Hans-Peter Kaul

The International Criminal Court: Key Features and Current Challenges

At the outset, let me express the hope that my German countrymen will not take it unkindly, if I hold my presentation in English. It is a sign of respect and sympathy acknowledging the many distinguished participants from abroad especially the American guests, co-organizers, and Touro College. I would like to express my personal appreciation that Touro-College under the farsighted leadership of its distinguished President, Dr. Bernhard Lander, is making such an important contribution in seeking a better understanding between Jews and a ‘New Germany.’ As I am still moved by Justice Bach’s (Israel) impressive speech this morning, may I take the liberty in mentioning that in the course of my career, I have devoted more than ten years of my work to promote German-Israeli relations and German-U.S. Jewish relations in Tel Aviv, Washington D.C. and in my own country.

On Sunday evening as we heard a gripping and mesmerizing key-note address by Whitney Harris, we jointly witnessed a very special return to Courtroom 600. In a much more modest sense, it was also for me a return to Courtroom 600. Why? Well, shortly after taking up my work as a full-time judge at the International Criminal Court in The Hague, I had the opportunity to speak on 21 October 2003 in the very same Courtroom 600 about the International Criminal Court, a conference organized by its distinguished Director, Prof. William Sheldon of the German-American Institute in Nuremberg. The title which I gave to my lecture may be of interest to you. I had thought about it quite a while. In the end, I concluded that the title should be: “The International Criminal Court – The Legacy of Nuremberg.”

The title mirrors an obvious truth. Members of the German delegation, which were together with me at the Rome Conference, – among them Claus Kress, who spoke this morning and Andreas Zimmermann, whom we will hear this afternoon – are all aware of this: Without the International Military Tribunal of Nuremberg, there would be no International Criminal Court. I am, therefore, very pleased to have been invited to make a presentation at this important conference. I am touched especially by the presence of two American friends, former Nuremberg Prosecutors, Messrs Whitney Harris and Benjamin Ferencz. Those who know the story of the Rome Conference will also know that both of them were, time and again, a source of encouragement and inspiration to the German delegation – you might even say that sometimes they acted as informal advisers to my delegation. Benjamin Ferencz advised us primarily on issues related to the crime of aggression and jointly we somehow managed in getting at least the crime of aggression recognized as an international crime of major concern to the whole world as referred to Art. 5 of the Rome Statutes. Having Whitney Harris on your side was an invaluable source of encouragement to the German delegation not to resign, not to give up in our quest for a credible International Criminal Court.

In my remarks I will deal with three questions:

- What are some noteworthy key features of the ICC?
- What are current tasks and challenges?
- Where does the Court stand today?

1 For editing purposes the original oral presentation given on 19 July 2005 has been generally maintained throughout the text.
3 Whitney A. Harris, Tyranny on Trial – The Trial of the Major German War Criminals After the End of World War II At Nuremberg, Germany 1945-1946 (rev. edition, 1999), with an introduction by Robert H. Jackson.
5 Benjamin Ferencz, Defining International Aggression: The Search for World Peace (1975).
I. Features of the Court

Before I summarize some key features of the Court, please permit me to make a brief announcement: In the latest edition of the American Journal of International Law, which appeared at the beginning of July 2005, you can find an article of mine entitled: “Construction site for more Justice – The International Criminal Court after two years” 6. This is the first article ever published by an active ICC judge in the American Journal of International Law. Obviously I am pleased that the AJIL accepted it so graciously, despite the well-known fact that the current U.S. Government does not have a very high regard for the International Criminal Court.

Now, what are some of the most noteworthy key features guaranteeing that the ICC will indeed remain an impartial, non-political and independent judicial institution engaged in fair proceedings? It is not possible in this short time to review all of the many detailed safeguards built into the Court. 7 But allow me at least to highlight some different aspects:

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 Art. 6-8 of the Statute of Rome. It is worthwhile to take a personal look at the long list of five different forms of genocide, 15 forms of crimes against humanity and more than 50 different war crimes. You will indeed discover that all of the crimes – and more – were prosecuted at the Nuremberg trials.

The Court’s jurisdiction 8 is not universal. It is clearly limited to the well-recognized forms of jurisdiction. The Court has jurisdiction over:

1. Nationals of States Parties; or
2. Offences committed on the territory of a State Party.
3. In addition, the Security Council can refer cases to the ICC independent of the nationality of the accused or the location of the crime.
4. The Security Council also has the power to defer an investigation or prosecution up to one year in the interest of maintaining international peace and security.

The ICC is a court of last resort. This is known as the principle of complementarity:

- In normal circumstances, States will investigate or prosecute offences.
- The Court can only act when States are unwilling or unable genuinely to investigate or prosecute offences. The primary responsibility to investigate and prosecute crimes remains a matter of the State.
- Furthermore, cases will only be admissible, if they are of such sufficient gravity to justify the Court’s involvement.
- The principle of complementarity was one of the many constructive inputs of U.S. negotiators at the Rome Conference. In passing, let me mention that other and more fingerprints of the able and competent U.S. delegation 9 can be found all over the Statute.

The ICC is an independent institution, created by a treaty open to any state to join voluntarily. The Court is not part of the United Nations, or any other political body. It exercises a purely judicial function. All cases are handled judicially, in accordance with its Statute. Numerous safeguards in the Statute also ensure that politically-motivated prosecutions will not take place. The Pre-Trial Chamber is one example of an important innovation in this regard. As I was just re-elected as President of the Pre-

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Trial Division with three Pre-Trial Chambers, I feel obliged to explain this safeguard. Generally the Prosecutor is under the control of the Pre-Trial judges. Before launching an investigation on his own initiative, the Prosecutor must first obtain authorization from the Pre-Trial Chamber. This ensures that investigations comply with the strict legal standards set forth in the Statute. These include the obligation upon the Prosecutor to consider whether there are reasonable grounds to believe that a crime within the jurisdiction of the Court has been committed and whether the case is admissible. The Pre-Trial Chamber also holds a hearing to confirm the charges against the accused, determining for itself that substantial grounds and sufficient evidence exist to proceed to trial. Only if the Pre-Trial Chamber is clearly satisfied may the prosecution go forward.

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

Another novelty in the Rome Statute is: Subject to the requirements of the rights of the accused and the guarantee of a fair trial, victims are substantially integrated into the Court’s proceedings – and this embraces both an acknowledged right to actively participate in the proceedings against the accused as well as a procedure to regain redress.

II. Current tasks and challenges

Since the start of my work in The Hague, I had the chance to follow, sometimes as an observer, sometimes as chairman of a working group, sometimes as a driving force, sometimes concerned or somewhat impatient, the manner in which the ICC continues to be confronted with at least four essential tasks. All of them have to be tackled concurrently under pressure and visible expectations of the international community while new difficulties arise on a daily basis:

First, the ICC must consolidate its ongoing effort to be an efficient and professional international organization while remaining a fully-functioning international court. Secondly, the Office of the Prosecutor needs to develop procedures, which are effective in the prosecuting war crimes, genocide, and other crimes against humanity. At the same time – and this is particularly difficult – the Office of the Prosecutor must successfully coordinate investigations in countries thousands of kilometers away from The Hague such as Congo, Uganda and in Darfur. I will return to this challenge in a moment. Thirdly, as the ICC is 100% dependent on the support of Member States, the Court must increasingly build up a new network of international criminal cooperation by winning over more State Parties so that it can work effectively.

Lastly – and this point is particularly difficult as it concerns an organizational weakness of the ICC as indicated in Chapter 9 of the Rome Statute – the States Parties and the Court must in a foreseeable future develop a system of best practices of effective criminal cooperation: direct, flexible, without bureaucracy, fast flow of information and supportive measures. This system must fully take into account that the ICC can only be as strong as the States Parties themselves. This concerns the
unresolved question about servicing arrest warrants and transferring suspected criminals to The Hague. It is obvious that the States Parties and all forces that support the ICC cannot allow the ICC lose its authority by other nations not carrying out arrest warrants with the result that an attitude prevails: “We have given you the money for the first budgets — now see yourselves, how you get the perpetrators before your Court...”. This will not work. One must hope that this is clear to all concerned. In the former Yugoslavia, most arrests by NATO and coalition forces have been for the International Criminal Tribunal. Likewise, States Parties and Security Council members must now find ways and means to support the ICC regarding the decisive issue of making arrests and transferring suspected criminals to The Hague.

