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THE INTERNATIONAL CRIMINAL COURT AND THE ENFORCEMENT OF INTERNATIONAL JUSTICE

**The Nineteenth Blaine Sloan Lecture on
International Law**

Pace Law School

March 8, 2005

**Presented by Judge Philippe Kirsch, President of
the International Criminal Court**

I. INTRODUCTION

Thank you very much for this very candid introduction. It is very appropriate to be introduced by Ben Ferencz, whose involvement with international criminal law and efforts to establish an international criminal court long precedes my own. In the *Einsatzgruppen* case, he made his famous “plea for humanity to law.”¹ He repeated his plea for nearly 50 years until a permanent international criminal court was established. And now today, Ben Ferencz is making that plea again on behalf of humanity to ensure the ICC is strong and effective. I would like to thank Dean Friedman, the Pace International Law Review, the Pace International Law Society, and all those who have made this event possible.

It is my particular pleasure to deliver the prestigious Blaine Sloan Lecture on International Law. I know there is a strong awareness of the importance of the International Criminal Court (hereinafter “ICC” or “the Court”) here at Pace Law School. I note that on October 1, 2005 the first annual ICC Moot Court will be held here. It is the importance of such events that contribute to the essential task of building knowledge and awareness of the Court. I always thought, and I con-

¹ In re Ohlendorf and Others (Einsatzgruppen Trial), 15 I.L.R. 656 (U.S. Mil. Trib. 1948)

tinue to think, that ignorance is the worst enemy of the Court, and ignorance can best be cured through this kind of lively event. I wish all of you involved in that event success.

In recent years the Blaine Sloan Lecture has acknowledged the great importance of international criminal law and the role of the ICC in international law. In 1997, when Ben Ferencz delivered the Sloan lecture on the verge of the Rome Conference, he noted that the creation of the Court was an evolutionary process stretching back even before the Nuremberg trials.² And that observation, which is absolutely correct, was repeated in March 2000 by another Sloan lecturer, Cherif Bassiouni,³ another man who for years did a lot in preparing the ICC. At that time, the Rome Statute had been adopted, but other critical preparatory work was very much under way.

Now the Court exists and we are entering the judicial phase of our operation. I would like to talk to you about three things: 1) the historical context which led to the establishment of the Court; 2) some key features of the Court; and 3) what to expect from the Court.

II. THE INTERNATIONAL CRIMINAL COURT IN HISTORICAL CONTEXT

I'll talk first about the historical context, not in as much detail and sophistication as past lecturers here, but because that context is essential to understanding both the reason behind the creation of the ICC, and particular features that were built into the ICC.

The creation of the Court was a process which took over 50 years. Initial interest began in the wake of the Nuremberg trials and the Tokyo Tribunal. Those efforts, however, were largely frustrated by the cold war. And during those long years, the legacy of Nuremberg was kept alive, primarily, in the writings of Ben Ferencz, Cherif Bassiouni, and others.

In the meantime, the atrocities continued to be committed, for example, in Cambodia by Pol Pot, and in Uganda by Idi Amin. And in those cases, as well as others, it was clear that

² Ben Ferencz, Blaine Sloan Lecture, *International Criminal Courts: The Legacy of Nuremberg*, PACE INT'L L. REV. 203 (1998).

³ Cherif Bassiouni, Blaine Sloan Lecture, *Searching for Justice in the World of Realpolitik*, 12 PACE INT'L L. REV. 213, 223-24 (2000).

the national courts all too often were either unwilling or unable to punish the perpetrators. Without an international court to act, where national courts could not or would not, the perpetrators of the most serious international crimes were protected by a wall of impunity.

