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THE 20TH ANNIVERSARY OF THE ROME STATUTE. A REVIEW ESSAY ABOUT THE NUREMBERG FORUM 2018

I INTRODUCTION

On 19 and 20 October 2018, in Courtroom 600 of the Nuremberg Palace of Justice, the International Nuremberg Principles Academy celebrated the 20th anniversary of the Rome Statute. Courtroom 600 certainly counts as one of the most famous courtrooms in the world. It is the place where the Major War Criminals Trial was held before the International Military Tribunal in Nuremberg. The black and white picture of the Courtroom with 22 former Nazi leaders in the docks, escorted by military personnel, can be found in every history schoolbook in Germany.

In these history-charged premises, the International Nuremberg Principles Academy held a two-day conference on the past, present and future of the Rome Statute. Within the two conference days that were filled to the brim with speeches and panels, the Academy managed to strike the balance between an appreciation of the International Criminal Court's achievement and a critical reflection of its problems and challenges ahead. This was especially due to the impressive and well selected lineup of representatives of state actors (first and foremost Heiko Maas, the German Foreign Minister), of the ICC (Chief Prosecutor Fatou Bensouda; former Judges such as Philippe Kirsch), and of course the academia and civil society.

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II OPENING REMARKS, A SURPRISE APPEARANCE, AND THE KEYNOTE ADDRESS

The conference started with opening remarks by *Klaus Rackwitz*, the Director of the International Nuremberg Principles Academy, by *Ulrich Maly*, Lord Mayor of the City of Nuremberg, by *Navi Pillay*, President of the Advisory Council of the International Nuremberg Principles, who gained international reputation as a judge at the ICC and the President of the International Criminal Tribunal for Rwanda (ICTR), and by *Thomas Dickert*, President of the Higher Regional Court of Nuremberg.

2.1 *Attacks Against the Integrity of International Criminal Justice*

All four speakers took recourse to Courtroom 600 and the Nuremberg trials and set the scene for the two days to come: they emphasised the importance of the ICC's anti-impunity-agenda and the dialogue between all actors involved in International Criminal Justice. Navi Pillay expressed concerns about a growing disrespect of international institutions and about the increasing amount of attacks against the integrity of International Criminal Justice. She especially addressed the 'lack of basic respect for human rights' and described in cautious language what was expressed later much more bluntly: the attacks on the ICC by state leaders such as Donald Trump. Navi Pillay combined her analysis with a concrete demand by calling on states to let international crimes not go unprosecuted and unpunished. Thomas Dickert saw the ICC weakened through the lack of state support, especially by some of the permanent members of the UN Security Council such as China, Russia and the United States. He contrasted this lack of support to the commitment of some States Parties of the ICC such as Germany and gave a brief account of the 80 ongoing investigations into international crimes in Germany – something that was described more concretely on the conference's second day by Christian Ritscher of the Office of the Federal Public Prosecutor General of Germany.

The two highlights of the morning session were the speech of Germany's Federal Foreign Minister and a speech that was not scheduled and therefore came as a surprise to many participants of the conference: The Nuremberg Academy managed to broadcast a video message by *Ben Ferencz* to the audience. No description of Ben Ferencz – last surviving former Prosecutor at the Nuremberg trials – could do justice of what this man has achieved. Ben Ferencz is at the

age of 99 and yet politely apologised for not being at the Forum in person. Who now expected a calm and reserved account of the ICC by a 99-year-old was quickly struck by a reality check: It took Ben Ferencz roughly two minutes until he both passionately and openly engaged in a condemnation of war and everybody who uses war as a means to implement his or her policies. Ben Ferencz was at his best, formulating the absurdity of war as an assembly line ('young people are being sent out to kill other people, they rest, they do it again, they rest, and so on...') and specifically addressing those people on the political playing field who are responsible for the current renaissance of nationalist tendencies: Donald Trump and John Bolton. Ben Ferencz's address was a rebuke of an 'irrational government' and a Security Advisor (John Bolton) who declared: 'We will let the ICC die on its own. After all, for all intents and purposes, the ICC is already dead to us'.¹ Ferencz recalled former US-president Dwight D. Eisenhower when he proclaimed: 'In a very real sense, the world no longer has a choice between force and law. If civilization is to survive it must choose the rule of law'² and sent a message to John Bolton: 'Bolton will be dead before the ICC, not *vice versa*'. He finished his address by giving 'three pieces of advice': 'First, never give up. Second, never give up. Third,...' – before Ferencz could finish, the audience in Courtroom 600 joined in a collective 'never give up' and for a moment there it seemed that the Courtroom once again was the beacon of hope. The audience applauded Ben Ferencz long after the picture of himself sitting in an armchair in front of what looked like an impressive book shelf was gone.

¹ The speech is available via Kahn, National Security Adviser John Bolton Remarks to Federalist Society, <https://www.lawfareblog.com/national-security-adviser-john-bolton-remarks-federalist-society>, last visited 26 October 2018. For a critical account of this speech and the reactions it provoked see Heinze, Exaggerations and over-simplifications in the debate about John Bolton's ICC Speech, *The Hill*, 3 October 2018, available at <https://thehill.com/opinion/white-house/409658-exaggerations-and-over-simplifications-mar-debate-about-john-boltons-icc>, last visited 29 October 2018; Scheffer, Ambass. David Scheffer on John Bolton's Announcement of 'Ugly and Dangerous' Punitive Actions against Judges, Prosecutors of Int'l Criminal Court, Just Security, 10 September 2018, available at <https://www.justsecurity.org/60678/ambass-david-scheffer-john-boltons-announcement-ugly-dangerous-punitive-actions-judges-prosecutors-intl-criminal-court/>, last visited 29 October 2018.

² Glass, Eisenhower proclaims 'Law Day', May 1, 1958, <https://www.politico.com/story/2012/05/eisenhower-proclaims-law-day-075750>, last visited 26 October 2018.

2.2 *Protection of Human Dignity and a Cosmopolitan Vision (Foreign Minister Heiko Maas)*

The scene Ben Ferencz set could not have been more appropriate for the speech of the German Federal Foreign Minister and it seemed that he too was impressed by Ben Ferencz's passionate remarks: Maas started by mentioning that John Bolton recently gave him his latest book and asked the Academy for a copy of Ben Ferencz's video message so he could return the favour and give that copy to Bolton. Heiko Maas' speech is available through the website of the German Federal Foreign Office³ and shall not be reproduced here. Needless to say that a read is highly recommended. Three of his remarks deserve special attention, though: First, Maas did not narrow himself down to declaratory and general remarks about the state of International Criminal Justice. Quite the contrary, he demanded action: 'When some people now declare this institution, of all institutions, to be dead in the water, then we must not allow that to go unchallenged. On the contrary, we should take it as an incentive to continue doing all we can to promote acceptance of the International Criminal Court and its jurisprudence around the globe'. Maas' explicit appeal to voice dissent against anti-multilateralism and to position oneself in a public discourse is a welcome counterpoint against the self-imposed containment and policy of undertones by the German government.⁴ Second, Maas not only emphasised the goal of universality, but also put the attacks against the ICC into the perspective of a general 'worldwide crisis of multilateralism' – a perception that many presenters shared in their later comments. The third remark is a one that Maas rather mentioned in passing. However, as I see it, it is the most important and most interesting remark: '[T]he fight for justice requires courage and stamina, particularly from Germany, as this fight always means striving for human dignity'. What Maas does here is a justification of International Criminal Justice based on the protection of human dignity. This is reminiscent of the Kantian idea of a *Weltbürgerrecht* and his concept of human dignity, focusing on people instead of States as subjects of the international order – more

³ Speech by Foreign Minister Heiko Maas at the Nuremberg Forum 2018 marking the 20th anniversary of the Rome Statute, <https://www.auswaertiges-amt.de/en/newsroom/news/maas-nuremberg-rome-statute/2151548>, last visited 26 October 2018.

⁴ About the government's lack of positioning and the ensuing effect on public debate and – eventually – democracy see Thiele, *Verlustdemokratie* (2016), pp. 112 *et seq.*

like a cosmopolitan vision.⁵ Human dignity is here also understood as a moral source of subjective rights of all people, of universally recognised human rights which ultimately have to be protected by a universal, interculturally recognised criminal law. It is a form of cosmopolitanism based on principles of reason with a claim of universal validity. Maas' focus on the human – and thereby victims of international crimes – as the main justification of the existence of International Criminal Law and an ICC can certainly be identified as the common theme of the conference. Many speakers have taken recourse to it – including ICC-Judge Bertram Schmitt in his closing remarks.

2.3 *With Great Power Comes Great Responsibility – The Chief Prosecutor's Critical Analysis*

During his remarks, Maas not only saw shadow in the current political situation with regard to the ICC, but also light. He concretely mentioned the collective referral by a group of States Parties to the Rome Statute, namely the Argentine Republic, Canada, the Republic of Colombia, the Republic of Chile, the Republic of Paraguay and the Republic of Peru, regarding the situation in the Bolivarian Republic of Venezuela on 27 September 2018.⁶ He passed the ball to Chief Prosecutor *Fatou Bensouda*, who gave the keynote address of the conference. Bensouda built on what the previous speakers said and especially addressed the challenges that lie ahead for the ICC ('the faster an object moves in time and space, the greater the obstacles'). She too – as Ben Ferencz did – made clear that the ICC was 'a child of war' after 'centuries of great suffering'. If someone were to identify the main term of Bensouda's speech, it would be 'responsibility'. Bensouda did not grow tired of emphasising the responsibilities of all actors involved in the ICC-project. Apart

⁵ See Kant's Third Definitive Article: 'Cosmopolitan Right shall be limited to Conditions of Universal Hospitality (principle of cosmopolitan right)', Kant, *Perpetual Peace*, in *Political Writings*, translation by Nisbet (1991), p. 98. See also Ambos, 'Punishment without a Sovereign? The Ius Puniendi Issue of International Criminal Law: A First Contribution towards a Consistent Theory of International Criminal Law', *Oxford Journal of Legal Studies (OJLS)*, 33 (2013), 293, 307; id., *Treatise on International Criminal Law Vol. I* (2013), pp. 307–308.

⁶ Statement of the Prosecutor of the International Criminal Court, Mrs Fatou Bensouda, on the referral by a group of six States Parties regarding the situation in Venezuela, <https://www.icc-cpi.int/Pages/item.aspx?name=180927-otp-stat-venezuela>, last visited 26 October 2018.

from the necessary support by States Parties and civil society, she also addressed her own responsibility as Chief Prosecutor by promoting an ‘honest and open look at the OTP’s track record’. Here, Bensouda did not resort to general promises and programmatic statements but presented a rather concrete analysis of the investigatory work (‘efforts to reduce the time gap between the events on ground and the investigation of the Office’; challenges posed by digital evidence) and of her case selection policy (‘quality over quantity’). Bensouda did not shy away from addressing critique against her office, even though she did not once mention (at least not explicitly) the acquittal of Jean-Pierre Bemba by the Appeals Chamber last June.⁷

⁷ *Prosecutor v. Bemba*, ICC-01/05-01/08-3636-Red, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III’s ‘Judgment pursuant to Article 74 of the Statute’. For a comment see Heinze, Some Reflections on the Bemba Appeals Chamber Judgment, *opinio juris*, 18 June 2018, available <http://opiniojuris.org/2018/06/18/some-reflections-on-the-bemba-appeals-chamber-judgment/>, last visited 26 October 2018; Amnesty International, Lessons must be learned from the Bemba case as a whole, 1 October 2018, available at <https://hrij.amnesty.nl/lessons-must-be-learned-from-the-bemba-case/>, last visited 29 October 2018; Karnavas, The Reversal of Bemba’s Conviction: what went wrong or right?, *International Criminal Law Blog*, 19 June 2018, available at <http://michaelgkarnavas.net/blog/2018/06/19/bemba-reversal/>, last visited 29 October 2018; Jackson, Commanders’ Motivations in Bemba, *EJIL: Talk!*, 15 June 2018, available at <https://www.ejiltalk.org/commanders-motivations-in-bemba/>, last visited 29 October 2018; id., Geographical Remoteness in Bemba, *EJIL: Talk!*, 30 July 2018, available at <https://www.ejiltalk.org/geographical-remoteness-in-bemba/>, last visited 29 October 2018. See also the critical responses of Sadat, Fiddling While Rome Burns? The Appeals Chamber’s Curious Decision in Prosecutor v. Jean-Pierre Bemba Gombo, *EJIL: Talk!*, 12 June 2018, available at <https://www.ejiltalk.org/author/leilansadat/>, last visited 29 October 2018; Amann, In Bemba and Beyond, Crimes Adjudged to Commit Themselves, *EJIL: Talk!*, 13 June 2018, available at <https://www.ejiltalk.org/in-bemba-and-beyond-crimes-adjudged-to-commit-themselves/>, last visited 29 October 2018; Whiting, Appeals Judges Turn the ICC on its Head with Bemba Decision, *Just Security*, 14 June 2018, available at <https://www.justsecurity.org/57760/appeals-judges-turn-icc-head-bemba-decision/>, last visited 29 October 2018; Sacouto, The Impact of the Appeals Chamber Decision in Bemba: Impunity for Sexual and Gender-Based Crimes?, *International Justice Monitor*, 22 June 2018, available at <https://www.ijmonitor.org/2018/06/the-impact-of-the-appeals-chamber-decision-in-bemba-impunity-for-sexual-and-gender-based-crimes/>, last visited 29 October 2018; Powderly and Hayes, The Bemba Appeal: A Fragmented Appeals Chamber Destabilises the Law and Practice of the ICC, *PhD studies in human rights*, 26 June 2018, available at <http://humanrightsdoctorate.blogspot.com/2018/06/the-bemba-appeal-fragmented-appeals.html>, last visited 29 October 2018.

III THE PANELS: PAST, PRESENT AND FUTURE OF THE ICC

The end of Bensouda's keynote speech was at the same time the kick off for the conference, starting with the Panel 'Making of the Rome Statute', chaired by William Schabas.

3.1 *The Making of the Rome Statute*

Schabas with his eloquence and expertise was the perfect fit for the panel chair. He opened with Bismarck's famous sausage-remark ('If you like laws and sausages, you should never watch either one being made') to address the difficulties delegates experienced during the negotiation of the Rome Statute. In a certainly journalistic fashion he chaired the panel by asking the panelists what they took away from the Rome Conference, whether mistakes could have been avoided and what lessons they learned. He could not have asked these questions to a better selected panel: Ambassador *Hans Corell*, former Under-Secretary-General for Legal Affairs and Legal Counsel at the United Nations, presented the perspective of the Secretariat and gave insights into challenges he experienced – for instance, the 700 (!) documents that were circulated during the Rome Conference and that all had to be translated into the official languages. *Philippe Kirsch*, former Chairman of the Conference, Committee of the Whole of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court and of course former Judge and first President of the ICC, underlined the pressure the delegates experienced. Kirsch gave an overview of the particularly controversial topics at the Conference such as complementarity, the role of the Prosecutor, the UN Security Council and of universal jurisdiction (or whether states should give their consent). Unsurprisingly, these topics also constantly re-appeared during the two days in Courtroom 600. Especially Kirsch's insight into the debates around the jurisdiction of the ICC (and the discomfort some delegates felt about the fact that the ICC was about to be the first court that had prospective jurisdiction) were illuminating. Finally, *William R. Pace* (one of the leading NGO-figures at the Rome Conference,⁸ Executive Director of the World Federalist Movement-Institute for Global Policy; Convenor, Coalition for the International Criminal Court) emphasised that the creation of the

⁸ A detailed description of Pace's role during the ICC-negotiations can be found in Struett, *The Politics of Constructing the International Criminal Court* (2008), pp. 77–79.

ICC was a ‘golden moment in history’. As many conference participants later agreed, Pace opined that this golden moment could not be repeated today. Asked by chairman Schabas, Pace took the time to address opportunities that he believed were missed at the Rome Conference: the lack of certain offences such as drug trafficking and terrorism; the lack of an advisory commission on the election of the Prosecutor; and the lack of more detailed rules about non-cooperation and arrest. He also regretted that the Assembly of States Parties (ASP) did not spend more time to make the Rome Statute ‘workable’. In the subsequent debate with the audience, the panelists became more concrete in both their analysis of possible mistakes and future challenges. Hans Corell especially criticised the rules on the selection and nomination of ICC-Judges and suggested to abolish List B all together.⁹ He also critically assessed the role of Article 13b ICC-Statute¹⁰ and demanded that ‘if the evidence leads the Prosecutor to persons at the highest national level, the Council must follow suit and order the state to transfer the persons in question to the ICC’, a demand he already expressed in his reflections at the Commemoration of the 20th Anniversary of the Rome Statute organised by the Coalition for the International Criminal Court on 15 February 2018.¹¹

3.2 Case Selection

In the first afternoon session the topic of case selection by the ICC-OTP – a topic already introduced by the Chief Prosecutor in her speech – was addressed extensively. The Academy selected panelists with a practical, an academic and a political background. All those features were combined by the prominent chair of the panel: *Stephen*

⁹ The judges are elected from two lists (Article 36(5) ICC-Statute):

List A shall consist of candidates with established competence in criminal law and procedures, and the necessary relevant experience, whether as Judge, Prosecutor, advocate, or in another similar capacity in criminal proceedings. List B shall consist of candidates with established competence in relevant areas of international law, such as IHL and human rights law, and extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court.

See in more detail Ambos, *supra* note 5, p. 26.

¹⁰ ‘A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations’.

¹¹ Corell, <http://www.havc.se/res/SelectedMaterial/2018021520thanniversaryromestatute.pdf>, last visited 26 October 2018.

J. Rapp, former United States Ambassador-at-Large for War Crimes Issues in the Office of Global Criminal Justice. Rapp set the common theme for the panel: prosecutorial discretion. *Serge Brammertz*, Chief Prosecutor at the Mechanism for International Criminal Tribunals (MICT), emphasised the importance of the debate around the question whether the OTP should investigate low-level, mid-level or high-level perpetrators first¹² and opined that the OTP should always go after the ‘top leaders’. Especially Brammertz’s comparisons between the International Criminal Tribunal for the former Yugoslavia (ICTY) and the ICC with regard to prosecutorial policies were insightful. He encouraged the current Chief Prosecutor of the ICC to be more communicative and not only speak publicly about achievements but also about problems the Office experiences. The second panelist was Professor *Margaret M. deGuzman*, Professor of Law at Temple University. DeGuzman criticised the OTP for its rather ‘legalistic’ approach to Article 53 ICC-Statute and for its narrow approach to the ‘interests of justice’-clause. She speculated that the motive behind such a narrow reading was for the OTP to appear as impartial and unpolitical as possible which deGuzman thought to be the wrong approach. She opined that the OTP should embrace discretion instead and interpret the ‘interests of justice’-clause more broadly. Her argument had a twofold basis: First, the primary goal of the ICC as ‘norm expression’ (‘versus an emphasis on victims’ – this premise turned out to be particularly controversial and was rejected, for instance, by Fabricio Guariglia in the subsequent debate [‘The Statute is victim centered’]). Second, gravity as a primary criterion.¹³ *Richard Dicker*, Director of the International Justice Program, Human Rights Watch, agreed that gravity was the ‘essential criterion’ for case selection. Dicker criticised especially the failure of the OTP

¹² Following a shift in strategy that was introduced by the OTP’s Strategic Plan 2012–2015, available at <https://www.icc-cpi.int/iccdocs/otp/OTP-Strategic-Plan-2013.pdf>, last visited 26 October 2018 and confirmed by the current Plan, available at https://www.icc-cpi.int/iccdocs/otp/EN-OTP_Strategic_Plan_2016-2018.pdf, last visited 26 October 2018, in situations in which the OTP has limited investigative possibilities, this approach is meant to allow for ‘a strategy of gradually building upwards’, which means that the OTP will ‘first investigate and prosecute a limited number of mid- and high-level perpetrators in order to ultimately have a reasonable chance to convict the most responsible’, see ICC-OTP, Strategic Plan 2012–2015 (2013), para. 22; also ICC-OTP, Strategic Plan 2016–2018 (2015), para. 34. See generally Ambos, *Treatise on International Criminal Law Vol. III* (2016), p. 134.

¹³ See also Pues, ‘Discretion and the Gravity of Situations at the International Criminal Court’, *JICJ*, 17 (2017), 960–984.

to bring cases when more than one party is involved in an armed conflict. Unlike panelists before him, Dicker drew attention to the Policy Paper on case selection and prioritisation that the OTP published in 2016¹⁴ and gave the paper an overall positive review, not without, however, criticising the lack of a ‘holistic vision what accountability means’ (what he meant by that unfortunately remained unanswered). The ensuing debate revolved around the OTP’s lack of resources and the question whether the Office should admit that political factors went into its case selecting decision.

3.3 *The Length of Proceedings*

The last panel of the first day dealt with the length of proceedings. After some general remarks by *Vladimir Tochilovsky*, former Trial Attorney at the ICTY, Judge *Ekaterina Trendafilova*, President of the Kosovo Specialist Chambers (KSC), gave an instructive insight to the KSC’s Rules of Procedure and Evidence (RPE) and the way the procedural regime attempts to ensure that trials are both speedy and fair at the same time. Trendafilova mentioned Rule 85(3) cl. 1 KSC-RPE, according to which ‘[t]he Pre-Trial Judge and the Specialist Prosecutor may hold meetings during the investigation and prior to the confirmation of the indictment.’ Status Conferences, Trial Preparation Conferences, a ‘Specialist Prosecutor’s Preparation Conference’ and a ‘Defence Preparation Conference’ to expedite proceedings are also provided for in Rules 86 and 116–119 KSC RPE. Moreover, the Pre-Trial Judge is entitled to ‘rule expeditiously on requests by the Specialist Prosecutor related to the conduct of the investigation’ (Rule 85(2) KSC RPE). The presiding judge of a Trial Panel may issue ‘trial management orders’ (Rule 116(4) KSC RPE).¹⁵ Trendafilova also informed the audience that the KSC judges introduced specific deadlines for trial and appeal judgments. Furthermore, the Pre-Trial Judge is obliged to ‘set a target date’ for his or her confirmation decision pursuant to Article 39(2) KSC Law, ‘which, subject to the specificities of the case, shall be no later than six (6) months from the filing of the indictment and all supporting material’ (Rule 85(5) KSC RPE). Considering these rather radical measures to expedite proceedings, it comes as no surprise that the KSC judges

¹⁴ For a detailed analysis of the paper see Ambos, ‘The International Criminal Justice System and Prosecutorial Selection Policy’, in Ackerman, Ambos and Sikirić, *Visions of Justice – Liber Amicorum Mirjan Damaška* (2016), pp. 23, 36 *et seq.*

¹⁵ See in more detail Heinze, ‘The Kosovo Specialist Chambers’ Rules of Procedure and Evidence’, *JICJ*, 15 (2017), 985, 1001–1005.

could not resist the temptation of obliging the Specialist Prosecutor to provide an in-depth analysis chart.¹⁶

After Judge Trendafilova's rather technical but highly informative remarks about the KSC-RPE, *Fabricio Guariglia*, Director of the Prosecutions Division of the ICC, shifted the focus back to the ICC and especially identified disclosure as a tool to expedite (or prolong) proceedings. Guariglia drew attention to disclosure problems that usually go unnoticed, such as the problem of translating hundreds of documents so the accused is able to read and understand them. He also stressed the challenge of complying with disclosure obligations in an ongoing armed conflict. In a side-note, Guariglia took on the current Chamber's Practice Manual – a best practices document that is useful but ineffective as long as Chambers do not comply with it. After *Michelle Jarvis*, Deputy Head of the International, Impartial and Independent Mechanism on Syria (IIIM Syria), especially addressed the impact of active judges on the proceedings and described the information management by the IIIM Syria, *Xavier-Jean Keïta*, Principal Counsel at the ICC's Office of the Public Counsel for the Defence, was probably – and expectedly – the most critical participant on the panel. His approach to the ICC's procedural regime was a cultural one. He very clearly rejected the common law elements in the Rules of Procedure and Evidence and opined that the implementation of more civil law elements would have been beneficial. As examples, he mentioned disclosure ('The DNA of a prosecutor is to prosecute. The investigation of both exculpatory and incriminating evidence is unrealistic.') and the interlocutory appeals (more concretely, the leave to appeal: 'It is not in my nature to ask the judge whether I may appeal his decision.'). As a reform proposal, Keïta suggested the introduction of an investigative judge. He closed with a critique of the ICC's low budget by labelling the ICC's work as 'Ryanair Justice'.¹⁷ In the last discussion of the day, all panelists

¹⁶ See in more detail Heinze, *JICJ*, 15 (2017), 985, 994–995.

¹⁷ About the budget of International Criminal Tribunals see Wierda and Triolo, 'Resources', in Reydams, Wouters and Ryngaert, *International Prosecutors* (2012), pp. 113 *et seq.*; Bassiouni, 'The ICC's Twelfth Anniversary Crisis: Growing Pains or Institutional Deficiency?', in Jalloh and Marong, *Promoting Accountability under International Law for Gross Human Rights Violations in Africa* (2015), p. 93, 94. Romano, too, regards the costs of international criminal justice relatively low in comparison to the costs of other trials, projects or institutions, see Romano, 'The Price of International Justice', *Law & Practice of International Courts & Tribunals*, 4 (2005), 281, 303, who compares the costs of the ad hoc Tribunals to the costs of 'several high profile trials and investigations' such as the Lockerbie trial (\$80 mil-

agreed on the – certainly controversial¹⁸ – claim that victim participation was not responsible for the lengthy trials at the ICC.

3.4 *Victim's Participation and Reparations*

It could not be more fitting that the second day started with the important issue of victim participation and reparations. Panel chair *Michaela Lissowsky* (Friedrich-Alexander-Universität Erlangen-Nürnberg) reminded the participants that there were not only founding fathers at the Rome Conference but also founding mothers. Lissowsky did not open the panel with a question (as did the panel chairs before her) but – very fittingly – describing the fate of ‘victim 480’ who was abused and raped several times a day in front of her father. As a result, she was diagnosed with HIV. She eventually participated in the trial against Bemba and made the following remark: ‘I feel good. I feel liberated. I feel relieved because I’ve been

Footnote 17 continued

lion), the Oklahoma City bombing investigation (\$82,5 million), the Whitewater and Monica Lewinsky investigations (\$62,5 million) etc. See also the instructive overview in McLaughlin, *International Criminal Tribunals* (2012), p. 77, who compares the costs of combined international criminal tribunals 1993–2015 (including the ICTY, ICTR and ICC: \$6,28 billion) with the Wall Street bonuses 2011 (\$20 billion), the London Olympics 2012 (\$15 billion), the U.S. Federal Court System budget 2012 (\$6 billion), the U.S. presidential election 2012 (\$6 billion), the sale of the L.A. Dodgers 2012 (\$2 billion) and the Apple Samsung Verdict 2012 (\$1 billion).

¹⁸ See, for instance, Van den Wyngaert, ‘Victims before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge’, *Case Western Reserve Journal of International Law* 44 (2011), 475, 489: ‘[A] criminal trial, unlike, for example, a truth and reconciliation commission, is not the appropriate forum for victims to express their feelings, as this would detract from the serenity of the trial and would not serve a useful purpose from the perspective of a criminal proceeding’. In a similar vein Ciorciari and Heindel, ‘Victim Testimony in International and Hybrid Criminal Courts: Narrative Opportunities, Challenges, and Fair Trial Demands’, *Virginia Journal of International Law*, 56 (2017), 266, 301: ‘The impulse of some victims in the courtroom to express rage, distress, or the desire for revenge, or to offer information extraneous to the charges, not only lengthens the proceedings, but also potentially jeopardizes the impartiality of the courtroom atmosphere’. Supporting the view of the panelists: Carayon and O’Donohue, ‘The International Criminal Court’s Strategies in Relation to Victims’, *JICJ*, 15 (2017), 567, 588: ‘Judges involved in the first trials have also spoken publicly and positively of victim participation in those cases, opining that the rights of victims and the defence can be balanced without greatly extending the length of the cases’.

able to express what I've been feeling for years. And I think that having had the chance to let this out, I feel good, I feel better.¹⁹

As the first panelist to speak, *Philipp Ambach*, Chief of the ICC's Victims Participation and Reparations Section, gave a valuable insight into his work. He focused on the ICC's outreach, the problem of resources, and the right of victims to choose a legal representative (Rule 90(1) ICC-RPE). Ambach clarified that his Section was actively engaging with victims, especially in the Bemba case, trying to explain 'what the Statute is and what it is not'. Responding to critical remarks made the day before, Ambach emphasised that victims generally support 'what's happening in The Hague in the courtroom'. With regard to the problem of resources, Ambach illustrated how 'inventive' his Section sometimes had to be to overcome these shortcomings. The interaction with civil society is a key factor for that. With regard to Rule 90(1) ICC-RPE, Ambach stressed that his Section generally asks about the preferences of the victims in choosing their representative.²⁰ He also referred to the 'Decision Establishing the Principles Applicable to Victims' Applications for Participation' in the Al Hassan case, where Single Judge Péter Kovács walked the victims step by step through the Rule 90 process.²¹ An interesting question was raised in the discussion after the panelists gave their presentation: Klaus Rackwitz drew attention to a decision by the Pre-Trial Chamber I in the Palestine Situation of 13 July 2018. In para. 10, the Chamber remarked: 'The Chamber underlines that in accordance with the Court's legal framework, the rights of victims before the ICC are not limited to their general participation within the context of judicial proceedings pursuant to article 68(3) of the Statute. In this regard, it is worth recalling that victims also have the right to provide information to, receive information from and communicate with the Court, regardless and independently from judicial proceedings, including during the preliminary examination stage.'²²

¹⁹ *Prosecutor v. Bemba*, ICC-01/05-01/08-T-369-Red-ENG, Sentencing Hearing, p. 69, lines 7–9.

²⁰ Ambach specifically refers to Human Rights Watch, Who will stand for us? Victims' Legal Representation at the ICC in the Ongwen Case and Beyond, <https://www.hrw.org/report/2017/08/29/who-will-stand-us/victims-legal-representation-icc-ongwen-case-and-beyond>, last visited 26 October 2018.

²¹ *Prosecutor v. al Hassan*, ICC-01/12-01/18-37-tENG, Decision Establishing the Principles Applicable to Victims' Applications for Participation, paras. 64 *et seq.*

²² *Situation in the State of Palestine*, ICC-01/18-2, Decision on Information and Outreach for the Victims of the Situation, para. 10.

Ambach answered Rackwitz's question, whether this meant that victims now enjoyed rights independent from any ICC proceedings, by a reference to footnote 17 in the quote, which in his view confirmed that the Chamber's remark was not constitutive but merely declaratory. In Ambach's view, victims already enjoyed certain rights independent from an investigation.

After *Pieter Willem de Baan* (Executive Director of the ICC's Secretariat of the Trust Fund for Victims [TFV]) specifically addressed the TFV's assistance mandate and repeatedly demanded a 'systemic response' to questions of victim participation and reparation, *Amanda Ghahremani*, Legal Director of the Canadian Center for International Justice, criticised the tendency to instrumentalise victims for the achievement of other aims (such as 'norm expression', promoted earlier by Margaret DeGuzman). Ghahremani clarified what Judge Bertram Schmitt in his closing remark repeated: Without victims and survivors, there would not be an ICC. Ghahremani therefore suggested to prioritise restorative justice aims. In her critique of victim instrumentalisation, Ghahremani especially took on the narrow understanding of victims as a source of information. *Fiona McKay*, Senior Managing Legal Officer at the Open Society Justice Initiative, mainly emphasised the importance of civil society for a meaningful victim satisfaction. She listed three grounds for improvement in the ICC's engagement with civil society: First, she advocated for a realistic perception of civil society. In her view, civil society was especially not apolitical. Second, she stressed that civil society takes considerable risks when it works with the ICC. These risks include concerns for both security and reputation. Third, McKay warned against the fuelling of expectations. These expectations can lead to great disappointments.²³ Victim participants may be led astray by their own expectations or by the failure of the ICC or its

²³ This was also expressed in *Prosecutor v. Bemba*, ICC-01/05-01/08-3636-Red, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's 'Judgment pursuant to Article 74 of the Statute', ICC-01/05-01/08-3636-Anx2, Separate opinion Judge Van den Wyngaert and Judge Morrison, para. 30. See also Human Rights Center, *The Victim's Court?*, available at <https://www.law.berkeley.edu/wp-content/uploads/2015/04/The-Victims-Court-November-2015.pdf>, last visited 26 October 2018, p. 4, which McKay is referring to; Damaška, 'The International Criminal Court between Aspiration and Achievement', *UCLA Journal of International Law and Foreign Affairs* 14 (2009), 19, 20: 'The gap between promise and achievement may disappoint their audiences and disillusion their friends, while providing argumentative ammunition to their enemies'.

representatives to be forthright about what it can and cannot provide.²⁴

3.5 *The Exercise of Jurisdiction and Complementarity within the Rome Statute*

'Exercise of Jurisdiction and Complementarity within the Rome Statute' was the topic of Panel V. In his introductory remarks, chair *Jens Meierhenrich*, Associate Professor at the London School of Economics and Political Science (LSE), reiterated the importance of Article 17 ICC-Statute – an 'ingenious compromise solution' in his view – as a 'cornerstone of the statute'.²⁵ Meierhenrich applauded, 'despite the criticism', former ICC Chief Prosecutor Moreno Ocampo for creating the Jurisdiction, Complementarity and Cooperation Division (JCCD)²⁶ as one of the operational divisions and 'diplomatic wing' of the OTP. How this 'wing' works, was a question he asked *Phakiso Mochochoko*, Director of the JCCD. Unfortunately, Mochochoko provided only a brief look behind the curtain of the JCCD but preferred to elaborate on general questions of complementarity. Only in the ensuing debate he left his path of general observations and described the challenges of state cooperation. *Brenda J. Hollis*, Prosecutor at the Residual Special Court for Sierra Leone (RSCSL), chose a more legalistic approach to describe her work and provided an extensive analysis of the challenges of legal characterisation and a lack of definition. After *Almudena Bernabeu* (Director, Guernica 37 International Justice Chambers) demonstrated what the ICC-OTP could learn from Latin America and

²⁴ Ibid.

²⁵ *Prosecutor v. Kony et al.*, ICC-02/04-01/05, para. 34.

²⁶ In a similar vein Kambale, *The ICC and Lubanga: Missed Opportunities, African Futures*, 16 March 2012:

At the outset, the ICC prosecutor took concrete and positive steps demonstrating his willingness to make the best use of complementarity mechanisms provided for in the Rome Statute. He organized his office so as to give complementarity issues the prominence they deserve. In addition to the Investigations and Prosecutions Divisions, he created a Jurisdiction, Complementarity and Cooperation Division (JCCD), which was given the task, among other things, to look into issues of admissibility and advise him on the proper balance between national prosecutions and the role of the ICC,

especially the use of Transitional Justice-language, *Christian Ritscher* was the only panelist who was willing to give an empirical account of his work. His presentation of the work of the Office of the Federal Public Prosecutor General of Germany was informative and appealing. Ritscher portrayed the work of his office historically and institutionally. He shortly mentioned the Rwabukombe case²⁷ and the investigation against, prosecution and conviction of former leaders of the Forces Démocratiques de Libération du Rwanda (FDLR).²⁸ The former judgment is final, in the latter case the appeal

²⁷ On 18 February 2014, after a three-year trial, the Higher Regional Court Frankfurt am Main found Onesphore Rwabukombe, the former mayor of the northern Rwandan municipality of Muvumba on the Ugandan border, guilty of aiding the Rwandan genocide on the basis of his participation in a church massacre on 11 April 1994 in Kiziguro (around 100 km north-east of Rwanda's capital, Kigali), where 400 people were brutally murdered, noting in particular his lack of genocidal intent. Rwabukombe was sentenced to 14 years in prison (Higher Regional Court Frankfurt am Main, Judgment of 18 February 2014, 5-3 StE 4/10). In the appeal proceedings (Revision), the German Federal Court of Justice criticised the lower court's legal analysis and annulled the Higher Regional Court's judgment with its Decision of 21 May 2015 (Federal Court of Justice, decision of 21 May 2015, 3 StR 575/14). After a retrial, on 29 December 2015 the Higher Regional Court Frankfurt am Main gave Rwabukombe a life sentence for his participation as a co-perpetrator acting with the required genocidal intent, noting his particularly serious guilt (Higher Regional Court Frankfurt am Main, Judgment of 29 December 2015, 4-3 StE 4/10-4-1/15). This judgment is now final after the Federal Court of Justice dismissed a second appeal on 26 July 2016. About the Rwabukombe case in more detail Ambos, 'The German Rwabukombe Case – The Federal Court's Interpretation of Co-perpetration and the Genocidal Intent to Destroy', *Journal of International Criminal Justice (JICJ)*, 14 (2016), 1221–1234.

²⁸ On 28 September 2015 the Higher Regional Court in Stuttgart handed down convictions in the trial of two Rwandan leaders of the Hutu militia group Forces Démocratiques de Libération du Rwanda (FDLR) (Higher Regional Court Stuttgart, Judgment of 28 September 2015, 5-3 StE 6/10). Ignace Murwanashyaka, president of the FDLR, and Straton Musoni, his vice president, were on trial for committing grave breaches of international law in the eastern Democratic Republic of Congo in 2008/2009. They were sentenced to thirteen and eight years imprisonment respectively. The main defendant Murwanashyaka was convicted of aiding war crimes and leadership of a foreign terrorist group (§ 129b StGB). His deputy Musoni was convicted of leadership of a foreign terrorist group. In detail European Center for Constitutional and Human Rights (ECCHR), Universal Jurisdiction in Germany? – The Congo War Crimes Trial: First Case under the Code of Crimes against International Law, available at https://www.ecchr.eu/en/our_work/international-crimes-and-accountability/congo-war-crimes-trial.html?file=tl_files/Dokumente/Publikationen/FDLR%20Report%20Executive%20Summary_EN.pdf, last visited 26 October 2018.

hearing started on 31 October 2018.²⁹ With regard to current investigations, Ritscher especially mentioned the *Strukturverfahren* (background investigations) in the middle east.³⁰ As one of the investigative challenges, Ritscher addressed the investigations into sexual violence and the lack of experience of his Office with these kinds of investigations (the jurisdiction of the Federal Public Prosecutor General of Germany is usually limited to prosecuting serious offences against the state such as high profile terrorism cases).³¹ Upon request by chair Meierhenrich, Ritscher gave valuable insights into the cooperation of his Office with the ICC-OTP and positively evaluated the exchange of information and expertise, the ‘practical approach to investigations into core crimes’ becomes a common theme of his presentation. Last but not least, Ritscher stressed the importance of a cooperation between the national authorities in investigating and prosecuting the crime of genocide, crimes against humanity and war crimes and speaks in high terms of the meetings of the Genocide Network at the Eurojust level.³² It goes without saying that Ritscher painted an overall positive picture of the work of his Office. Unfortunately, he failed to address the structural deficiencies of his Office in the early years of the existence of the German Code on International Criminal Law (*Völkerstrafgesetzbuch*, VStGB) or controversial decisions to discontinue war crimes proceedings, such

²⁹ See <https://www.bundesgerichtshof.de/SharedDocs/Termine/DE/Termine/3StR236.html?nn=6128288>, last visited 29 October 2018.

³⁰ German authorities carry out their investigations under the VStGB as follows: They first systematically review all situations around the world that could be relevant from an international criminal law point of view by assessing numerous reports from the media, NGOs, blogs and reports by international organisations and then set up monitoring procedures. Where an initial threshold of suspicion is met, and the case has some link to Germany, the authorities will open a ‘Strukturverfahren’ or a background investigation. As the European Center for Constitutional and Human Rights describes, ‘[t]hese proceedings qualify as investigations as defined in the German Code of Criminal Procedure and can thus involve criminal justice mechanisms such as the hearing of witness testimony. They are comparable to ‘situations’ under scrutiny at the ICC. Over the course of these proceedings, individual suspects may be identified. Further investigations are then pursued against these suspects in separate proceedings’, ECCHR, *supra* note 28, p. 7.

³¹ See s. 120 of the German Courts Constitution Act (*Gerichtsverfassungsgesetz*, GVG).

³² For more information on the Genocide Network see Eurojust, European Network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes, <http://www.eurojust.europa.eu/practitioners/networks-and-fora/pages/genocide-network.aspx>, last visited 26 October 2018.

as the prominent case against the German army colonel Georg Klein that involved civilian casualties from an aerial bombing near Kunduz in Afghanistan in September 2009.³³

3.6 *State Engagement and Disengagement*

The afternoon session on the last day heralded the start of what certainly could be labelled as the grand finale of an information-packed conference. The session was kicked off by the ‘State Engagement and Disengagement’-panel, certainly one of the richest panels of the conference. Panel chair *Carsten Stahn* (Professor of International Criminal Law and Global Justice, Leiden University) listed both ‘new forms of engagement’ (the increase in self-referrals of states to the ICC that were not foreseen in Rome; Article 12(3)-declarations; collective referrals) and ‘new forms of disengagement’ (the ‘unsigning’ of the ICC-Statute, state withdrawals, and backlash against the Court). The well selected panel – the African continent and the permanent UN Security Council members that are non-state parties were represented – started with *Erika de Wet*’s presentation of the relationship between the ICC and both African states and the African Union (AU).³⁴ The Professor of International Constitutional Law at the University of Pretoria only shortly mentioned the many hostile acts of African states and the AU against the ICC and shifted the focus mainly to the reasons of that hostility. It was refreshing to see that de Wet did not blame one but several stakeholders for the current situation. She especially advocated for a better understanding of the ‘immense sensitivity about colonialisation’ on the African

³³ The Public Prosecutor General of Germany, Investigation proceedings against Colonel (Oberst) Klein and Staff Sergeant (Hauptfeldwebel) W. based on the suspicion of a criminal offence having been committed in violation of the Code of Crimes Against International Law (Völkerstrafgesetzbuch, VStGB) along with other offences, 3 BJs 6/10-4, Termination of the proceedings pursuant to section 170 (2), first sentence, of the Code of Criminal Procedure (Strafprozessordnung, StPO), 16 April 2010. See also ECCHR, German Air Strike near Kunduz – A Year After, available at <http://www.adh-geneve.ch/RULAC/news/ECCHR-Kunduz-A-Year-After.pdf>, last visited 29 October 2018; von der Groeben, ‘Criminal Responsibility of German Soldiers in Afghanistan: The Case of Colonel Klein’, *German Law Journal (GLJ)*, 11 (2010), 469 *et seq.*

³⁴ See in more detail Ambos, ‘Expanding the Focus of the “African Criminal Court”’, in Schabas, McDermott and Hayes, *The Ashgate Research Companion to International Criminal Law – Critical Perspectives* (2013), pp. 499–529; Vilmer, ‘The African Union and the International Criminal Court: counteracting the crisis’, *International Affairs*, 92 (2016), 1319 *et seq.*

continent, not without, however, clarifying that this sensitivity is sometimes manipulated. It was this well-struck balance between the resentments and affinities of stakeholders what made de Wet's presentation very insightful. Three points received particular critical attention by de Wet: First, the lack of (financial) support of the UN Security Council once it referred a situation to the ICC ('cynical'); second, the sub-optimal timing of the arrest warrants against a sitting head of state (de Wet referred to the Al Bashir case); third, the missed opportunity of the Assembly of States Parties (she probably meant the States Parties³⁵) to remove former Chief Prosecutor Moreno Ocampo.³⁶ In reply to chair Stahn's remark that these deficiencies may well be solved from within the Statute and the Court and do not warrant a state withdrawal, de Wet clarified that the resentments against the Court 'go deeper' and are especially fuelled by a lack of communication between the Court and African states. In the later discussion, Article 13b ICC-Statute and the role of the UN Security Council re-entered the podium and was condemned by de Wet's slogan 'The best use of Article 13b is no use of Art 13b'.³⁷ The US-perspective was presented by no less than *David Scheffer*, first United States Ambassador-at-Large for War Crimes Issues during President Bill Clinton's second term in office and currently Director of the Center for International Human Rights at Northwestern University. Scheffer led the US negotiating team during the Rome Conference. Scheffer was well aware that his account of the making of the Rome

³⁵ The removal requires the affirmative vote of a majority of the states parties, not the ASP, which means that at least half of the states that have ratified the statute must approve the Prosecutor's removal Art. 46(2) ICC-Statute. See also Heinze, *International Criminal Procedure and Disclosure* (2014), p. 251.

³⁶ As is the position in respect of the judges, the Prosecutor or the Deputy Prosecutor can only be removed where he or she is found to have committed serious misconduct or a serious breach of his or her duties or is unable to exercise the functions required by the ICC-Statute, Art. 46(1) ICC-Statute. Such misconduct would include activities incompatible with official functions, abuse of office, or concealing information, which would have precluded the Prosecutor from taking office (Rule 24(1) ICC-RPE). See also Heinze, *International Criminal Procedure and Disclosure* (2014), p. 251.

³⁷ See also de Wet, 'Referrals to the International Criminal Court Under Chapter VII of the United Nations Charter and the Immunity of Foreign State Officials', *American Journal of International Law Unbound*, 112 (2018), 33 *et seq.*

Statute could fill an entire conference³⁸ and cut right to the chase: he made recommendations of how the Rome System could be improved. Scheffer reiterated what he already proposed at the ICC Forum of the UCLA School of Law: create a ‘Select Committee of ICC State Party Representatives’ that ‘would fulfill the critical function of communicating directly with non-party States and imminent break-away States Parties, as well as non-cooperating States Parties, to achieve the Court’s membership, investigative, prosecutorial, and enforcement objectives’.³⁹ As a positive recent development, Scheffer welcomed the collective referral mentioned earlier. Even though Scheffer seemed to be a bit reluctant to comment on the recent attacks on the Court by the US-administration, chair Stahn nevertheless pressed him on that point. Although the comments on the US-position are certainly numerous, Scheffer still managed to bring a new perspective into the discussion by addressing the topic from a meta-level. In his view, the attacks on the ICC were just symptoms of a what he called a ‘mind-set shift’ towards anti-multilateralism. In a nuanced account, Scheffer clarified that exceptionalism in itself was not intrinsically bad. However, the current administration ‘used exceptionalism destructively rather than constructively’. Finishing on a positive note,

³⁸ Scheffer, *All the Missing Souls: A Personal History of the War Crimes Tribunals* (2012), pp. 347 *et seq.*; id., ‘The International Criminal Court’, in Schabas and Bernaz, *Routledge Handbook of International Criminal Law* (2011), pp. 67–68; Matheson and Scheffer, ‘The Creation of the Tribunals’, *American Journal of International Law*, 110 (2017), 173, 186–187.

³⁹ Scheffer continues:

The Select Committee would be elected every two years (maximum four year terms) by the Assembly of States Parties and would be comprised of, say, twenty States Parties whose senior foreign ministry and justice ministry officials and members of parliament would be on standby to convene and travel to relevant capitals for the purpose of engaging in dialogue with their counterparts in countries that are of interest and concern to the Court. The membership of the Select Committee would be subject to the will of the Assembly of States Parties, but there would be guidelines on the selection of committed governments and senior and knowledgeable officials and lawmakers to populate the Select Committee.

Scheffer pointed out that a large majority of US citizens supported the ICC.⁴⁰

Bakhtiyar Tuzmukhamedov, Vice-President of the Russian Association of International Law and former ICTY-/ICTR-judge, presented Russia's position *vis-à-vis* the ICC, especially during the negotiations of the Statute. Tuzmukhamedov informed the audience that Russia's current rejection of the Court does not reflect the rather positive engagement with the Court in the past. He condemned the 'unsinging' of the Rome Statute by Russia in November 2016, also for legal reasons: In his view, to 'unsign' an international or multi-lateral treaty was simply not possible. The reasons for the discrepancy between Russia's engagement with the Court and the current policy were discussed in the ensuing debate. As an explanation for Russia's signature under the Treaty, William Schabas in an audience-comment hinted at a possible compensation for the Soviet Union's abstention in the vote for the Universal Declaration of Human Rights (UDHR) in 1948. The panel was closed by *Dan Zhu*, Professor of Law at Fundan University, who portrayed China's position towards the ICC. In a rather descriptive and probably too uncritical account, Zhu emphasised China's commitment for International Criminal Law and explained the reasons of the country's refusal to be part of the ICC-project.

⁴⁰ See Scheffer and Hutson, Strategy for U.S. Engagement With the International Criminal Court, p. 6, available at <http://warcriminalswatch.org/documents/Scheffer.pdf>, last visited 29 October 2018:

The ICC has aroused neither broad public interest nor outrage among the American people. The ICC has occupied primarily the attention of the fraternity of international lawyers, law professors, and multilateralists supporting the court and some new sovereigntists, military veterans, and conservatives who passionately oppose it as well as many other international institutions. But occasional national polls show that large majorities (ranging from 68% to 74%) of Americans, when directly asked, support U.S. participation in the ICC,

citing, *inter alia*, Chicago Council on Global Affairs, *Global Views 2006: The United States and the Rise of China and India: Results of a 2006 Multination Survey of Public Opinion* (2006), available at <https://www.thechicagocouncil.org/publication/global-views-2006-united-states-and-rise-china-and-india>, last visited 29 October 2018. Whether this figure still seems valid today, seems questionable.

3.7 *Quo vadis*, ICC? The ICC within the next 20 Years

The last panel served as a summary panel, named ‘*Quo vadis*, ICC? The ICC within the next 20 Years’, chaired by *David Tolbert*, Visiting Scholar at Duke University, who worked with the United Nations for almost 15 years, acting as a senior legal advisor, deputy chief prosecutor and assistant secretary-general. *Kamari Clarke* (Professor of Global and International Studies/Law and Legal Studies, Carleton University) brought a socio-political perspective into the debate around withdrawals of African states from the Statute and recommended that states should pay closer attention to the actual effect of withdrawal- and non-cooperation-declarations (‘What is the productive work of a declaration?’, ‘What does a declaration do?’, and ‘What does a pledge of non-cooperation do?’). She also advocated for ‘a more creative framework through which we can view the Court’. A completely new perspective was presented by *Barbara Lochbihler*: Lochbihler is a member European Parliament and introduced the EU-perspective to the debate. The invitation of Lochbihler as one of the panelists was certainly a coup and the Academy should be applauded for that. Lochbihler gave valuable insights into the EU’s support of the ICC but unfortunately drew a dark picture for the future: As a result of a possible Brexit in March 2019 and growing nationalism in European states, Lochbihler expected the EU-parliament to experience a shift to the right in the upcoming elections to be held on 23–26 May 2019. This will – according to Lochbihler – eventually have an impact on the EU-Commission’s decision about ICC-funding (the funding will be reduced anyway due to the Brexit-related cut in the EU’s budget). On a more positive note, Lochbihler highlighted the work of the European Parliament Group, who supports the ICC and encourages member states to sign the Statute.⁴¹ The last two panelists of the conference were the well-known Judge *Sang-Hyun Song* (former President of the ICC) and *Christian Wenaweser*. Judge Song opined that the future of the ICC depended on two factors: First, how well the Court operated as a ‘court institution’ and second, how diligently states supported the Court. As to the first factor, Song especially – and very openly – criticised the judge-selection-procedure at the ICC. Song drew on his experience as Judge and President of the Court when he emphasised the importance

⁴¹ European Parliament, PGA and the European Parliament Support ICC and the Fight Against Impunity, available at <http://www.pgaction.org/entities/regional/european-parliament.html>, last visited 26 October 2018.

of trial experience for judges at the ICC. The way Song hinted at a low quality of previous ICC-judges certainly raised some eyebrows in the audience. Song generally advocated for a better quality of the ICC's officials (legal officers included) and a better identification with the Court's values. With regard to the second factor, Song condemned the lack of support by states and States Parties. In his view, it is not the Court's but the states' job to defend the Court. The Court (and its organs) itself must stay politically neutral. In that regard, Judge Song stood in opposition to panelists of the day before (such as Margaret deGuzman), who encouraged the OTP to embrace political factors in prosecutorial decisionmaking. In his critique, he included the UN Security Council and reminded the audience of the detention of four ICC staff members in Libya during the course of a privileged visit to Saif Al-Islam Gaddafi,⁴² which brought him '26 sleepless days and nights' until he could reach an agreement to free the staff members.⁴³ The UN Security Council failed to provide support in the matter. The final word of all panelists went to Ambassador *Christian Wenaweser* (Permanent Representative of Liechtenstein, Mission of Liechtenstein to the United Nations), who advocated for an open-minded discussion of the ICC's future, including possible alternatives to the Court. As the last panelist, Wenaweser was the first panelist who touched upon the sensitive issue of questioning the existence of an ICC in the future. The advocacy for alternative mechanisms is hardly surprising, considering that Wenaweser is the 'parent of the new IIM Syria' (Tolbert). