the International Criminal Court* ('*Rome Statute*') came into force and the International Criminal Court ('ICC') was formally created on 1 July 2002.⁶ Five staff members opened the door of the rented building in The Hague on that day. A new permanent international judicial organisation was thus born, independent of the UN or any other pre-existing body.

The ICC was given jurisdiction for four groups of heinous crimes: genocide, crimes against humanity, war crimes and the crime of aggression. Failure, at the time of adopting the *Rome Statute*, to define aggression and set the jurisdictional rules for its prosecution was later overcome by the amendments adopted at the first Review Conference of the Statute in Kampala in 2010.⁷ Bringing these amendments into force will require 30 ratifications and an additional vote by states parties sometime after 2017 at the earliest.⁸

As of January 2016, 123 states have ratified or acceded to the *Rome Statute*. Nine country situations are under investigation and prosecution at the ICC (five self-referrals, two Security Council referrals and two *proprio motu* investigations). The Prosecutor is following developments in many more situations across the world through preliminary examinations. In 2012, the ICC delivered its first two trial judgments, concerning the alleged use of child soldiers in the Democratic Republic of the Congo or 'DRC', in the *Lubanga* and *Ngudjolo Chui* cases.⁹ A third trial judgment in the same situation followed in 2014 in the *Katanga* case;¹⁰ in early 2016, a fourth trial judgment is expected concerning alleged war crimes and crimes against humanity in the Central African Republic in the *Bemba* case.¹¹ Four other cases are at trial stage, involving ten accused, including the ICC's first case on crimes against the

⁶ *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) ('*Rome Statute*').

⁷ Review Conference of the Rome Statute, International Criminal Court, *Resolution RC/Res.6: The Crime of Aggression*, 13th plen mtg, ICC Doc No RC/11 (11 June 2010) annex I arts 8 *bis*, 15 *bis*.

⁸ *Ibid* art 15 *bis* (2)–(3).

⁹ *Prosecutor v Lubanga (Decision on Sentence)* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06, 10 July 2012) ('*Lubanga Sentencing Judgment*'); *Prosecutor v Ngudjolo Chui (Judgment)* (International Criminal Court, Trial Chamber II, Case No ICC-01/04-02/12, 18 December 2012).

¹⁰ *Prosecutor v Katanga (Judgment)* (International Criminal Court, Trial Chamber II, Case No ICC-01/04-01/07, 7 March 2014).

¹¹ See, eg, *Prosecutor v Bemba (Confirmation of Charges)* (International Criminal Court, Pre-Trial Chamber II, Case No ICC-01/05-01/08, 15 June 2009).

administration of justice. One case remains at trial preparation since the accused's attendance at court has not been secured to date. Ten cases are at pre-trial stage, involving a total of 12 suspects, ten of whom remain at large.

III FROM PUNITIVE TOWARD PREVENTIVE JUSTICE

Over the last 70 years the world has witnessed a remarkable development of international efforts to hold perpetrators of mass atrocities accountable. The nature and context of these efforts have significantly changed over time.

Nuremberg and Tokyo were purely *ex post facto* tribunals set up in reaction to atrocities that had already occurred. Their central purpose was to punish actions committed during a conflict which had already ended.

In the 1990s, the situation slowly started changing. The Security Council set up the ICTY while the conflict was continuing and left its temporal jurisdiction open-ended, thereby putting would-be perpetrators on notice that they could be held to account. The Security Council expressly pronounced that the creation of the Tribunal was expected to contribute to the restoration of peace and an end to the ongoing atrocities.¹² However, even the states on the Security Council were not fully prepared to provide political backing to the Tribunal.¹³

The ICTR, the Special Court for Sierra Leone, the Special Panels in East Timor and the Extraordinary Chambers in the Courts of Cambodia were all established essentially *ex post facto*. However, viewed together, they seemed to be indicating a trend that was making accountability for atrocities an increasingly real possibility. Moreover, with the parallel conceptual development of transitional justice, there was a growing recognition that international justice should not only be about punishment, but also about helping societies build a stable future.

The public perception of the ICC still seems to be influenced by the earlier history of international justice, and the ICC is often seen primarily as a means for the international community to put high-level perpetrators on trial. While this is true, the *Rome Statute* framework in my view does not only operate to punish past atrocities — what makes this new system fundamentally different from earlier efforts is its potential for the *prevention of future crimes*.

IV PREVENTION

The potential for the preventative effect of the *Rome Statute* appears in several different forms, which can be categorised under the broad headings of deterrence, timely intervention, stabilisation and norm setting.

A Deterrence

Deterrence is the most direct preventative effect of international justice. But it is notoriously difficult to measure. A similar exercise is far more difficult with regard to mass atrocities. Every situation is unique and each conflict has its own specific historical and political setting. The greatest challenge is causality.

¹² SC Res 827, UN SCOR 48th sess, 3217th mtg, UN Doc S/RES/827 (25 May 1993) Preamble.

¹³ See generally Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton University Press, 2000) 206, 275.

Nevertheless, there is reason to believe that a deterrent effect is slowly emerging. Arrest warrants for sitting heads of state issued by the ICC as well as other international courts demonstrate that no one is immune from accountability and the likelihood of punishment has grown.¹⁴

The most concrete appraisals of the ICC's deterrent effect I have heard so far were from the then Justice Minister of the DRC, some other African leaders and NGOs. The DRC Minister told me that tensions surrounding the DRC elections in 2011 had been very high, but large-scale violence had fortunately been avoided. People had already seen DRC nationals facing the ICC and the Minister said the ICC had been a constant topic of discussion around the elections, which in his view had had a significant deterrent effect. The International Nuremberg Principles Academy, the Advisory Council of which I am a member, just started conducting empirical studies on the deterrent effects at my suggestion.

B *Capacity to Make a Timely Intervention*

Another aspect of the ICC's preventive potential closely related to deterrence is the Court's ability to make a timely intervention in active situations. Important in this respect is the fact that the Court is an independent institution that requires no approval of political organs to investigate ICC crimes. The ICC's intervention may take several forms, escalating from a preliminary examination through an investigation to the issuance of arrest warrants and prosecution. Holding trials before the ICC is the last available tool, not a goal in itself.

A public announcement that the ICC Prosecutor is following the situation can be a powerful tool, putting potential perpetrators on notice that they might be held liable for their actions and could be subject to arrest warrants enforceable in the 123 states parties. A warning of this kind can boost the ICC's deterrent effect. The ICC intervention can also draw local as well as international attention to the situation and help induce the relevant stakeholders to take necessary action to defuse the tensions and to prevent atrocities.

If crimes do occur despite such efforts and the national authorities are unable or unwilling to address the situation, the ICC can open an investigation. In the best-case scenario, the fact that the ICC opens an investigation will help prompt the national authorities to prosecute the alleged crimes in an expeditious manner, thereby reducing the likelihood of further atrocities.

Finally, if trials are held at the ICC, this can be expected to strengthen deterrence in the long-term, both in the situation country, as well as elsewhere. Through its proceedings, the ICC becomes a factor in the broader efforts to outlaw and eradicate grave breaches of international humanitarian law and to help societies overcome the legacy of such crimes.

C *Stabilisation*

I will now talk about the capacity of international justice to contribute to long-term peace, stability and sustainable development in post-conflict societies. These are fundamental guarantees for a future free of violence.

¹⁴ Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (W W Norton, 2011) 258.

The connection of peace and justice is well recognised. The two are not mutually exclusive — on the contrary, they reinforce each other. Indeed, the World Bank Report recognised transitional justice as one of the core tools to forestall cycles of violence.¹⁵ Any efforts to help a society regain health, wealth and the capacity to profit from its own resources must include accountability for the past atrocities and strengthening of the rule of law. Indeed, research suggests that countries that have held former leaders accountable for their crimes have, in most cases, come away stronger.¹⁶

The emerging system of international criminal justice, centred on the *Rome Statute*, is an essential building block for the stability, security and prosperity of the world. The world has to find a way to prevent the enormous suffering caused by atrocities. It is possible to create conditions necessary for all of the world's citizens to prosper in peace. Indeed, I find peace to be the most fundamental precondition of stability and development. But there is no sustainable peace without justice. Justice, whether delivered by domestic or international institutions, is a necessary tool for the stabilisation of peace.

Where atrocities have already been committed, the acknowledgment of the suffering of the victims and the individualisation of guilt for the crimes helps to stabilise peace. But attributing guilt to individual perpetrators is not sufficient to foster the chances of a victimised community to break out of the vicious cycle of conflict and poverty.

Here I stress that the role of the development agencies is crucial in this respect. However, addressing the legacy of mass violence is currently not topping their agenda. It is very hard for countries to get international assistance to support development of their police forces and judiciaries.

The development community and the international justice community have many goals in common. They share concerns about the impact of violence on human populations. They share a desire to see nations affected by violence move into a future where their citizens can thrive in safety.

Forging new partnerships between these two communities will take us one step closer to our shared objectives. Lasting peace and prosperity in post-conflict societies can only be achieved if development challenges and justice enforcement are addressed in a coordinated manner. In particular, I appeal to those in charge of designing development programmes to remain conscious of the role that justice plays in ensuring sustainable development and security in post-conflict societies. No sustainable development without justice!

The potential for synergy is significant. Those responsible for war crimes and crimes against humanity are often part of wider networks involved in corruption, bad governance and organized crime. Helping societies dismantle these criminal structures represents a major step for rooting a culture of the rule of law. In this way, capacity-building for addressing *Rome Statute* crimes supports more general justice reforms and vice versa.

To enable a more comprehensive process of justice, the ICC founders introduced several important provisions in the *Rome Statute* for the empowerment of victims. First of all, the ICC is the first international judicial

¹⁵ World Bank, above n 1, 17–18.

¹⁶ Kathryn Sikkink, 'Making Tyrants Do Time', *The New York Times* (New York), 16 September 2011, A29.

body to allow victim participation in their own right, and not just as witnesses. Along with this, the *Rome Statute* pays special attention to the needs of women and children, who are often the most vulnerable victims of atrocities. The ICC's legal documents extensively codify specific crimes against women and impose a responsibility on each organ of the ICC to ensure the safety, psychological health, dignity and confidentiality of female victims and witnesses.¹⁷ Another innovative feature of the *Rome Statute* system is the creation of a Trust Fund for Victims, which is without precedent in international criminal justice.¹⁸ Recognising both the rights and the needs of victims and their families, the Fund empowers victims to become key stakeholders in the pursuit of transitional justice.

The Fund has been able to articulate a truly human dimension to the process of international criminal justice. For instance, in addition to basic medical services and vocational training, the manufacture and supply of artificial limbs, community-based educational programmes for children, peace education, microloans, reconstructive surgery and trauma-based counselling for rape victims are widely provided. As of the last year, more than 110 000 direct beneficiaries have received assistance provided by the Fund and its local and international partners.¹⁹ The number will be expected to double this year.

D Norm Setting

Finally, I come to norm setting, which I see as the ICC's greatest potential to have a significant preventive effect by entrenching a system of norms that outlaw atrocities.²⁰ I am not merely referring to a layer of international laws that label certain actions as criminal offences. What we need to achieve is a system of fully internalised legal and social norms that make the *Rome Statute* crimes not only punishable but also simply unacceptable in societies everywhere.

The fact that a state ratifies the *Rome Statute* does not mean that all the rights defined therein miraculously take immediate effect. But with proper national implementation, education and democratic support, adherence to treaties can make a huge difference. In the best scenario, the gradual emergence of legal norms and core societal values is a mutually reinforcing process.

V CHALLENGES FOR THE EFFECTIVENESS OF THE *ROME STATUTE* SYSTEM

I will finally turn to challenges. In my view, key challenges for progress include universality, cooperation, complementarity, efficiency, quality of the proceedings, the ICC's institutional integrity and judicial independence, and its relationship with the Assembly of States Parties or 'ASP'. These challenges are not for the ICC alone to answer: quite the contrary. It requires strong support from the ASP, political resolve from states, constructive efforts by multilateral organisations and tireless advocacy from civil society.

¹⁷ *Rome Statute* art 68.

¹⁸ *Ibid* art 79.

¹⁹ Trust Fund for Victims, 'Assistance & Reparations: Achievements, Lessons Learned, and Transitioning: Programme Progress Report' (International Criminal Court, 2015) 8, 69–71.

²⁰ Sikkink, *The Justice Cascade*, above n 14, 258.

A Universality

Arguably, the ICC can only fully serve its intended role when it becomes a universally accepted institution. In practical terms, the effectiveness of the ICC depends very much on the ratification status of the *Rome Statute*. There are several reasons for this.

First, the ICC only has territorial jurisdiction in the states parties. Even the most heinous crimes of concern to mankind are out of bounds for the ICC if committed on the territory of non-states parties.

Secondly, states parties have a legal obligation to cooperate fully with the ICC. Consequently, the more states that join the *Rome Statute*, the greater will be the ICC's ability to access witnesses, to obtain evidence or to have suspects arrested anywhere in the world.

Thirdly, the expansion of the ICC's membership will positively affect the ICC's global legitimacy and the normative effect of the *Rome Statute*.

How should we then view the current figure of 123 states parties? It is almost two-thirds of the UN membership — which can be perceived as a success. But with more than 70 states yet to join, including the world's four most populous countries,²¹ the majority of the population around the globe still remain outside the legal protection of the *Rome Statute* system. Where are the greatest gaps? Approximately one-third of African states and two-thirds of Asia-Pacific states have yet to join the ICC. As the ICC President, I made it one of my priorities to promote greater involvement of the Asian region in the ICC. After all, international justice should not be regarded as a concept foreign to this part of the world. International criminal law has deep-seated roots in Asia, spanning a legacy of more than two thousand years. The writings of Sun Tzu in China and the Laws of Manu in India laid down some of the earliest foundations of humanitarian rules for armed conflict, such as the humane treatment of the sick, wounded, prisoners and civilians and respect for religious institutions in occupied territories.²²

All Asian countries, without exception, are states parties to the four *Geneva Conventions*, and have thereby agreed to criminalise the grave breaches defined in those treaties, which form a major part of the war crimes contained in the *Rome Statute*, and to prosecute the perpetrators. Indeed, Asian countries participated in the creation of the ICC and all the ad hoc UN tribunals, and judges from 15 Asian countries have served on the benches of at least one of these courts. However, some persistent obstacles remain, often due to misunderstandings, for example concerning the principles of non-retroactivity and complementarity enshrined in the *Rome Statute*. Clarifying these matters is crucial for progress to occur.

It is also important to underline the various benefits of membership in the ICC. These include the possibility to participate in the decision-making of the ASP; for instance, on amendments to the legal instruments or nominating candidates for elections of Judges or Prosecutor and Deputy Prosecutor. Furthermore, joining the *Rome Statute* provides legal protection for the citizens

²¹ China, India, the United States and Indonesia.

²² M Cherif Bassiouni, *Introduction to International Criminal Law* (Martinus Nijhoff, 2nd ed, 2012) vol 1, 30–1.

of states parties through the increased likelihood of accountability for any ICC crimes committed on the country's territory. Therefore, there is no reason for Asian states to shy away from the ICC.

In this respect, the Assembly has recently shown signs of increasing its involvement in the area of universality, for instance by appointing several states parties as co-focal points on the Plan of Action for Universality and Full Implementation of the *Rome Statute*. A positive recent development is the increased utilisation of the Universal Periodic Review or 'UPR' at the Human Rights Council, which provides a public and legitimate forum for states parties to make recommendations to other states on ratification or implementation of the *Rome Statute*. Furthermore the UPR prompts the states under review to provide a public response on the recommendations received.

But perhaps most importantly, non-states parties should be encouraged to consider the ratification question not only from a narrow, national viewpoint but from a wider perspective, viewing the ICC as a community where participation carries benefits not only for their citizens but also for humanity as a whole. Above all, joining the ICC is a powerful measure for strengthening international peace, security and the rule of law and helping prevent impunity for the gravest crimes of concern to the international community as a whole.

B Cooperation

Another crucial aspect for the credibility and effectiveness of the ICC is the cooperation of states, international organisations and NGOs with the Court and in the enforcement of the Court's orders. In creating the ICC, states decided to devise a two-pillar system, in which the Court serves as the judicial pillar, while states act as the enforcement pillar. Indeed, the Court has no enforcement mechanism of its own and it would be powerless without the cooperation of states.

While cooperation is generally forthcoming, it is not always problem-free. Lack of cooperation generates delays in judicial proceedings, resulting in increased operational costs and diminishing the Court's ability to deliver justice in the eyes of the victims.

Protracted failure to arrest suspects may fuel the perception that impunity is permissible. This would weaken the effectiveness of the *Rome Statute* system, undermine the Court's credibility and seriously risk eroding its deterrent effect. Unfortunately, the reality is that several ICC arrest warrants have remained outstanding for years, including against well-known persons such as Mr Joseph Kony and President Omar al-Bashir. Political will to bring suspects to justice is crucial.

It is important that the states parties collectively hold each other accountable for compliance with the treaty that connects them. Failure to cooperate should not pass without consequences. In this respect the non-cooperation procedures adopted at the 10th Session of the ASP are very welcome.²³

²³ ICC Assembly of States Parties, *Strengthening the International Criminal Court and the Assembly of States Parties*, 10th sess, 9th plen mtg, ICC Doc No ICC-ASP/10/Res.5 (21 December 2011) 30 [9] and annex ('*Assembly Procedures Relating to Non-Cooperation*').

There are also specific issues that present considerable challenges but are not fully covered by the *Rome Statute*. Notably, the voluntary cooperation of states is required for the enforcement of sentences and the relocation of witnesses. The latter issue, in particular, has recently become an increasingly burning need for the ICC, with a growing number of witnesses involved in court proceedings requiring protection. While several states parties have concluded framework agreements with the ICC on either sentence enforcement or witness protection, more support will be needed in the future and this is likely to remain a continuing challenge.

The Court is likely to face a further, particularly difficult challenge with respect to the situation of persons appearing at the ICC in the Netherlands, who, once their presence in The Hague is no longer required for the judicial purpose, claim that they cannot return to their country of origin for fear of threats against their life or security. The Court has already faced situations of this kind, which may become long-term problems unless adequate solutions are found.

Cooperation with the ICC is not only limited to states parties. Several non-states parties provide highly valuable cooperation to the Court. The ICC also enjoys strong support from the UN, based on the *UN-ICC Relationship Agreement* concluded in 2004.²⁴ This relationship deals with both institutional issues and matters pertaining to judicial assistance and cooperation.

The two UN Security Council referrals to the ICC under Chapter VII of the *UN Charter* represent a sign of the international community's confidence in the Court's role within the broader international system of peace and security.²⁵ However, for the ICC to deal effectively with referrals of the Security Council, it needs to be able to count on the full cooperation of the relevant states, whether they are states parties or not. Thus far, the Security Council has regrettably not shown sufficient initiative in securing the necessary state cooperation with the ICC.

C Complementarity

Making the complementarity principle fully effective remains one of the huge challenges for creating a truly credible and comprehensive system of deterrence and prevention. The domestic justice systems of states should be so well equipped to deal with *Rome Statute* crimes that they can serve as the primary deterrent worldwide, while the ICC is a safety net that ensures accountability when the national jurisdictions are unable, for whatever reason, to carry out this task.

A vast amount of work remains to be done. A large number of ICC states parties are yet to incorporate *Rome Statute* crimes into their national criminal codes. Where large-scale crimes have occurred, their effective investigation and prosecution frequently present enormous challenges for the national jurisdictions involved in terms of human resources, technical capabilities and specialised skills, etc.

²⁴ *Relationship Agreement between the United Nations and the International Criminal Court*, 2283 UNTS 195 (signed and entered into force 4 October 2004).

²⁵ See SC Res 1593, UN SCOR, 60th sess, 5158th mtg, UN Doc S/RES/1593 (31 March 2005) (Situation in Darfur); SC Res 1970, UN SCOR, 66th sess, 6491st mtg, UN Doc S/RES/1970 (26 February 2011) (Libya).

The *Rome Statute* created much more than a court. The ICC is the centrepiece of a new, evolving international criminal justice system that consists of two main levels: national jurisdictions as the first line of defence against impunity and the ICC as a failsafe option, a court of last resort.

The two levels of justice complement each other, forming a novel international structure intended to ensure accountability for the gravest crimes. Under the *Statute*, if a state can demonstrate that national jurisdiction is genuinely conducting the investigation and prosecution, the ICC must, as a matter of law, defer to the national jurisdiction. This is the judicial aspect of the complementarity principle. In October 2013, Pre-Trial Chamber I issued the first ever decision of the Court to this effect, declaring the case of Mr Abdullah al-Senussi inadmissible before the ICC on the grounds that domestic proceedings are underway in Libya, and that Libya is willing and able to genuinely carry out the corresponding investigations.²⁶

For the evolving mechanism of international criminal justice to be further strengthened, commitment and resolute action are needed from a broad range of stakeholders, including national authorities, the ASP, the UN, international justice and development assistance agencies, regional organisations, professional associations and civil society. In this sense, we can see a vast, interconnected web of actors emerging, with the power to solidify the progress that the world has made during the last century in adopting and implementing legal norms against mass violence based on fundamental human values.

D *Efficiency*

International criminal justice is not cheap, nor is it fast. The gravest international crimes are inherently complex in nature and their proper investigation, prosecution and trial require significant time and resources.

With 18 judges, sitting in benches of three at pre-trial and trial, and as a bench of five on appeal, the ICC can only hear a very limited number of cases simultaneously at any given time. This creates tremendous demand for efficiency so that the Court can complete cases in a reasonable timeframe while not jeopardising the quality or fairness of the proceedings.

The language requirement is a distinctive budgetary and operational challenge for the ICC, which is largely absent from most national criminal proceedings. The suspects and witnesses come from a variety of countries, which are inhabited by a large number of ethnic groups speaking different languages. In accordance with fair trial standards, the Court must provide interpretation services for a language that the suspect or accused can fully understand. Thus far, simultaneous interpretation has been provided for 10 different languages.²⁷ In some cases, the Court had to train interpreters from scratch for tribal languages for which no professional interpreters exist. Due to the nature of the ICC's mandate, this challenge is open-ended and one that is likely to be always present.

²⁶ *Prosecutor v Gaddafi (Decision on the Appeal against the Decision of Pre-Trial Chamber I of 11 October 2013)* (International Criminal Court, Appeals Chamber, Case No ICC-01/11-01/11 OA 6, 24 July 2014).

²⁷ English, French, Swahili, Lingala, Sango, Arabic, Alur, Zaghawa, Lendu and Kinyarwanda.

As soon as the ICC's first trial concluded in April 2012, the Court embarked on a 'lessons learnt exercise', with the goal of identifying procedural innovations that could expedite the criminal process. This exercise, conducted with the support of, and in coordination with, the ASP has already produced three sets of amendments to the Rules of Procedure that have been adopted by the Assembly, and many more are in the pipeline.

E *Quality of Proceedings*

Equally important is the quality of the investigations, prosecutions, trials and judgments produced by the Court. Preliminary examinations by the Prosecutor must effectively serve the purpose of identifying situations where investigations are warranted; investigations need to verify allegations, identify the gravest crimes and uncover the evidence implicating those most responsible for them; prosecutions need to prove criminal responsibility effectively beyond reasonable doubt; trials must be uncompromised in their fairness and the Court must provide for effective legal aid and ensure the equality of arms as necessary preconditions for fair proceedings. Judgments need to be fair, clear and convincing in both their factual findings and legal reasoning.

To achieve these goals, the ICC must be able to recruit top professionals, representing a variety of backgrounds and legal systems, to best serve the *sui generis*, hybrid legal system of the ICC. The Court also needs highly qualified, immediately available and experienced judges in robust health, allowing them to work very hard day after day on often lengthy, complicated proceedings. It is important that states parties put forward outstanding candidates for the bench, and that the Assembly elects the most suitable ones for the needs of the ICC. In this respect, the recent establishment of the Advisory Committee on Nominations is a very welcome development.²⁸

F *Institutional Integrity and Judicial Independence*

Effectiveness of the ICC will depend on safeguarding its integrity and reputation as an independent and impartial judicial institution. The mere fact that the ICC is a judicial institution operating in a political world makes this very challenging. The Court is subject to high expectations, intense debates and, at times, political attacks due to the sensitive nature of the subject matter under its jurisdiction.

As a judicial body, the ICC is not well equipped to address politically motivated attempts to undermine its institutional legitimacy. For instance, the Court's ability to discuss ongoing proceedings is usually restricted for reasons of judicial ethics. It would be inappropriate to comment on pending cases. The confidentiality of certain information may prohibit the Court from responding on some issues. Furthermore, the ICC is frequently viewed by the public as a single entity, but in reality, it contains several organs, notably the judiciary, each Chamber and Judge being independent, and the independent Office of the Prosecutor. The potential disparity of views between the organs in

²⁸ See ICC Assembly of States Parties, *Strengthening the International Criminal Court and the Assembly of States Parties*, 10th sess, 9th plen mtg, ICC Doc No ICC-ASP/10/Res.5 (21 December 2011) [19].

some situations can be an additional challenge for the Court's ability to communicate effectively.

Engaging actively in political debates would risk undermining the integrity of the ICC as a neutral, judicial institution. On the other hand, remaining passive in the face of a serious crisis is not a feasible option either. In practice, the Court must navigate the difficult path of finding the right balance between these two.

The states parties' role in protecting the Court's judicial independence and integrity cannot be overestimated. It is absolutely crucial that states parties buffer the Court from political issues that could undermine the Court's integrity. First and foremost, the states should fully respect the Court's independence, and refrain from exerting political pressure on judicial proceedings.

G *Relationship with the Assembly of States Parties*

One of the peculiar characteristics of the institutional structure created by the *Rome Statute* is the relationship between the ICC and the ASP. While the Assembly exercises legislative and oversight powers in relation to the Court, decides on its budget and elects its highest officials, the Court is independent in the performance of its judicial and prosecutorial functions.²⁹

While the Assembly usually meets once a year in an annual session, the various subsidiary organs of the Assembly meet throughout the year and engage in close communication with the Court on many matters, ranging from the Court's budget to questions of cooperation, complementarity, strategic planning, expediting the judicial process, legal aid and the position of victims. Between formal sessions of the Assembly, its work is taken forward in the New York and Hague Working Groups of the Bureau of the Assembly, where representatives of states parties spend countless working hours during the year dealing with the ICC issues. For similar reasons, ICC officials are requested to attend numerous meetings of the states parties, while representatives of states parties in their national capacity frequently approach ICC officials directly in order to discuss issues of mutual interest and to inform the ICC of their respective countries' policy positions on relevant matters.

All of this is positive in the sense that it shows the tremendous level of interest that states parties take in the work of the ICC. That said, the intensive engagement of the Assembly has been straining the resources of the Court and the States Parties. Furthermore, states sometimes fail to fully appreciate that the ICC is unlike any other multilateral organisation. ICC operations cannot be initiated, controlled or suspended by them as states may sometimes wish in light of political pressure or competing priorities. The working relationship between the Court and the Assembly should be reconsidered and streamlined to ensure that it is functional, purposeful and supportive.

VI CONCLUSION

The ICC has advanced to full speed and is now very busy. Yet we are aware that there is much room for improvement.

Perhaps the most important factor for future success is the steadfast and principled commitment of the states' parties to support the ICC's work, to

²⁹ See especially *Rome Statute* Preamble and arts 40, 42.

provide full cooperation for its operations while respecting the Court's independence, and to make the *Rome Statute* stronger and more universal.

Indeed, the Court is not an isolated actor. The Court will only be as strong as the support it receives, not only from states parties but also from the UN.³⁰ For a holistic assessment of the ICC's success, it must be viewed as part of a broader, interconnected puzzle of actors on the international scene where every piece is different but equally relevant to the evolving system of international criminal justice.

Fortunately, there is great willingness on the part of states, the UN and other international organisations and the civil society to support the ICC's work. However, that support cannot be taken for granted.

As difficult as it may sometimes seem, we must continue our efforts to eradicate mass violence and the illegal use of armed force. The ICC is an essential building block for a more peaceful, less violent future governed by the force of the law. By punishing violations of international law and by promoting adherence to legal norms of fundamental importance to the global community as a whole, the ICC and the *Rome Statute* system play an important part in advancing international peace, stability, security, harmony and prosperity. We live in an interconnected world with global challenges that require global solutions. The rule of law is a fundamental requirement for progress and the wellbeing of humanity.

Thank you very much.

³⁰ Elizabeth Sophie Mazzella di Bosco Balsa, 'Statement by the Head of the Delegation of Brazil' (Statement delivered to the XIIth Assembly of States Parties, The Hague, 20 November 2013) <<https://perma.cc/R5Y3-NKLR>>.