III. The Court Today

Today the Court functions. The four bodies of the ICC, the Presidency, the Chambers, the Office of the Prosecutor and the Registry, are now working effectively in well organized parameters. We have currently a staff of around 450, most of them highly motivated, often working evenings and on the weekends. The Court’s daily workload and judicial proceedings are functioning better and better. Indeed, we are more and more in the critical transition from the organizational to the judicial phase of the Court’s operations: Four cases have been referred to the Prosecutor; three States Parties have referred cases by virtue of Article 14 of the Rome Statute. As you are undoubtedly aware, on 31 March 2005, the Security Council referred the situation in Darfur, Sudan to the ICC. The President of the ICC has assigned each case to one of the Pre-Trial Division chambers of which I am the President. Meanwhile, the Office of the Prosecutor is carrying out investigations in three other parts of the world: Uganda; the Democratic Republic of Congo; and, as announced by the Prosecutor on 6 June 2005, the situation in Darfur. Many investigative missions have been carried out by The Office of the Prosecution requiring that it conclude agreements necessary to complete its work, and participate in pre-trial hearings. Pre-Trial Chamber I, which has the responsibility for the situation in the Democratic Republic of Congo, has held the first hearings and issued several rulings. Our Public Information Office promptly disseminates information about these proceedings and the status of all situations. Apart from that, the judges have held a plenary session in which they adopted the Code of Judicial Ethics, which you can find on the ICC website. The Court’s Registry has undertaken a range of activities to support the Court in its field operations. The Kampala field office in Uganda is fully operational as will soon be the field office in Kinshasa in the Democratic Republic of Congo. Networks have been established with local counterparts to support the Court in carrying out its mandate and efforts are underway to provide information to affected communities about the work of the Court.

From a long-term perspective — as Chairman of the ICC Committee dealing with the future permanent location of the International Criminal Court —, the ICC is currently preparing a public solicitation to build a new court. We hope that among the international architects competing for the bid will also be the finest architects of the United States.

IV. Conclusion

In concluding let me note that the Court is one ratification away from having 100 members, Mexico probably being number 100 and more to come. It took the international community more than half a century after the Nuremberg Tribunal to establish a permanent international criminal court. Many obstacles still lie between the Court and the effective enforcement of international justice. Over time, however, with international cooperation, we can work together to fight against the depressing phenomena of impunity and build a culture of accountability.

11 www.icc-cpi.int.
Finally, let me reaffirm one point – which I have already made quite often, also before American audiences, in New York\(^1\) and elsewhere – and I continue to draw some encouragement from a personal letter of congratulations and good wishes dated 18 February 2003 from Jimmy Carter, which I received after my election as an ICC judge – the point is: The Court needs the support of the United States of America, this great country, which time and again had a decisive role in bringing about the fall of tyranny and in re-establishing the rule of law. Especially here in Nuremberg I need not elaborate on this. It remains our hope that the U.S. government will eventually make its peace with the ICC to which Americans have contributed so much. The Court needs American support morally, politically, materially and in other ways. It also needs American prosecutors and other U.S. staff working for the Court.

It remains also our hope that one day the judges may have an American colleague on the bench, maybe somebody with the stature of Justice Jackson or Whitney Harris whom they may elect as the first American President of the International Criminal Court. This day shall come. It will.

\(^{12}\) See statement by Hans-Peter Kaul in New York on 27 November 2000 before the Preparatory Commission of the United Nations for the International Criminal Court on the occasion of the ratification of the Rome Statute by Germany.
Hans-Peter Kaul

**Der Internationale Strafgerichtshof – Hauptmerkmale und künftige Herausforderungen**

In diesem Beitrag werden zunächst die wichtigsten Merkmale und Sicherungen des Römischen Statutes des Internationalen Strafgerichtshofs (IStGH) genannt, die garantieren sollen, dass der IStGH eine unparteiische, nicht-politische und unabhängige gerichtliche Institution ist und bleiben wird, die mit allen rechtsstaatlichen Garantien für ein faires Verfahren ausgestattet ist. Dies findet seinen Ausdruck etwa in der beschränkten Gerichtsbarkeit des IStGH, dem Prinzip der Komplementarität, der Einschaltung der Vorverfahrenskammer, die den Chefankläger kontrolliert und die im Rom-Statut verankerten Rechte des Angeklagten.


Der Autor schließt mit dem erneuten Ausdruck der Hoffnung, dass die Regierung der Vereinigten Staaten eines Tages ihren Frieden mit dem neuen Weltstrafgericht schließen wird, zumal Amerika und die Amerikaner zur internationalen Strafgerichtsbarkeit bereits so viel beigetragen haben.