With the end of the cold war, the creation of the ICC became again a realistic possibility, and in 1989, the same year that the Berlin Wall fell, the United Nations (hereinafter "UN") resumed its work on the establishment of the ICC. At this point I would like to mention Roy Lee, who used to be at the UN, and who did a lot of that work. In the early 1990's, in response to crimes committed on a massive scale in the former Yugoslavia and in Rwanda, the UN Security Council established *ad hoc* tribunals for each of those countries. The rationale behind creating international tribunals is that when united systems fail, they can further three objectives: to punish individuals responsible for the most serious international crimes; to bring justice to victims; and, over time, to contribute to the deterrence of potential perpetrators and the building of a culture of accountability. The work of international criminal tribunals is also linked to maintaining security, guaranteeing lasting respect, and the enforcement of international justice. What the *ad hoc* tribunal did was to demonstrate that international criminal tribunals were a realistic possibility.

But these [*ad hoc*] tribunals have a number of limitations. They are geographically limited. They respond primarily to events in the past. Their establishment involved substantial costs and delays. And last but not least, their creation depends on the political will of the international community of the day. In the case of an *ad hoc* tribunal, they required a decision by the Security Council acting under Chapter VII of the Charter. Because of all these factors, both the punishment and the deterrence function of the *ad hoc* tribunals are limited.

In the recent speech of his father's experience as a Nuremberg prosecutor, United States Senator Dodd, from the neighboring State of Connecticut said, "To truly be called effective, a Court must not simply punish the guilty then disband. It must serve as a permanent reminder to any potential criminals that they, too, will be held accountable. Such a Court cannot only

punish crimes – it can deter them.”⁴ So a permanent, truly international court was necessary to respond to the most serious international crimes and to overcome the limitations of the *ad hoc* tribunals. In 1998, the UN General Assembly convened the Rome Conference, which established the ICC.

Even though I am not going to talk about the Rome Conference, I have to mention that the methods of the Court's creation were influenced by its predecessors. Unlike the post-World War II tribunals, which were sometimes criticized as “victors' justice;” or *ad hoc* tribunals, which are seen by some as impositions of the Security Council, the ICC was created by an international group. In other words, it was created, finished and established by the states for themselves. It is independent from the UN, although it maintains an important relationship with the UN. All states were invited to participate in the negotiations of the Statute, and the vast majority, 160 nations, did in fact, participate. In negotiating the Statute, states sought wide agreement without compromising the key values and objectives behind the fair and impartial court. Efforts towards universal acceptance were largely achieved, and on July 17, 1998, the Statute was approved by 120 states.

The atmosphere at the end of the Rome Conference was divisive. After the Rome Conference, a Preparatory Commission met for three and a half years. That commission was charged with developing the Court's subsidiary instruments, including the Rules of Procedure and Evidence, and the Elements of Crime. At the Preparatory Commission, in which I have had the privilege to participate, the top priority of negotiators was to achieve what was not being achieved in Rome - that was universal acceptance, universal support for what was being done. And indeed, in three and a half years, all decisions of the Preparatory Commission were taken by consensus, including the two instruments that were referred to, the Rules of Procedure and Evidence and the Elements of Crimes.

By building consensus behind the Court, the Preparatory Commission contributed, I think, significantly, to the interna-

⁴ Senator Christopher J. Dodd, *Prosecuting the Peace of the World: The Experiences of Thomas J. Dodd at the International Military Tribunal, Nuremberg, Germany, 1945-46; February, 15, 2005; available at http://dodd.senate.gov/press/Speeches/109_05/0215.htm.*

tional support for the Court. From 120 states who voted for the Court in 1998, the number jumped to 139 before the deadline for signature expired at the end of 2000. Four other States that did not sign have since acceded to the Statute.

Such broad acceptance in international negotiations, at least to my knowledge, is absolutely impressive. Normally, states vote for a treaty because it is easy to vote for a treaty and then forget about it. In the case of the ICC statute, it is remarkable, given the statute's complexity and the effort that states would have to make in order to implement its provisions into their domestic legislation, that such a leap forward took place. And I think this is reflection of the time, strength and momentum behind international justice. Now 98 countries, representing broad geographical diversity, are a party to the statute. It is one thing to create an instrument and have good reasons to do it; it is another to create an instrument that can be supported by many states.

III. FEATURES OF THE COURT

I would like now to turn to the second part of my presentation of the Court. I will begin with aspects of the Court's jurisdiction and the admissibility of cases. Then, I'll move to the conduct of the proceedings.

A. *Jurisdiction and Admissibility*

The Statute provides detailed rules governing jurisdiction and admissibility, including rules that determine who may raise objections to jurisdiction and admissibility, and at what stages. In any case, it would be for the Court to decide those issues in accordance with the applicable law. The Court's foundation on the rule of law and not on politics is, of course, the defining aspect of the Court.

The first aspect of jurisdiction is crime. The Court has jurisdiction only over the most serious crimes of concern to the international community as a whole; genocide, crimes against humanity and war crimes. These crimes are well established in customary international law, and have been published by the Nuremberg, Tokyo, and Security Council Tribunals, as well as by national courts. Some crimes are detailed in the Statute in a way not done before. Rape, for example, was clearly a crime

under customary law, but was not spelled out as a crime in the Geneva Convention. Rather, it was subsumed under broader definitions. Now, rape and crimes of a sexual nature are described specifically in the Rome Statute. The Rome Statute contains the detailed definitions, and those definitions were supplemented by the Elements of Crimes to which I referred earlier, which provide additional details and clarity. Those elements will assist the judges to interpret and apply the detailed definition of crime. That means the necessary context for the commission of the crime: *mens rea* and *actus reus*. The Elements of Crimes were included largely due to the efforts of the United States.

The concept of specifying these elements was foreign to many other criminal jurisdictions. Indeed, at the Rome Conference, I doubted that some of those elements would be accepted because there was such opposition to them. On reflection, it was a good idea to include the Elements of Crimes. They allowed the delegates to better understand what the crimes were, and to update some definitions to what is currently understood to be an international crime rather than depend on the definitions of the early 20th century.

There is also another crime included in the Statute - the crime of aggression. Inclusion of the crime of aggression in the Statute was deemed essential by many states because of the symbolic nature it had. Many states thought that without the crime of aggression, many other crimes would be avoided. However, states could not agree either on a definition of aggression or on the conditions that would allow the Court to determine its jurisdiction. Aggression was listed as a crime, but the exercise of the Court's jurisdiction over the crime of aggression was deferred. These definitions and conditions had to be consistent with the UN Charter and agreed upon by amendment to the Statute. Amendments will take place at the earliest at a Review Conference scheduled to be held in 2009, seven years after the Statute's entry into force.

B. *Jurisdiction Ratione Temporis*

The jurisdiction of the Court is limited to offenses committed after the Statute's entry into force on July 1, 2002. In addition, where a state joined the Court after July 1, 2002, the

Court would only have jurisdiction over offenses committed after the Statute's entry into force date for that particular State.

C. *Exercise of Jurisdiction By the Court*

The Court does not possess universal jurisdiction, rather it is specifically limited by its Statute. Under customary international law, there may be five possible bases for a court to exercise jurisdiction: these are 1) territoriality, the offense that occurs on another state's territory; 2) nationality of the accused; 3) nationality of the victim; 4) protection of certain state interests; and 5) universal jurisdiction over certain offenses. At the Rome Conference, a number of those bases for jurisdiction were considered. Many states wanted something similar to universal jurisdiction. But going so far was unacceptable to other states, and eventually, the conference decided to limit the exercise of the Court's jurisdiction to two bases of jurisdiction: crimes committed on the territory of a state party, or by nationals of a state party accused of crime.

The structure of the Court also recognizes the special role of the Security Council in maintaining peace and security. Under the Statute, the Security Council may refer situations to the Court instead of creating an *ad hoc* tribunal. A referral by the Security Council is independent of the nationality of the perpetrator or the territory where the alleged crime was committed. A referral by the Security Council must be made under Chapter VII of the UN Charter, which requires the affirmative votes of nine Council members and the concurring votes of the permanent five members. In addition, the Security Council can refer the situation to the Court, but it can also defer an investigation or prosecution for a period of one year, again acting under Chapter VII of the UN Charter.

D. *Admissibility*

Even where the Court may technically exercise its jurisdiction, it is constrained by the principle of complementarity, which governs the admissibility of a case. The ICC is premised on the idea that national courts have primary responsibility for punishing crimes within their jurisdiction. This is actually stated, in so many words, in the preamble of the Statute. The need for an international criminal court arises only where na-

tional courts cannot or will not act. Under this principle of complementarity, the case will generally be inadmissible if it has been investigated or is undergoing investigation by the State party. In addition, a case is inadmissible if prosecuted by a State with jurisdiction over the offense.

This is of course completely contrary to the jurisdiction of the *ad hoc* tribunals, which have the right to request that a state surrender a person whenever the tribunal deems it necessary. This is not the case of the ICC. Under the Rome Statute, a case would be admissible if the state is unwilling or unable, generally, to carry out investigation or prosecution. For example, if proceedings were conducted solely to shield a person from justice. The Statute includes detailed definitions of both unwilling and unable. For example, "unable" covers the situation of a post-conflict state where national judicial systems have collapsed. Now, assuming that the case is otherwise admissible, the ICC is intended to focus on only the most serious offenses. So, a case will also be inadmissible if it is not of sufficient gravity to justify further action by the Court.

Issues of jurisdiction and admissibility must be considered in light of the procedural regime established by the Statute, which also governs who may raise issues before the Court and in what manner. The statute provides that the situation may come before the Court in three ways: it may be referred to the prosecutor; by finder state party; or the Security Council. If the prosecutor in such a case decides not to investigate the situation that has been referred to him or her, the state or the Security Council may ask the Court to review the prosecutor's decision.

The prosecutor is also entitled to initiate an investigation *proprio motu*. This was a controversial point in Rome. Not all states were favorable to an independent prosecutor, but it was seen by many as an essential requirement that the Court not to be controlled by any political body. Now, if the prosecutor prevails, and determines to commence investigations, he must first seek approval from the Court. Specifically, the Pretrial Chamber must authorize any such investigation. In any case before it, the Court has an obligation to satisfy itself that it has jurisdiction and that the legal requirements of the Statute are met. It may also determine the admissibility on its own initia-

tive. The Prosecutor, a State or the accused may challenge jurisdiction or admissibility according to the statute. Either party to a case may also appeal any decision with respect to jurisdiction over admissibility in accordance with the Rules of Procedure and Evidence.

IV. CONDUCT OF PROCEEDINGS

Now turning to the conduct of proceedings, all efforts to create international courts face a common challenge of obtaining agreement among states with diverse ideas on how proceedings should be conducted, and the ICC was no exception. The diversity of systems is not an insurmountable obstacle if states can establish sufficient common ground. In connection with the establishment of the Nuremberg Tribunal, as Justice Robert Jackson observed, "Legal systems exhibit disparities in their methods of procedure greater than the principles of law they serve."⁵ I think it is an accurate statement, and sometimes I remind my own judges of that as discussions become too animated. The same observation applies to the creation of the ICC. The Statute and the Rules of Procedure and Evidence constitute a self-contained legal system. The system accommodates concerns of representatives of diverse legal systems, but the paramount concerns are the commonly held principles of the fair trial, and the independence and impartiality of the Court.

When you look at procedures before the ICC, it is important to focus not on whether proceedings comply with every detail of our national experience, but whether the proceedings comply with the essential principles of due process and a fair and impartial Court. That can sometimes be a challenge for lawyers. Again, Justice Robert Jackson, regarding the Nuremberg Tribunal said, "Members of the legal profession acquire a rather emotional attachment to forms and customs to which they are accustomed and frequently entertain a passionate conviction that no unfamiliar procedure can be morally right."⁶

⁵ *Preface to Report of Robert H. Jackson*, UNITED STATES REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIALS: LONDON, 1945, available at <http://www.yale.edu/lawweb/avalon/imt/jackson/jackson.htm>.

⁶ *Id.*

You will be happy to know that I will not give you a detailed recitation of the procedural law of the Court. Sometimes I'm tempted to summarize all the procedures by saying, watch Law & Order to find everything you need to know. Honestly, I cannot comment on how similar the Court is to what American lawyers or lawyers-in-training would consider as part of criminal procedure. But I would in this context note a statement made by the well-known Professor and former Legal Adviser to the State Department, Monroe Leigh, on behalf of the American Bar Association. Speaking to the U.S. Congress he said, "The list of protections in the Rome Treaty should not be viewed with suspicion, rather with pride because it embodies rights which were first constitutionalized in the United States Constitution." He went on to say, "It cannot be denied that the Treaty of Rome contains the most comprehensive list of due process protections which has so far been promulgated."⁷

I would like to mention just a few key features safeguarding the integrity of the proceedings. First the Court is premised on the idea of an independent, impartial judiciary, which is absolutely essential to the fair conduct of proceedings. Detailed provisions govern the election of judges, requiring them to have both excellent general qualifications as well as specific relevant experience. If a question arises regarding the partiality or perceived partiality of a judge, clear procedures exist for the recusal or disqualification of the judge.

The rights of the accused are fully protected at all times. The Statute includes the presumption of innocence, the right to counsel, the right of the accused to examine witnesses against him or her, and prohibition of in absentia trials. Further, the Statute provides clear protection for the rights of persons during investigations, including freedom from arbitrary arrest or detention, the right to counsel, the right to remain silent, and the requirement that suspects be notified of their rights prior to questioning.

One additional feature, which is particular to the ICC, concerns the rights of victims and witnesses, who are also specifically protected throughout the Statute and the Rules. Special care has been taken to account for the needs of victims of vio-

⁷ Hearings before the House Committee on International Relations, July 25-26, 2000, pp. 95-96.

lence, particularly against woman and children. This is a major innovation because in the case of *ad hoc* tribunals, there were provisions for the good treatment of victims who were essentially witnesses for the prosecution or for the defense, but not in their own right. The Rome Statute protects the victims in their own right rather than merely as witnesses.

The Statute also contains another important innovation - the Pre-trial Chamber. I referred earlier to questions of jurisdiction and admissibility. The principal role of Pre-trial Chamber is to determine questions of jurisdiction and admissibility. The chamber ensures the efficiency of the proceedings, and also acts as an important check on the prosecutor. As mentioned earlier, the Pre-trial Chamber must authorize any *proprio motu* investigation by the prosecutor. Further, it acts to protect the rights of suspects, victims, and witnesses. Essentially, this pre-trial chamber, which is not present in any other tribunal, could be seen as an additional layer of protection. We hope it will serve as a factor of efficiency by evacuating from the trial itself any preliminary issues that have encumbered the trials conducted by the *ad hoc* tribunal. The Pre-Trial Chamber will allow the trial chamber to focus only on the determination of the key points of each case.

V. THE COURT TODAY AND GOING FORWARD

We have seen the imperative need for the Court. We have seen why the ICC is well suited to fill this need. I would like to turn now to what we can expect from the Court going forward.

Obviously, much work has been done on building the Court since 2002. We are now beginning the judicial phase of the Court's operations. Three countries, Uganda, Democratic Republic of the Congo, and the Central African Republic have referred alleged crimes committed on their territory to the Prosecutor. The prosecutor's office is conducting investigations into the situations in northern Uganda and Congo. The case of the Central African Republic is still in the preliminary phase.

In his report of last August on the *Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, UN Secretary-General Kofi Annan observed "the Court is already having an important impact by putting would-be violators on notice

that impunity is not assured and serving as a catalyst for enacting national laws against the gravest international crimes.”

The Pre-Trial Chambers have begun to hold their first preliminary proceedings. The Court is beginning to have a more direct impact, which of course can only grow as it begins to regularly conduct proceedings.

The Court cannot be seen as an isolated institution. It will never be able to end impunity or really make a significant dent against impunity alone. Its success will depend upon the support and commitment of states, international organizations, and civil society. Because the Court's jurisdiction is limited to the nationals and territory of State Parties, continued ratification of the Statute is essential for the Court to have a truly global reach. Because the Court is complementary to national jurisdiction, states will continue to have primary responsibility to investigate and prosecute crimes. But when the Court does act, it will require cooperation from states at all stages of proceedings, such as executing arrest warrants, providing evidence, and enforcing sentences of the convicted. The Statute provides detailed provisions of the cooperation envisaged and procedures for obtaining cooperation from the states.

International organizations can also support the Court in a number of ways. First of all, support of the UN is particularly important in this regard. In October of last year, the Secretary General Annan and I concluded a relationship agreement on behalf of our two institutions, which provides for effective cooperation while recognizing the independent, judicial nature of the Court. Non-governmental organizations, and civil society more broadly, are also instrumental to the work of the Court. To that end, NGOs play an important part in urging ratification of the Statute by the states, and in assisting states in developing legislation implementing the Statute. And also, because NGOs possess knowledge directly relevant to the Court's work, they play a critical role in increasing understanding and awareness of the Court, which is particularly important in the field where the Court is actually going to operate.

VI. CONCLUSION

This year marks the 60th anniversary of the creation of the Nuremberg Tribunal. That tribunal was a necessary response

to the horrible atrocities that preceded it. Too many years - and too many victims - have passed while international communities have tried to set up a permanent court.

Two months ago, the UN General Assembly, in a historic special session, commemorated the liberation of Nazi concentration camps. On that occasion, my friend Ben Ferencz commented:

The highest tribute we can pay to the memory of those who perished in past Holocausts is to prevent such atrocities from happening again. We must hold accountable those leaders responsible for the most massive crimes against humanity that terrorize innocent people everywhere. That is why the establishment of the ICC stands today as one of the most remarkable achievements of the past century. Only equal justice applied equally to everyone can lead to a more peaceful and humane world.⁸

The ICC may be are our last hope to end the prevailing culture of impunity and to secure what Ben Ferencz has long championed as “the legacy of Nuremberg.” The ICC cannot alone end impunity. But with the support of states, international organizations NGOs, and individuals, the Court can help build a culture of accountability. We cannot fail.

A NOTE ABOUT THE SPEAKER:

Judge Kirsch was elected President of the ICC for a six-year period from the Western European and Others Group of States (WEOG); he is assigned to the Appeals Division.

He is member of the Bar of the Province of Quebec and of the Canadian Council on International Law and was appointed Queen’s Counsel in 1988. He has extensive experience in the process of the establishment of the ICC, international humanitarian law, and international criminal law.

In 1998 Judge Kirsch served as Chairman of the Committee of the Whole of the Diplomatic Conference of Plenipotentiaries on the Establishment of an ICC. He was also Chairman of the Preparatory Commission for the ICC (1999 to 2002). He served as

⁸ Press release, Coalition for the International Criminal Court (Jan. 24, 2005), at <http://www.commondreams.org/news2005/0124-13.htm>

Chairman of the Drafting Committee of the International Conference on the Protection of War Victims (1993), Chairman of the preparatory and subsequent Intergovernmental Working Groups of Government Experts on the Protection of War Victims (1993, 1995), and Chairman of the Drafting Committee at the 26th and 27th International Conferences of the Red Cross and the Red Crescent (1995, 1999). He was Chairman of the Canadian National Committee on Humanitarian Law (1998 – 1999) and member of the Group of International Advisers to the International Committee of the Red Cross (2000 – 2003).

He has extensive experience in the development of international criminal law with regard to issues such as various acts of terrorism; suppression of unlawful acts against the safety of maritime navigation; unlawful acts of violence at airports serving international civil aviation; safety and security of UN and associated personnel; and the taking of hostages. He has written extensively on the ICC and other international legal issues.