TOR KREVER

DISPENSING GLOBAL JUSTICE

The International Criminal Court is the newest would-be global institution to have been established by the big powers since 1945.* Its Statute, agreed at a conference in Rome in 1998, was ratified by the minimum necessary sixty states in 2002; the Court opened its doors in The Hague the following summer. The ICC raises both political questions—its relation to the major powers, above all the United States, and its function in world conflicts—and juridical ones. The history of international criminal law tends to be told as a teleological story of irreversible progress, in which the violence of cold state calculi gives way to a supra-political justice. Milestones along the way include the pre-1914 attempts to sanitize war between the European powers, when Swiss lawyers floated the idea of an international tribunal to back up the first Geneva and Hague Conventions, and the Versailles Treaty's arraignment of the Kaiser for offences against 'international morality and the sanctity of treaties', never followed through. More salient have been the 1945–46 Nuremberg and Tokyo trials of selected German and Japanese officials; the *ad hoc* International Criminal Tribunal for Yugoslavia, set up in 1993 by the UN Security Council to try individual Serbian leaders, and a much smaller number of Croatians and Bosniaks, for 'crimes against humanity'; and the less celebrated International Criminal Tribunal for Rwanda, set up by the UNSC in 1995. At the end of this narrative stands the ICC, 'the most dramatic marker yet in the long human struggle for accountability'.[1]

The actual story is a less romantic affair, marked throughout by power politics. This essay will examine the context of the ICC's establishment, the motives of the states that set it up and the record of its operations to date, with the aim of providing a rough cadastral survey of the

juridical and political terrain, as the basis for an initial assessment of the Court's first decade.

Precedents

Traditionally, international law has been understood as a horizontal framework, based on equal, sovereign states conforming to mutually agreed rules and treaties. States might breach international legal obligations, but criminal responsibility did not attach to the individuals involved. The post-war Nuremberg and Tokyo tribunals marked a major break with this conception: for the first time in modern history, individuals from the vanquished powers were to be held liable for infractions, before a tribunal constituted by their victors. The US overrode the hesitations of the other Allies, hammering out the legal framework for an International Military Tribunal to prosecute selected figures from the Axis powers. The setting up of the IMT was announced on 8 August 1945, in the interlude between the atomic bombing of Hiroshima and that of Nagasaki; it issued its first indictments from the Palace of Justice at Nuremberg two months later. In Tokyo, General MacArthur himself proclaimed the establishment of the International Military Tribunal for the Far East, in January 1946, and proceeded to appoint its judges.

Whatever purposes were served by the Nuremberg and Tokyo tribunals, it is widely acknowledged that justice as such was not among them. The US Chief Justice Harlan Fiske Stone dismissed the Nuremberg trial as a 'high-grade lynching party' operating under a 'false façade of legality'—'too sanctimonious a fraud' for his liking.[2] Many, Germans included, who were happy to see Nazi officials executed for what they had done nevertheless baulked at this type of court. The principles of valid law, impartiality and legally established jurisdiction were trampled underfoot, along with basic matters such as *habeas corpus*, the right to appeal and the admissibility of evidence. As with Stalin's show trials, there was a distinct air of inevitability about the proceedings: 'They will all hang', Soviet prosecutor Andrei Vyshinsky famously toasted.[3] The indictments

---

* I am grateful to Teresa Almeida Cravo and Rob Knox for their critical comments on an earlier draft, and to Paul Clark for discussions of the Libyan cases.

[1] Erna Paris, *The Sun Climbs Slow: The International Criminal Court and the Struggle for Justice*, New York 2009, p. 19.

[2] See Alpheus Thomas Mason, *Harlan Fiske Stone*, New York 1956, pp. 715–6.

[3] Telford Taylor, *The Anatomy of the Nuremberg Trials*, New York 1992, p. 21.

included newly minted crimes—'war of aggression', 'crimes against humanity'—that breached the principle of *nullum crimen, nulla poena sine lege* (no crime, no punishment in the absence of law), amounting to *ex post facto* criminalization. The courts' jurisdiction was established by fiat of the occupying powers, who appointed both prosecutors and judges, while granting themselves impunity. As the Indian judge Radhabinod Pal put it in his dissenting judgement at Tokyo, it appeared that 'only a lost war is a crime'. The impunity of the victors shocked Hans Kelsen, perhaps the foremost proponent of an international criminal court at the time, who declared that Nuremberg could serve only as a negative example for international justice.[4]

As for the principle of individual accountability, the novel claim of the Nuremberg and Tokyo tribunals, it was regularly over-ridden by the political and economic interests of the Allies. Not only Emperor Hirohito but the entire Imperial Family was shielded by MacArthur. 'Repentance'—in practice: expression of willingness to serve the new masters—trumped accountability for most ex-Nazis. Nor could Nuremberg and Tokyo be said to serve a deterrent effect, since the overwhelming military superiority of the Allies had already provided that. Instead, it has been argued, the value of the Allies' tribunals was not so much juridical as educational and expressive: international show trials, in other words. Yet expressive of what? The German writer and jurist Ronen Steinke has suggested that what international criminal courts can supply above all is an 'authoritative confirmation of a certain narrative of "historical truth"'.[5] In this, Nuremberg was very successful. The US had been prepared to deal with Hitler's Germany until December 1941, and with Vichy France until the end. In the late 1930s, Britain and France had calculated on backing the Nazi regime against the USSR. The very features that compromised Nuremberg and Tokyo in legal terms—*ex post facto* proclamation of 'crimes against humanity' and 'war of aggression'; impunity of the victors—were highly effective in establishing a new narrative 'truth' of the Allies as defenders of peace and humanity.

---

[4] See Hans Kelsen, 'Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?', *International Law Quarterly*, vol. 1, no. 2, Summer 1947, pp. 153–71. For a present-day critique see Danilo Zolo, *Victors' Justice: From Nuremberg to Baghdad*, London and New York 2009.

[5] Ronen Steinke, *The Politics of International Criminal Justice: German Perspectives from Nuremberg to The Hague*, Oxford 2012, p. 9.

The victors' impunity and their identity as international peacekeepers were both inscribed in the US-drafted Charter of the United Nations, which restricted the right to determine the legality of wars to the five permanent, veto-wielding members of the UN Security Council. The UN Charter was approved in San Francisco in June 1945, just weeks before the establishment of the Nuremberg Tribunal; many thought that an international criminal court along similar lines would be a natural extension of Washington's global institution-building. A model statute for an international court to try genocide was included in early drafts of the Convention for the Prevention and Punishment of the Crime of Genocide, which the UN General Assembly adopted in 1948. The proposal was dropped from the final agreement, and the General Assembly instead tasked the UN's International Law Commission with the preparation of a draft statute for a permanent international criminal court and a code of crimes. The ILC submitted its blueprint for a new juridical institution six years later. But Washington would have little use for such a body during the Cold War, as the US perpetrated its own acts of aggression in Korea, the Dominican Republic, Vietnam, Laos, Cambodia, El Salvador, Grenada, Honduras, Nicaragua and elsewhere.

Exemplars

It was only with American victory in the Cold War that international criminal justice would re-emerge as a potent tool in the politics of the 'new world order'. An initial proposal, floated by German Foreign Minister Hans-Dietrich Genscher in April 1991, in the wake of the first Gulf War, was to arraign Saddam Hussein before a 'Nuremberg-type' tribunal. The Bush Administration was cool about the idea; the Butcher of Baghdad would no doubt use the dock to spell out how close his links with Washington had been. But the German move was significant. In the decades after Nuremberg, German jurists had complained bitterly of the victors' justice imposed there, deploring the infringement of *nullum crimen* and other principles of positive law. With the end of the Cold War, however, the Federal Republic of Germany was in a position to impose some victor's justice of its own on the functionaries of the GDR. Special prosecutorial departments were established under the Länder Ministers of Justice; the first indictments were issued in September 1991—the accused included East German border guards, officials of the National Defence Council and members of the SED Politburo. Nearly 100,000

ex-GDR officials were investigated for state crimes over the course of the 1990s; around 500 were sentenced.[6]

Once again, the need to establish a historical 'truth' was paramount. 'We must succeed in delegitimizing the GDR regime' explained Kohl's Justice Minister Klaus Kinkel, a protegé of Genscher and soon to succeed him as Foreign Minister. The principle of *nullum crimen* would be waived, the Bundesverfassungsgericht confirmed.[7] Though the accused had broken no GDR laws, they should have acted according to the laws of humanity, as deduced from the formulations of the Universal Declaration of Human Rights. Though some denounced the spectacle, the *de jure* criminalization of the GDR regime helped to legitimize a social reconstruction of the eastern Länder, orchestrated from Bonn, that involved mass redundancies across all walks of life.

The break-up of Yugoslavia proved more fertile ground than Iraq for the application of international criminal justice. Kohl and Genscher's 'preventive recognition' of Slovenian and Croatian secession from the Yugoslav Federation in 1991 was acclaimed as a triumph for a newly assertive German foreign policy. Kohl forced it through as European Community policy during an all-night Maastricht negotiating session in December 1991. 'Preventive recognition' was supposed to ensure a ceasefire between the breakaway republics and the federal forces, but it was proclaimed without ensuring any security for the large Serbian minority in Croatia and without consideration for its knock-on effects on an overall Yugoslav settlement. Washington, preoccupied with the Middle East and the dissolution of the Soviet Union, had opposed involvement in Yugoslavia. But Germany's 'getting out ahead', as the State Department's Lawrence Eagleburger put it, spurred the US to take a leading role, pushing for Bosnia–Herzegovina to secede—a prospect at which Germany had baulked. The Bosnian War erupted in April 1992, the day the West recognized the republic's independence. Bosnian Serbs, inheriting artillery from the Yugoslav Army as it withdrew, aimed to secure their own zones of control; Tudjman's forces planned for a greater Croatia.[8] By August 1992 the Western media was streaming images, inevitably

[6] Steinke, *Politics of International Criminal Justice*, p. 63.
[7] Steinke, *Politics of International Criminal Justice*, pp. 68–72.
[8] Susan Woodward, *Balkan Tragedy: Chaos and Dissolution after the Cold War*, Washington DC 1995, pp. 183–8.

selective, of Bosnian Serb atrocities and 'concentration camps'. Kinkel, who had now succeeded Genscher as German Foreign Minister, took up a Human Rights Watch call for an international tribunal.[9] The incoming Clinton Administration would take a harder line on the Serbs: vetoing a Vance–Owen power-sharing proposal, implementing a no-fly zone and NATO strikes on Bosnian Serb positions. Madeleine Albright saw an international criminal tribunal as fitting well with this plan.

In May 1993, UN Security Council Resolution 808 established the International Criminal Tribunal for the former Yugoslavia, the first such tribunal since the 1940s, to investigate and prosecute 'persons responsible for serious violations of international humanitarian law'. The ICTY installed itself in the Aegon Insurance building in The Hague, issuing its first indictments in November 1994. A close and lasting collaboration ensued between the Chief Prosecutor's office and NATO personnel—in effect, the Court's police force. While Washington brokered a Croat–Muslim agreement to unite against the Bosnian Serbs, re-equipped the Croatian Army and monitored its brutal ethnic cleansing of at least 200,000 *krajina* Serbs, Chief Prosecutor Louise Arbour was happy to look the other way.[10] The narrative to be established would paint the complex tragedy of Yugoslavia as a case of 'Serb aggression', excluding consideration of the role that outside powers had played. When NATO's two-month bombardment of Yugoslavia began in 1999, Arbour's response was to issue an indictment against Milošević. NATO's use of cluster bombs and its attacks on civilian trains, truck convoys, bridges and media centres fell within the jurisdictional competence of the Court. The Chief Prosecutor's office dismissed the possibility of indictments against Western leaders after a perfunctory inquiry operating on the assumption that 'NATO countries' press statements are generally reliable.'[11] NATO publicist Jamie

[9] Pierre Hazan, *Justice in a Time of War*, College Station, TX 2004, p. 20.

[10] Three Croatian Army generals, Ante Gotovina, Ivan Čermak and Mladen Markač, were eventually prosecuted at the ICTY in 2008 for their roles in 'Operation Storm'. All three were acquitted (Gotovina and Markač on appeal) and returned to heroes' welcomes in Croatia.

[11] Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, 13 June 2000, para. 90. Later the third Chief Prosecutor would write that, with the response to her request for information about NATO actions, 'I understood that I had collided with the edge of the political universe in which the tribunal was allowed to function': Carla del Ponte, *Madame Prosecutor: Confrontations with Humanity's Worst Criminals and the Culture of Impunity*, New York 2009, p. 60.

Shea put it even more bluntly: 'It was the NATO countries who established the Tribunal, who fund it and support it on a daily basis.'[12] Here, once again, was a quintessential case of victors' justice: big powers using *post bellum* trials—or, in the case of Milošević, *in bello* trials—to criminalize their defeated opponents, while their own conduct remains above judicial scrutiny.[13]

Blueprints

Buoyed up by the launching of the ICTY, human-rights lobbies renewed their efforts for a permanent international tribunal. The UN's ILC had been tasked once again with drafting a statute for an international court; diplomatic interest in its work now grew.[14] Much of the preparatory work was underwritten by Washington, which wanted a central role for the UN Security Council, with the US able to use its veto to prevent any investigation of American crimes. The Clinton Administration was well disposed to the ILC's initial proposal for a court modelled on the Yugoslav and Rwandan tribunals, under strong Security Council control.[15] Acting on the ILC's recommendation, the UN General Assembly established a Preparatory Committee in 1996 to hammer out the details.

Meanwhile the NGO and international-justice lobby, which had grown exponentially with the ending of the Cold War, campaigned for an 'independent' court—a detached global body, in its own likeness. A coordinating group, Coalition for the International Criminal Court, was organized in 1995 by Amnesty, Human Rights Watch and two dozen

---

[12] See David Chandler, '"International Justice"', NLR 6, Nov–Dec 2000, p. 64.

[13] The *ad hoc* tribunal for Rwanda based in Arusha, Tanzania, has been no less controversial. A pro-conviction bias coupled with a failure to prosecute the crimes of Paul Kagame's Rwandan Patriotic Front has led even Court champions Human Rights Watch to bemoan the institution's politicization (see its 'Letter to the Prosecutor of the ICTR', 26 May 2009). If the Yugoslav court provided the justificatory cover for NATO aggression, the Rwandan tribunal has provided the ideological prop for the RPF to maintain its victim status and enjoy apparent impunity—and Western support—for its aggressive and authoritarian regime.

[14] Trinidad and Tobago had proposed to the UN General Assembly in 1989 that an international court be created to prosecute drug trafficking, for which the islands had become a major hub.

[15] James Crawford, 'The ILC's Draft Statute for an International Criminal Tribunal', *American Journal of International Law*, vol. 88, no. 1, January 1994, p. 140.

others, winning funding from the Ford and MacArthur foundations. Its convenor opined that 'UN Security Council control would reduce the international criminal court to sham status, one which would dispense international criminal justice only to small and weak countries, never to violators in powerful nations.'[16] From the start of 1997, the NGOs gained unexpected state support. Excluded from the UN Security Council, Germany was nevertheless determined to play a central role. Kinkel appointed Hans-Peter Kaul as head of the German Foreign Ministry's International Law Department and increased the German delegation to the Preparatory Committee in New York from two to seven.[17] Kaul's team organized other non-UNSC states with global ambitions, like Canada, and European Community minions, like the Netherlands, into a caucus that dubbed itself 'the like-minded group'. Their goal was an 'independent' ICC, in the sense that the Prosecutor would have *proprio motu* powers to launch investigations without instructions from the UN Security Council—but not, as Kaul and Kinkel made clear to sceptical German Interior and Defence Ministry officials, an impartial one. German nationals, including Luftwaffe pilots in the skies over the Balkans, would be shielded from prosecution by the principle of complementarity: the ICC would only investigate cases where the domestic judicial system was incapable of doing so.[18] The like-minded group used tactics long honed in the European Community: snaffling the chairmanship of key committees—the Preparatory Committee itself was chaired by a Dutch official, Adriaan Bos—roping in the support of small states, and using the psycho-dynamics of all-night sessions to manufacture agreement.

---

[16] William Pace, cited in David Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics*, Oxford 2014, p. 41. A fine example of the professionalization of the human-rights lobby, Pace has worked at Amnesty International, the Center for the Development of International Law and the Hague Appeal for Peace; he is a co-founder of the International Coalition for the Responsibility to Protect, President of the Board of the Center for UN Reform Education, an Advisory Board member of the One Earth Foundation, a co-founder of the NGO Steering Committee for the UN Commission on Sustainable Development and of the NGO Working Group on the UN Security Council, and Executive Director of the World Federalist Movement–Institute for Global Policy, as well as being Convenor of CICC.

[17] Steinke, *Politics of International Criminal Justice*, p. 101. Trained in law at Heidelberg, Kaul's diplomatic cursus included Israel, Washington, the Near East and the UN.

[18] Steinke, *Politics of International Criminal Justice*, pp. 111–4. Kinkel put the weight of the German Foreign Ministry behind Kaul's tactics in an article published under his name in Germany's most prestigious legal journal: Klaus Kinkel, 'Für einen funktionsfähigen Weltstrafgerichtshof', *Neue Juristische Wochenschrift*, Heft 43, 1997.

The ICC's Preparatory Committee moved with unusual alacrity for a UN body. A 'conference of plenipotentiaries' was summoned to meet in Rome on 15 June 1998. There, 5,000 representatives from 160 states met at the Food and Agricultural Organization's offices to negotiate what would become known as the Rome Statute. Joining the diplomats were representatives from hundreds of NGOs, all eager to see a court take shape. Bos had fallen ill; his place as chair was taken by a Canadian diplomat, Philippe Kirsch. Many issues were delegated to working groups, but key questions—limits to the Court's jurisdiction; the *proprio motu* powers of the Prosecutor and the role of the Security Council; definitions of core crimes—were handled by Kirsch in backroom negotiations.[19] The US argued strongly for limiting jurisdiction to the nationals of state parties—that is, countries which had signed and ratified the Statute; the ICC's member states, so to speak. (It was understood that Congress would not ratify the Statute in the foreseeable future, so the US considered itself a *de facto* non-member state.) David Scheffer, Legal Advisor to the State Department and Clinton's point man at Rome, had threatened that the US would actively oppose the Court if it were granted universal jurisdiction. As to how the Court's investigations should be set in motion, the US supported the original ILC proposal that 'the Prosecutor should act only in cases referred either by a state party to the treaty or by the [Security] Council', with the latter determining whether cases that pertained to its functions under Chapter VII of the UN Charter—that is, international peace and security—should be considered by the Court.[20] Washington was opposed to the prosecutor having *proprio motu* powers.

Rome and after

The draft statute prepared by Bos's Committee left over 1,700 square-bracketed items to be resolved. But Kaul had gone through the text, bolding all the provisions that had the like-minded group's support: 'I sent this version of the draft statute to the German UN mission in New York. We duplicated it and bound it and gave it to all like-minded delegations. We told them, you just have to look at the bolded text.'[21] Scheffer, by contrast, complained of having to pursue 'time-consuming bilateral

[19] William Schabas, *An Introduction to the International Criminal Court*, Cambridge 2011, p. 20.
[20] David Scheffer, 'The United States and the International Criminal Court', *American Journal of International Law*, vol. 93, no. 12, January 1999, p. 13.
[21] Interview in Bosco, *Rough Justice*, p. 46.

diplomacy', while in the final forty-eight hours of the Conference: 'The treaty text was subjected to a mysterious, closed-door and exclusionary process of revision by a small number of delegates, mostly from the like-minded group, who cut deals to attract certain wavering governments into supporting a text that was produced at 2AM on the final day of the conference, July 17.'[22]

Scheffer was furious that, under Article 12 of the Statute, the Court's jurisdiction would extend to crimes committed by non-member-state nationals on a member state's territory, theoretically leaving Americans vulnerable to prosecution. Assurances from German and Canadian delegates that US citizens would be protected by the UNSC's ability to defer any investigation indefinitely, and by the principle of complementarity, cut no ice. Scheffer demanded a limitation on the Court's jurisdiction: indictment should be dependent on the agreement of the accused's home state. India, by contrast, put forward a last-minute amendment that the use of nuclear, chemical and biological weapons be defined as a war crime and that the ICC should be entirely independent of the Security Council. With agreement about to be scuttled, the two motions were deferred, and 'this "take it or leave it" text', as Scheffer put it, 'was rushed to adoption hours later on the evening of July 17 without debate.'[23] The final vote registered 120 for adoption, seven against—the US, Israel, China, Cuba, Syria, Iraq, Yemen—and 21 abstentions.

At first sight, the outcome at Rome seems a striking contrast with the conference at San Francisco half a century before, when Washington had orchestrated international agreement for a United Nations designed as a handmaiden of US global strategy.[24] If American power was undiminished, its attention to dictating institutional blueprints appeared to have declined. Much has been made of American opposition to the ICC, and there has been no shortage of broadsides from the Beltway; but it would be a mistake to see the US pitched against an international court *per se*. The US had strongly supported the ILC's initial draft, which envisaged the Court as an appendage of the UN Security Council. As Scheffer stressed: 'The United States was not opposed. In fact we were strong supporters of the Court from the very beginning. The question was what kind of court would it be? Our position was that we wanted this

[22] Scheffer, 'The US and the ICC', p. 20.
[23] Scheffer, 'The US and the ICC', p. 20.
[24] See Peter Gowan, 'US: UN', NLR 24, Nov–Dec 2003.

Court, but we wanted the Security Council to be responsible for triggering the cases.'[25] All the major states had supported the ILC draft in 1994, and Washington had every reason to hope that its realization would be smooth sailing. Had it suspected that the Germans and Canadians would start pushing for a bigger role for themselves, the US might have kept the statute-drafting process more tightly under the control of the UN Secretary-General, instead of opening it to UN General Assembly processes under the rule of one state, one vote.

As it was, the German-led 'like-minded group' campaign from 1997 onwards—coinciding with the Asian financial crisis, the blockade of Iraq and the simmering situation in the Balkans—caught the Clinton Administration on the back foot. While Scheffer struggled to rally his P5 allies at Rome, final instructions from Washington did not arrive until four weeks into the five-week conference.[26] (Clinton was perhaps more preoccupied with the looming Monica Lewinsky scandal.) Nevertheless, the US sent a large delegation to participate in the post-Rome Preparatory Commission which would take charge of the Court's operational details. In reality, as examination of the Rome Statute shows, Scheffer and his colleagues had little to complain of in the final version.

Under the Statute's terms, the ICC would enjoy jurisdiction over four categories of crime, each of them ill-defined: genocide, crimes against humanity, war crimes and 'aggression'—in the words of the Statute's Preamble, the 'most serious crimes of concern to the international community as a whole'.[27] All states ratifying the Statute would gain a seat and a vote in the Assembly of State Parties, which would be responsible for choosing the Court's Prosecutor and eighteen judges, who would supervise investigations, oversee trials and rule on appeals. (Though the judges had to be nationals of state parties, the Prosecutor did not, leaving the position open to an American.[28]) The Prosecutor, appointed for a 9-year, non-renewable term, would review information about possible crimes, conduct investigations, request arrest warrants and prosecute those on trial. Three mechanisms could trigger an investigation: a member state

[25] Quoted in Paris, *The Sun Climbs Slow*, p. 261.
[26] Ruth Wedgwood, 'Fiddling in Rome: America and the International Criminal Court', *Foreign Affairs*, vol. 77, no. 6, 1998.
[27] The crime of 'aggression' would not be investigated or prosecuted until the state parties agreed upon a binding definition of it. They would do so at the 2010 ICC Review Conference in Kampala.
[28] Schabas, *Introduction to the ICC*, pp. 377–8.

could refer a situation to the Prosecutor; the UN Security Council could do the same; or the Prosecutor could act *proprio motu*, though a panel of ICC judges would have to review his or her decision to do so, and the Security Council would be able to suspend the investigation for a year, under Article 16, renewable for subsequent 12-month periods without limit. The Court would enjoy jurisdiction over crimes committed on the territory of a member state, and/or by a national of a member state; in the case of a UN Security Council referral, the Court would acquire jurisdiction even if neither the territorial nor the nationality conditions were met. The Court would be 'complementary to national criminal jurisdictions', understood as meaning that it would only investigate crimes if national courts could not do so, in the opinion of the ICC judges. It would only consider cases deemed to be 'of sufficient gravity'.

The passage of the Statute in Rome was greeted with wild displays of enthusiasm: 'diplomats abandoned themselves to cheers and chants, tears and embraces, rhythmic stomping and applause'.[29] Within a year, many of the same figures would be cheering on the NATO bombardment of Yugoslavia. But the emotive atmosphere in favour of humanitarian warfare in the late 1990s was very useful in building support for ICC ratification; there was no contradiction in the eyes of the military humanists between the moral use of force by the 'international community' and its criminalization if resorted to by outsiders. In the final months of the Clinton Administration, Scheffer helped mobilize Elie Wiesel, Nelson Mandela and Jimmy Carter in a campaign for the US to sign, if not ratify, the Statute, and thus to 'reaffirm America's inspiring role as leader of the free world in its search for peace and justice', as supporters put it in the *New York Times*.[30] On his last evening in the White House Clinton instructed Scheffer, now US Ambassador for War Crimes, to sign the Rome Statute, allowing the US to play a role in selecting judges and shaping the future of the Court. But it would not be ratified by Congress until 'significant flaws' were remedied, Clinton announced; the US remained a non-member of the ICC.[31] Nevertheless, sixty states had ratified by April 2002, an unprecedentedly swift passage

[29] Interview with John Washburn, convenor for the American NGO Coalition for the ICC (AMICC), in Bosco, *Rough Justice*, pp. 50–1.

[30] Robert McNamara and Benjamin Ferencz, 'For Clinton's Last Act', NYT, 12 December 2000.

[31] David Scheffer, 'Staying the Course with the International Criminal Court', *Cornell International Law Journal*, vol. 35, no. 1, 2001, pp. 47–100.

by the standards of international law. The Statute entered into force two months later, on 1 July 2002.

Setting up shop

On 11 March 2003, international luminaries gathered in the Ridderzaal, the Netherlands' medieval parliament in The Hague, to celebrate the inauguration of the new International Criminal Court. Although it was rumoured at Rome that Lyon, Nuremberg or the Italian capital itself might play host to it, ultimately the Netherlands was the only state to extend an offer.[32] The Hague was already home to various international legal tribunals—the International Court of Justice, or World Court, which hears disputes between states; the ICTY; the Appeals Chamber of the ICTY and ICTR—and the ICC was provided with a modern, 15-storey office block on the outskirts of the city, former home of the Dutch postal service. Two-thirds of the Court's funding was supplied by Europe and Canada, with Germany the largest provider at 20 per cent. The like-minded group retained its grip on appointments. Philippe Kirsch became President of the Court, Hans-Peter Kaul a judge in the crucial Pre-Trial Chamber, ruling on investigations in Uganda, the Democratic Republic of Congo, Sudan, the Central African Republic, Kenya, Côte d'Ivoire, Libya and Mali; Kaul has also been the President's representative on the ICC Permanent Premises Committee, charged with finding the Court a more luxurious home. At the opening ceremony in the Ridderzaal, Queen Beatrix of the Netherlands greeted the gathered officials and Prince Zeid of Jordan, the first President of the Assembly of States Parties, opined about the Court's role in maintaining international peace and security, and furthering the rule of law. Here, in The Hague, was history's *telos*. Amid champagne and smoked-salmon canapés, no one mentioned the impending invasion of Iraq.

In fact, the campaign to reassure Washington that the ICC was in safe hands had begun the moment the Statute was passed. Kirsch bent over backwards to praise the US delegation to the post-Rome Preparatory Commission for its constructive contributions.[33] Fears that the ICC might become 'politicized'—code for the investigation of American war crimes—were repeatedly rejected as 'unwarranted' and 'far-fetched', a most 'unlikely eventuality', against which the Rome Statute had plentiful

[32] Schabas, *Introduction to the ICC*, p. 369.
[33] Bosco, *Rough Justice*, p. 59.

'safeguards', 'checks' and 'restraints'.[34] The Bush Administration, gearing up after 9/11 for the invasion of Afghanistan, and with sights already set on Iraq, demanded harder guarantees. Article 98 of the Rome Statute provided for an exception to the member states' obligation to surrender an accused to the Court, if doing so would breach an existing agreement with another state. This was implicit recognition of the Status of Forces and Host State agreements which provide immunity for US (and other) military forces operating overseas. As soon as the Rome Statute entered into effect, the US announced its intention to enter into 'bilateral' Article 98 agreements: each party would agree not to hand over any nationals to the ICC. Over the next four years, agreements were signed with 102 countries, starting with Romania; of the 54 states that refused, nineteen saw a reduction in their US economic aid.

Blair followed suit, the UK drafting a Status of Forces agreement with occupied Afghanistan which specified that no NATO troops would be surrendered to an international tribunal. Bush also 'unsigned' the Statute in May 2002, to the delight of John Bolton, his Undersecretary of State for Arms Control; Israel did so three months later.[35] The 2002 American Service Members' Protection Act threatened to limit US participation in UN peacekeeping operations, unless the Americans involved were granted immunity from any potential ICC prosecution;

[34] The literature is vast, but see among others: Richard Goldstone and Adam Smith, *International Judicial Institutions: The Architecture of International Justice at Home and Abroad*, Oxford and New York 2009, p. 114; Philippe Kirsch and Darryl Robinson, 'Initiation of Proceedings by the Prosecutor', in Antonio Cassese, Paola Gaeta and John R. W. D. Jones, eds, *The Rome Statute of the International Criminal Court: A Commentary*, Oxford 2002, p. 663; Matthew Brubacher, 'Prosecutorial Discretion within the International Criminal Court', *Journal of International Criminal Justice*, vol. 2, no. 1, March 2004; Amnesty International, 'The International Criminal Court: Fact Sheet 2: The Case for Ratification', 2000. For a more thoughtful defence of prosecutorial discretion, albeit one that reaches a similarly sanguine conclusion, see Allison Marston Danner, 'Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court', *American Journal of International Law*, vol. 97, no. 3, July 2003.

[35] A principled opponent of international justice on the grounds that there is no corresponding international legislature or sovereign power, Bolton had also warned that the Court would be used against the US and its allies: 'There is no doubt that Israel will be the target of a complaint concerning conditions and practices by the Israeli military in the West Bank and Gaza.' See John Bolton, 'The Risks and Weaknesses of the International Criminal Court from America's Perspective', *Law and Contemporary Problems*, vol. 64, no. 1, Winter 2001.

it also authorized US Marines to 'storm the beaches of Holland to rescue any American citizen who might languish in ICC custody'.[36] The UN Security Council quickly bowed to Bush's demands: American peacekeepers would be immune from prosecution for one year, a boon subsequently renewed in 2003.

Ignoring Iraq

Bush need not have worried. As Luis Moreno Ocampo, the incoming ICC Prosecutor, hastened to assure a US official in March 2003, he 'could not imagine launching a case against a US citizen'.[37] Ocampo had been the Clinton Administration's initial choice for chief prosecutor at the ICTY in 1993 and only missed out when his own country, Argentina, refused to endorse him. His application for the ICC position was co-drafted by Samantha Power. Born in 1952 to a once wealthy family, he kept his head down during the dictatorship, focusing on his studies at the University of Buenos Aires Law School while tens of thousands from his generation were disappeared in the Junta's dirty war. He became a prosecutor in 1984, a year after the restoration of democracy under Raúl Alfonsín, and in 1985 gained his first taste for fame as a young assistant to the chief prosecutor, Julio César Strassera, in the trials of the Junta for kidnap, torture and murder. Ocampo has cultivated a reputation as the man who put the Junta behind bars, but even at the time Strassera complained about his assistant's penchant for the media spotlight, while the dictatorship's victims distrusted him: 'No survivor wanted to talk to him', according to one.[38] In the 1990s Ocampo moved into private practice, also working as a World Bank consultant on corruption and appearing in the reality TV show *Fórum, la corte del pueblo*, Argentina's answer to *Judge Judy*. In 2002 Ocampo was a visiting professor at Harvard Law School. Once he and Power had submitted his application for the position of ICC prosecutor, he flew to Europe at his own expense to present his credentials to the Court's paymasters in Berlin, Paris and London.[39]

Ocampo was formally appointed in April 2003, within weeks of the unsanctioned US–UK invasion of Iraq and the USAF's use of cluster

[36] Paris, *The Sun Climbs Slow*, p. 62.
[37] Bosco, *Rough Justice*, p. 88.
[38] Julie Flint and Alex de Waal, 'Case Closed: Prosecutor without Borders', *World Affairs Journal*, Spring 2009.
[39] Bosco, *Rough Justice*, p. 84.

bombs there. Iraq was not an ICC member state, so the Court had no jurisdiction over its territory; but it did have jurisdiction over war crimes and crimes against humanity committed or directed by nationals of member states Britain and Australia. The Athens Bar Association submitted a call for an investigation of acts in Iraq ordered by Blair, Geoff Hoon and Jack Straw.[40] Ignoring the whole question of the Iraq war, Ocampo's first statement as Prosecutor suggested that the Court might enjoy a Zen-like inactivity: its efficiency should not be measured by the number of cases it took up; on the contrary, 'the absence of trials led by this court as a consequence of the regular functioning of national institutions would be its major success.'[41] The NGO lobby was affronted by this do-nothing approach; the Prosecutor had to do *something*. The Office of the Prosecutor began scanning the world for sites of violence other than Afghanistan and Iraq. At his July 2003 press conference, Ocampo announced that he would be examining the situation in eastern Congo.

Before the Prosecutor could turn up anything in the Congo, however, the Ugandan President Yoweri Museveni submitted a request for an investigation of crimes against humanity in his own country. Since seizing power in 1986, Museveni and his forces had been fighting a counterinsurgency in the northern jungles of Uganda. Initially, 'Operation North' had pitted government forces against rebel groups associated with deposed leaders Milton Obote and Lutwa Okello, with attendant atrocities and civilian massacres. In 1996 the counterinsurgency entered a new phase: 'a government-directed campaign of murder, intimidation, bombing, and burning of whole villages to drive the rural population into IDP camps, complete with enclosures guarded by soldiers'.[42] By the mid-1990s much of the rural population of the three Acholi districts were interned—the camp population had reached almost a million by 2002. This, in turn, created the conditions for the rise of new militias, most famously the Lord's Resistance Army led by Joseph Kony, with its proclaimed goal of overthrowing Museveni and creating a state based on the Ten Commandments. The LRA did not shy away from its own atrocities and was known for its forced recruitment of under-age soldiers.

---

[40] Helena Smith, 'Greeks accuse Blair of war crimes in Iraq', *Guardian*, 29 July 2003.
[41] 'Election of the Prosecutor, Statement by Mr Moreno-Ocampo, 22 April 2003', on ICC website.
[42] Mahmood Mamdani, *Saviours and Survivors: Darfur, Politics and the War on Terror*, New York 2009, p. 280.

The drafters of the Rome Statute had assumed that states would refer crimes occurring in other states, so Museveni's referral came as some surprise. Notably, it asked the Prosecutor to investigate 'the situation concerning the Lord's Resistance Army'. The Statute speaks of the referral of 'situations', rather than cases or specific crimes, in order to prevent the use of the Court to 'settle scores', as Kirsch had noted.[43] Yet this was precisely what Museveni appeared to be doing: instrumentalizing the court for his own political purposes. Officially, Ocampo chose to interpret Uganda's referral as encompassing 'all crimes committed in Northern Uganda'. Unofficially, commentators suggest, the Prosecutor had a 'tacit, if not an explicit, understanding with the Ugandan authorities' that he would only prosecute rebel leaders.[44] By July 2004, Ocampo had decided there was a reasonable basis for an investigation, announcing that he had found evidence of systematic attacks by the LRA against the civilian population, including sexual violence, torture, under-age conscription and forced displacement. He was curiously silent on atrocities committed by government forces which, needless to say, continued. The following year, the Prosecutor applied to the ICC's Pre-Trial Chamber for five arrest warrants for leaders of the LRA, including Kony. However, the Office of the Prosecutor had no means to enforce the warrants and Kony remained at large.[45]

'Common goals'

By the summer of 2004, the rising death toll in Iraq and images of US torture at Abu Ghraib were dominating world headlines. Another narrative was badly needed. In July 2004 the US Holocaust Memorial Museum and American Jewish World Service organized a Darfur Emergency Summit in New York, claiming the Sudanese government was pursuing a genocidal campaign against rebels in Darfur.[46] Inter-tribal violence

---

[43] Philippe Kirsch and Darryl Robinson, 'Referral by States Parties', in Cassese, Gaeta and Jones, eds, *The Rome Statute of the International Criminal Court*, p. 623.
[44] Schabas, *Introduction to the ICC*, pp. 165–6.
[45] The international justice lobby would be furious when Museveni and UN negotiators began peace talks with Kony in 2006, overseen by US and EU officials, with an informal offer to guarantee his safety against the ICC warrant. As Richard Goldstone expostulated to the *Guardian*, 'If you have a system of international justice, you've got to follow through on it. If that's going to make peace negotiations difficult, that may be the price that has to be paid.' Chris McGreal, 'Justice or Reconciliation?', *Guardian*, 9 January 2007.
[46] Save Darfur Coalition website.

in the westernmost province of Sudan had long been simmering, its roots in a colonial legacy of tribal land parcelment, exacerbated by four decades of drought and desertification, which pitched landed against landless. In 2003, an uprising there had provoked a brutal counterinsurgency by the Bashir government; now, Muslims were the aggressors. In September 2004 Colin Powell called upon the Security Council to take action against what he described as genocide in Darfur. A UN Commission chaired by Antonio Cassese, first president of the ICTY, was dispatched to investigate the situation. Cassese reported to the Security Council in January 2005 that there was no evidence that the Sudanese government had pursued a policy of genocide, but that violence by both government and rebel forces might amount to 'crimes against humanity'. The Commission recommended that Darfur be referred to the ICC for prosecutions.[47]

The Bush Administration was still formally opposed to the Court, but Bush himself seemed to care more about Darfur than about the ICC. When the Security Council voted to refer the situation in Darfur to the ICC on 31 March 2005, the US abstained rather than using its veto. The UN Security Council referral had a dramatic effect. According to Ocampo: 'Darfur was like a different dimension. Suddenly we were connected with the Security Council—it was a totally different game!'[48] Within a year, the State Department's legal advisor John Bellinger was opining that the ICC did have 'a role to play in the overall system of international justice'; the US and the Court ought to be pursuing 'common goals' rather than indulging in 'divisiveness'.[49] Washington's reconciliation with the ICC was underway.

Ocampo's excitement at being contacted by the UNSC did not translate into any very energetic pursuit of the facts on the ground in western Sudan, where he claimed that the security situation made a judicial investigation impossible. Worried that he might be letting the side down on such an important referral, Hans-Peter Kaul and his fellow judges in the Pre-Trial Chamber took the unprecedented step of asking for an outside opinion. Cassese, chair of the 2005 UN inquiry, and Louise Arbour, now UN High Commissioner for Human Rights, were

[47] Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Geneva, 25 January 2005.
[48] Interview in Bosco, *Rough Justice*, p. 113.
[49] Jess Bravin, 'US Warms to Hague Tribunal', *Wall Street Journal*, 14 June 2006.

both invited to submit *amicus curiae* reports, which were duly damning. Ocampo was exaggerating the security problems, they said: Cassese had interviewed numerous witnesses in both Darfur and Khartoum, whereas the Prosecutor had 'got no further than the Hilton Hotel', as his Senior Trial Attorney put it.[50] Outraged, Ocampo responded that his investigation was proceeding very successfully based on evidence found outside Sudan. He ramped up the rhetoric, telling the UN Security Council in December 2007 that Bashir had personally planned and put into operation a two-stage genocide. In July 2008 he applied for a warrant against Bashir for both genocide and crimes against humanity. 'Bashir does not need gas chambers, bullets or machetes', he announced. 'This is genocide.'[51]

The Pre-Trial Chamber at first demurred: under the Rome Statute, in order to establish the crime of genocide it is necessary to show that the perpetrator acted with *intent* to destroy the targeted group; Ocampo could provide no direct evidence of Bashir's alleged genocidal intent. Nonetheless, the Pre-Trial Chamber saw fit to reverse its decision on appeal and the ICC issued a warrant for Bashir on the charge of genocide in July 2010. Ocampo took to the *Guardian*'s pages to declare 'The genocide is not over'—although monthly mortality levels in Darfur had dropped significantly from the 2004 peak and by 2006 were in the low hundreds—and to claim the Court had found that 'Bashir's forces have raped on a mass scale in Darfur' and that Bashir was inflicting conditions on ethnic groups there 'calculated to bring about their physical destruction'.[52] The Court, of course, had found no such things, and the integrity of any future trial must be called into question by such brash disregard for the Prosecutor's judicial duty of impartiality during the investigative phase. However, as in Uganda, big-power political interests proved more fluid than international justice. 'Save Darfur' faded from the headlines, along with Iraq. US officials continued talks with the Khartoum government about the independence of South Sudan, a pet American project. By 2010 Obama's Special Envoy to Sudan was suggesting that the time was not right for accountability and international justice.[53]

---

[50] Andrew Cayley, 'Witness Proofing: The Experience of a Prosecutor', *Journal of International Criminal Justice*, vol. 6, no. 4, September 2008, p. 780.

[51] Prosecutor's Statement, The Hague, 14 July 2008.

[52] Luis Moreno Ocampo, 'Now end this Darfur denial', *Guardian*, 15 July 2010.

[53] Briefing by Scott Gration: 'Sudan: Fifth Anniversary of the Comprehensive Peace Agreement', Foreign Press Centre, Washington, DC, 11 January 2010.

Meanwhile in 2006, the ICC had succeeded in taking its first prisoner into custody. Joseph Kabila's government in the Democratic Republic of the Congo had referred its own territory to the Court in 2004, apparently under European pressure; the second state referral to the ICC after Museveni's.[54] The Prosecutor had already decided to focus his investigation on the northeastern region of Ituri—perhaps, commentators have suggested, because there was less evidence to connect Kabila to the atrocities there.[55] Gold-rich Ituri had been roiled by the spill-over from Rwanda; the entry of Rwandan and Ugandan forces had inflamed, and exploited, long-running, partly tribal conflicts over land. Multiple local militia groups fought for control, allying with or against Kabila's, Kagame's and Museveni's soldiers, or those of the UN peacekeeping force, MONUC. One of the militia leaders was Thomas Lubanga Dyilo, scion of a local family and a psychology graduate, who had earlier been allied with Uganda but split in 2001 to set up his own Union des Patriotes Congolais. In 2003 Lubanga moved to Kinshasa to register the UPC as a political party under the UN-brokered power-sharing accord that would lead to the DRC's first general election in 2006. But in February 2005, MONUC forces in Ituri came under attack from militia fighters. Kabila was under international pressure to react and duly arrested Lubanga, detaining him at first in one of Kinshasa's luxury hotels.

Ocampo's investigation into the situation in Ituri had been proceeding slowly; he had no evidence of Lubanga ordering violent crimes, but thought he could mount a case against him for recruiting under-age soldiers. A warrant for his arrest was issued by the ICC in February 2006, and Lubanga was swiftly rendered to The Hague in a French military plane. He came before the Pre-Trial Chamber on 20 March 2006, the first defendant ever to appear before the ICC. The fact that the sole charge against him was the recruitment of under-15s surprised many: Congolese militia forces regularly engaged in rape, and Lubanga's were no exception. The Rome Statute was the first international treaty to recognize and define such acts as war crimes and crimes against humanity, not simply as acts collateral to war. Congolese human rights and women's groups warned that the charges risked 'offending

[54] Bosco, *Rough Justice*, p. 99.
[55] Phil Clark, 'Law, Politics and Pragmatism: The ICC and Case Selection in Uganda and the Democratic Republic of Congo', in Nicholas Waddell and Phil Clark, eds, *Courting Conflict? Justice, Peace and the ICC in Africa*, London 2008.

the victims and strengthening the growing mistrust in the work of the International Criminal Court in the DRC and in the work of the Prosecutor specifically.'[56]

Further concerns arose about the prosecutor's handling of the case when it was revealed, just days before the expected start of the trial, that Ocampo had refused to disclose exculpatory evidence to the defence. The Prosecutor had been supplied with thousands of documents by the UN Mission in Congo—weekly situation reports, child protection reports, etc—relating to the Ituri region. MONUC officials had assumed that these would merely provide the 'signposts' for the Prosecutor's further investigation, and they were handed over on the expectation of confidentiality. Detailed investigation was not Ocampo's speciality, however, and his case leaned heavily on the MONUC reports. A series of stand-offs ensued between the Prosecutor and the ICC judges, who at one point halted the proceedings and ordered Lubanga's immediate release. The trial eventually got underway in January 2009, but was halted again after defence witnesses testified that intermediaries working for the Prosecutor's investigators had coached and bribed witnesses to claim that they had served as under-age soldiers. Finally, on 14 March 2012, some six years after his initial transfer to The Hague, Lubanga was found guilty of conscripting under-15s and sentenced to fourteen years of imprisonment. For a Court set up to try only 'the gravest of crimes', this was setting the bar low.[57]

Another defendant charged as a result of the Prosecutor's investigation into the 'Situation in the DRC' has already been acquitted. Mathieu Ngudjolo, leader of a militia that had clashed with Lubanga's forces in the Ituri village of Bogoro in 2003, was charged with crimes against humanity arising from the fighting. Ngudjolo denied ordering the

[56] 'Beni Declaration on the Prosecutions by the ICC' by women's rights and human-rights NGOs, Beni, North Kivu, DRC, 16 September 2007.

[57] In May 2008, while Lubanga's case was still in progress, the ICC issued an arrest warrant for Kabila's arch rival Jean-Pierre Bemba, a senior Congolese politician who had served as vice-president in the 2003 transitional government and had garnered 40 per cent of the vote in the 2006 election. Bemba had retired to Belgium in 2007 after harassment from Kabila's forces. Once the warrant was issued, he was promptly arrested by the Belgian police and rendered to The Hague. His trial, on charges relating to his militia's alleged attacks on opponents of the Patassé government in the Central African Republic in 2002–03, began in 2010 and is still underway at The Hague four years later. See Bosco, *Rough Justice*, pp. 141–2.

attack, saying he only heard of it days later. As in Lubanga's case, the Prosecutor's investigation was found wanting. His first forensic investigation in Bogoro was conducted only in 2009, six years after the event, greatly diminishing any probative value. Much of the evidence consisted of reports by MONUC or NGO officials. Delivering the acquittal in December 2012, presiding judge Bruno Cotte described the evidence as 'too contradictory and too hazy'.[58] One might have expected that the Court's first acquittal would be greeted as an indication of the judges' independence, a sign that theirs was not a hanging court. Yet the reaction from the CICC NGOs was outrage. Human Rights Watch announced that the judgement left the victims of Bogoro 'without justice for their suffering'; other groups spoke of the 'abandonment of victims'. Organizations once known for championing the rights of defendants to fair trials now lamented judges' failure to convict when there was patently insufficient evidence to do so.

Reassuring Israel

By the end of the second Bush Administration, the ICC's selection of situations to investigate was starting to tell its own story. The Prosecutor had closed the file on Iraq in February 2006, just as the insurgency was reaching its height, announcing that, if war crimes had been committed there, they did not reach the required 'gravity' threshold. The Court also turned a blind eye to Afghanistan, a member state, where the Prosecutor could have used his hard-won *proprio motu* authority; timid requests for information were simply ignored by the NATO powers occupying the country. Israel's ferocious 3-week attack on Gaza, launched in late December 2008, threatened to give the ICC more of a headache. Days after Operation Cast Lead came to an end in January 2009, the Palestinian Authority Justice Minister flew to The Hague and submitted a declaration to the ICC that granted the Court jurisdiction over crimes on Palestinian territory since 1 July 2002.[59] In addition, the UN Fact-Finding Mission's report on the Gaza conflict, published in September 2009, had found evidence of widespread war crimes and crimes

[58] 'DR Congo: Mathieu Ngudjolo Chui acquitted of war crimes by ICC', BBC News, 18 December 2012.

[59] Non-member states are authorized to make such a declaration by Article 12(3) of the Rome Statute; it was on the basis of an Article 12(3) declaration that the Prosecutor would open an investigation in Côte d'Ivoire in 2011.

against humanity, describing Operation Cast Lead as 'a deliberately disproportionate attack designed to punish, humiliate and terrorize a civilian population, radically diminish its local economic capacity both to work and to provide for itself, and to force upon it an ever increasing sense of dependency and vulnerability.'[60]

The Mission recommended the UN Human Rights Council to submit its Report to the ICC Prosecutor and proposed that the Security Council should, if need be, refer the situation in Gaza to the ICC. Naturally the US would have blocked any such UNSC action, and nothing came of either recommendation. Secretary of State Condoleezza Rice issued a warning to the Court: 'How the ICC handles issues concerning the Goldstone Report will be perceived by many in the US as a test for the ICC.'[61] The Office of the Prosecutor rose to the occasion. Over the next three years, a great show was made of undertaking a serious legal analysis to determine whether the Palestinian territories would constitute a state for the purposes of Article 12. Submissions were invited from NGOs, scholars and practitioners, and there was further correspondence with the Palestinian Authority. Finally, just weeks before the end of his term in 2012, Ocampo announced his findings: it was not for him to decide.[62]

With the advent of the Obama Administration, international-justice proponents came to occupy key cabinet positions. Samantha Power was on the National Security Council, in charge of multilateral affairs. At the State Department, Hillary Clinton expressed her regret that the US had not joined the Court.[63] She appointed Harold Koh (former Dean of Yale Law School) as Legal Advisor, Anne-Marie Slaughter as Director of Policy Planning and Stephen Rapp as Ambassador at Large for war crimes. ICC officials started receiving invitations to the State Department and White House. By March 2009 the Prosecutor was giving distinctly political briefings to US diplomats, advising Susan Rice, Obama's hawkish Ambassador to the UN, on how to reassure China

[60] UN Human Rights Council, 'Report of the United Nations Fact-Finding Mission on the Gaza Conflict', 15 September 2009, para. 1690.
[61] Wikileaks, Unclassified Memo from the US Mission to the UN to the US Secretary of State, 'Ambassador Rice Meeting with ICC President Song', 3 November 2009.
[62] ICC, Office of the Prosecutor, 'Situation in Palestine', 3 April 2012. Ocampo brushed aside communications from NGOs about the 2010 Israeli attack on the Mavi Marmara, part of the Gaza aid flotilla, on grounds of insufficient gravity.
[63] Bosco, *Rough Justice*, p. 154.

about regime change in Sudan.[64] Though the Prosecutor's office had become mired in bureaucratic infighting, amid accusations of sexual harassment—Ocampo sacked the whistleblower, who sued successfully for wrongful dismissal—mainstream media coverage glowed. Ocampo would be selected as one of *The Atlantic* magazine's 'Brave Thinkers'—people who 'risk reputations, fortunes and lives in pursuit of big ideas'—along with Steve Jobs, Chris Christie et al.[65] Washington returned to its observer's seat at the ICC's Assembly of States Parties in November 2009 and played a central role in preparations for the Review Conference the following summer.

Shielding Americans

In June 2010, ASP representatives gathered in Kampala, Uganda for a stocktaking of the Court's first seven years. Ban Ki-Moon welcomed the delegates on the terrace of a 5-star resort overlooking Lake Victoria. The American delegation led by Koh was by far the largest: thirty negotiators, compared to fifteen from the Netherlands, eleven from Germany, ten from the UK and seven from France. Koh made it clear that the US was not planning to be outvoted again. The main debate centred on the crime of aggression, left undefined at Rome. After hard negotiations, Koh was exultant at the final compromise: as long as the US remained a non-signatory, 'no US national can be prosecuted for aggression.'[66] The Kampala Conference defined an *act* of aggression as 'the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.' A *crime* of aggression was likewise defined as 'the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.'[67] The tripartite caveat—character *and* gravity *and* scale—allowed for a good deal of flexibility and legal indeterminacy.

More importantly, the Court's jurisdiction over the crime of aggression was strictly limited. In cases of a state referral, or when the Prosecutor

[64] 'US embassy cables: ICC prosecutor alleges Bashir secret fortune of $9bn', cable dated 24 March 2009, *Guardian*, 17 December 2010.
[65] 'Brave Thinkers 2011', *The Atlantic*, 4 October 2011.
[66] Bosco, *Rough Justice*, p. 166.
[67] Rome Statute, Article 8 *bis*.

wishes to proceed *proprio motu*, the Court has no jurisdiction over aggression when committed by a non-State Party's nationals or on its territory—precisely the restrictive approach to jurisdiction advocated by the US in Rome in 1998.[68] Only when the Security Council refers a case of alleged aggression to the Court may the Prosecutor proceed with an investigation as with other Statute crimes. Moreover, member states may choose to opt out of the Court's jurisdiction over the crime of aggression altogether. The Kampala amendments also require ratification or acceptance by at least thirty States Parties, as well as a decision by a two-thirds majority of the ASP to activate the Court's jurisdiction, which cannot take place until 1 January 2017. So far only seven states have ratified.[69]

Détente between the US and ICC has given way to a warm rapprochement. The pattern first established in the Balkans in the 1990s has re-emerged: Western military intervention is accompanied by the justificatory apparatus of ICC judicial intervention. So it went with NATO's latest outing in Libya. On 26 February 2011, barely a week after the first anti-Gaddafi demonstration in Tripoli, the UN Security Council voted to refer the situation in Libya to the ICC. Within days, Ocampo held a press conference announcing that he was putting the Libyan Foreign Minister and the head of the Intelligence Service 'on notice' that they would be held criminally responsible for the acts of those under their command.[70] The Court's Public Counsel for the Defence felt obliged to issue a reprimand: the publication of names of suspects at such an early stage contravened the presumption of innocence and, given the tumultuous nature of events on the ground in Libya, it was questionable whether the investigation could have proceeded to the extent that disclosing names of potential suspects could be 'either warranted or acceptable'. The objective of deterrence would have been better served by clearly delineating the types of action that could warrant prosecution.[71]

Ocampo pushed on regardless, applying to the Pre-Trial Chamber on 16 May 2011 for arrest warrants for Gaddafi, his son Saif Al-Islam and military intelligence chief Abdullah Al-Senussi. In June, as the

---

[68] Schabas, *Introduction to the ICC*, p. 77.

[69] By the end of 2013 Germany, Luxembourg, Liechtenstein, Estonia, Samoa, Trinidad and Tobago, and Botswana had ratified the Kampala amendments.

[70] 'International Criminal Court investigates Libya violence in response to UN request', UN News Centre, 3 March 2011.

[71] ICC Office of Public Counsel for the Defence, Letter to the Prosecutor, 2 March 2011.

seven-month NATO bombardment to 'protect' Libya's citizens dragged on, the Prosecutor was again in the news, claiming that he had evidence of Libya acquiring 'containers' of 'Viagra-type medicaments', with Gaddafi personally ordering the rape of hundreds of women.[72] Pfizer, the manufacturer of Viagra, felt compelled to issue a statement that the company had 'stopped shipping all products to Libya in February, when sanctions were implemented'. It emerged that Ocampo was simply parroting claims made by Susan Rice in a closed Security Council meeting two months earlier, when the US was seeking to step up the military intervention. The accusation was quietly dropped. Proceedings against Saif Gaddafi and Senussi were delayed when the Libyan authorities insisted they would pursue their own prosecutions at home. In May 2013, the ICC's Pre-Trial Chamber ruled that Libya was unable to carry out the prosecution of Saif and his case should proceed in The Hague, while in October it ruled, by way of contrast, that Libya had demonstrated a will and ability to prosecute Senussi. Both decisions have been appealed. But once again, the caravanserai of the international community has moved on.

Ocampo's nine-year term as Prosecutor of the ICC came to an end in June 2012. His successor is Fatou Bensouda, a Deputy Prosecutor at the Court who had managed, where so many colleagues had failed, to maintain a working relationship with Ocampo. Born in the Gambia in 1961, Bensouda studied law in Lagos, returning to her native country in 1987 to work in the public prosecution service. In 1998 she was appointed Justice Minister and Attorney General by the ex-military autocrat Yahya Jammeh, quitting two years later after apparently falling out with him. From 2001 to 2004 she worked as a trial lawyer at the ICTR in Arusha. The appointment of an African Prosecutor is obviously helpful at a time when the Court faces growing charges of racism and anti-African bias. Where Moreno Ocampo was brash, Bensouda is cautious and considered. She describes herself as 'a victim-oriented person' and has the support of the NGO lobby; former colleagues say she is 'less gifted as a trial lawyer and more appreciated for her affable personality and organizational skills'.[73] But there is little reason to expect any change in substance. Bensouda has said she views the ICC as a 'tool' of the Responsibility to Protect doctrine, the familiar ideological cloak for North Atlantic warfare. The

[72] 'Gaddafi ordered mass rape, ICC prosecutor says', France24, 9 June 2011.
[73] Rick Gladstone, 'A Lifelong Passion Is Now Put to Practice in The Hague', NYT, 18 January 2013.

Court's annual budget has grown from an initial €30 million in 2002 to over €100 million. Japan is now the top payer, at nearly €20 million, with Germany second at €11.5 million. The Court will soon be moving to the upmarket seaside suburb of Scheveningen. Its current premises, according to its officials, 'lack the dignity of a court building'—the image 'does not correspond with the idea of a permanent universal court'.[74] Construction has started and the Court should move into its new home by 2016. According to its architects the design, a huge glass block, is meant to convey eminence and authority as well as trust and hope.

Africa in the dock?

In July 2012 the Office of the Prosecutor opened an investigation into the situation in Mali, its eighth formal investigation—and the eighth in Africa.[75] The Court's myopic focus has caused anger on the continent. That military intervention by former colonial powers has been followed, almost *de jure*, by juridical intervention by the ICC, leaves Africans understandably suspicious. At the African Union summit in Addis Ababa in May 2013, Ethiopia's Prime Minister Hailemariam Desalegn accused the ICC of 'hunting' Africans because of their race.[76] The notion that international criminal law is a neo-colonial imposition is no longer limited to critical international legal theorists; it is now heard most loudly from the post-colonial elites of Addis Ababa and other African capitals. The AU adopted a resolution calling on African states not to cooperate with the ICC when the Security Council refused to defer proceedings against Bashir. The AU has also demanded a halt to proceedings against Kenyan President Uhuru Kenyatta and his deputy William Ruto, accused of fuelling violence following the contested

[74] Report on the future permanent premises of the International Criminal Court for the Fifth Session of the Assembly of State Parties, 31 October 2006, para. 91.

[75] The Mali investigation was opened in response to a referral by the short-lived military government of Amadou Sanogo, no doubt prompted by Paris; French forces arrived six months later in January 2013. Bensouda's preliminary report appeared once again limited to one party to the conflict, focusing on alleged crimes by rebel fighters. Of government forces or French paratroopers, there is no mention. Much the same applied to Côte d'Ivoire in the wake of the post-election crisis and French intervention of 2010–11: charges were brought by the ICC against the defeated candidate, Laurent Gbagbo, his wife Simone and the Minister for Sports and Youth for 'crimes against humanity' during the post-election violence; none were filed against the French-backed opposition, or the intervention force itself.

[76] 'African Union accuses ICC of "hunting" Africans', BBC News, 27 May 2013.

2007 election, and has deliberated upon the potential mass withdrawal of African member states.[77]

That the Court's investigations have coincided with imperial concerns is apparent; that they are motivated by simple racism is less evident, although this is not to downplay the court's role in reproducing a long-standing dynamic of racialization in international law.[78] On the Court's record, crimes against humanity and war crimes are acts committed by non-Westerners. The Hague's courtrooms replicate a historical pattern in which, as Makau Mutua puts it, 'morality comes from the West as a civilizing agent against lower forms of civilization'.[79] Images of a white-suited prosecutor stepping from his helicopter onto the hot plains of Africa—one of Ocampo's many unfortunate penchants—reproduce, like the very idiom of international criminal law and humanitarianism, the racialized metaphor of savages, victims and saviours: the violence of international crimes lies outside the civilized West; its victims are powerless, in need of saving by NATO intervention or US-trained human-rights lawyers.

The doctrine of 'complementarity', too, affirms a sharp division between Western countries, with their developed judicial architecture—which, as the German representative gloated, will never be found unable to carry out a prosecution—and the rest of the world, where the ICC may more readily make out a case for a judicial system's ineffectiveness. In this respect, the Court appears to reproduce the colonial international law of the 19th century, underpinned by a distinction between civilized and uncivilized states.[80] This understanding of the ICC's role emerged

[77] Extraordinary Session of the Assembly of the African Union, Addis Ababa, 11–12 October 2013. The Kenyan investigation was the only one instigated by Ocampo using his *proprio motu* powers. Ruto's trial began on 10 September 2013 at The Hague, while Kenyatta's has been delayed repeatedly, most recently after the Prosecutor requested more time following revelations a key witness had lied; they continue to serve as Kenya's president and vice president. In September 2013, Kenya's National Assembly urged the government to 'undertake measures to immediately withdraw' from the Rome Statute: Laura Klein Mullen, 'Kenya Lawmakers Approve Motion to Withdraw from ICC', *Jurist*, 5 September 2013.

[78] On the continuing salience of this dynamic, see Robert Knox, 'Civilising Interventions? Race, War and International Law', *Cambridge Review of International Affairs*, vol. 26, no. 1, 2013, pp. 111–32.

[79] Makau Mutua, *Human Rights: A Political and Cultural Critique*, Philadelphia 2002, p. 15.

[80] See Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law*, Cambridge 2004.

relatively late in the negotiating process. The 1994 ILC draft had envisaged a court much like the *ad hoc* tribunals: if the Court's prosecutor chose to proceed with a case, domestic courts could not pre-empt this by offering to do the job themselves.[81] Under the Prosecutorial Strategy developed by Moreno Ocampo, complementarity has taken on central importance: 'In this design, intervention by the Office must be exceptional—it will only step in when States fail to conduct investigations and prosecutions, or where they purport to do so but in reality are unwilling or unable to genuinely carry out proceedings.'[82] In theory, the principle encourages the development of national judicial institutions. In practice, it provides the Prosecutor with significant discretion in deciding whether and when to pursue prosecutions, and has often been abused. The Ituri region's judicial system was fully functional when The Hague took custody of Lubanga, courtesy of Kabila's security forces. Similarly, when the Prosecutor received Uganda's referral, its judiciary was 'one of the most proficient and robust in Africa'.[83] The only reason Uganda was 'unable' to prosecute was its inability to secure custody of the LRA leaders; but, as many commentators have pointed out, in this respect Uganda was no worse off than the Court itself.[84] Rather, the ICC decided that this would be a non-controversial way to get a prisoner in its dock.

Even within its narrow African horizons, the Court has dispensed a selective justice. In Uganda, only the leadership of the LRA faces prosecution while Museveni, a Western ally, enjoys impunity. In Sudan, a single-minded campaign to indict Bashir has awarded rebel movements an undeserved imprimatur and undermined efforts at a lasting peace. In the DRC, the court has prosecuted small-fry militia leaders while turning a blind eye to the ravages of the Kabila government's forces and the Ugandan and Rwandan armies that have plundered the country for decades. More damagingly, perhaps, the ICC's interventions throw up ideological blinders to the nature of mass violence in the contemporary

[81] The term 'complementarity' does not actually appear in the Rome Statute, although Article 1 speaks of the Court being 'complementary to national criminal jurisdictions'.

[82] 'Report on Prosecutorial Strategy', ICC, 14 September 2006.

[83] Clark, 'Law, Politics and Pragmatism', pp. 40–1. Indeed, as one recent study makes clear, the ICC's interventions in Uganda and Sudan have not led to any significant increase in domestic proceedings for conflict-related crimes: Sarah Nouwen, *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan*, Cambridge 2013.

[84] Schabas, *Introduction to the ICC*, p. 167.

world order. The framing of war crimes and crimes against humanity as the product of pious individuals or crude savagery obfuscates the structures and social relations out of which such crimes arise. Instances of mass violence are understood as random events, abstracted from the historical and socio-economic contexts that have shaped them. This is particularly glaring in the case of the Congo, where Western powers oversaw the murder of Patrice Lumumba, the country's first elected leader after independence, then for thirty years propped up the murderous and plutocratic dictatorship of Mobutu, rather than see the country tilt to the left during the Cold War. Now the sons and daughters of those Western governments deem themselves fit to judge the local leaders to whom Mobutu's monstrous regime gave birth.

As the reactions to Ngudjolo's acquittal revealed, many of the human-rights and international-justice advocates who once concerned themselves with the rights of the accused have become preoccupied with victims and the 'scourge of impunity' instead. Prosecution and conviction are increasingly conceptualized as the 'fulfilment of the victims' human right to a remedy', as Darryl Robinson has noted.[85] Amnesty International once focused on the release of political prisoners, with 'amnesty' central to its mission; on the treatment of defendants in custody and their right to a fair trial. Today, with the rise of an international-criminal-justice complex, Amnesty consistently opposes amnesty laws and is not wont to challenge the treatment of defendants accused of international crimes.[86] This was evident at the Rome Conference, where human-rights NGOs under the CICC umbrella were the most strident pro-prosecution voices. These groups advocated loudly for broad and open-ended definitions of crimes and modes of liability—and narrow defences—so as to avoid acquittals that would risk 'victims' rights to justice'.[87] As Robinson put it:

> Whereas in a national system one may hear that it is preferable to let ten guilty persons go free rather than to convict one innocent person, the [international criminal law] literature seems to strike the balance rather

[85] Darryl Robinson, 'The Identity Crisis of International Criminal Law', *Leiden Journal of International Law*, vol. 21, no. 4, December 2008, p. 930.
[86] Karen Engle, 'Self-critique, (Anti)politics and Criminalization', in José María Beneyto and David Kennedy, eds, *New Approaches to International Law: The European and American Experiences*, The Hague 2012.
[87] Machteld Boot, *Genocide, Crimes against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the ICC*, Cambridge 2002, p. 614.

> differently, replete as it is with fears that defendants might 'escape conviction' or 'escape accountability' unless inculpating principles are broadened further and exculpatory principles narrowed.[88]

Yet far from ending the *de facto* impunity long enjoyed by the powerful, the ICC has helped to institutionalize it. The Court's selective and highly politicized interventions have operated to reproduce one-sided narratives of complex conflicts, demonizing some perpetrators as *hostis humani generis*, while legitimating military interventions in the name of humanity. The logic of 'international criminal law' on this model was spelled out with refreshing frankness by the former Prosecutor in a recent interview on Canada's CBC. NATO and the Court should work hand in hand, serving one another: 'Integrate the SC, the ICC, NATO forces.'[89] Once celebrated as an avatar of Kantian cosmopolitanism, the ICC has served rather to shield and strengthen the imperial powers, less a tool of international justice than the judicial concomitant to Western intervention.

[88] Robinson, 'Identity Crisis of International Criminal Law', pp. 930–1.
[89] 'Defiant Assad', CBC News, 9 November 2012.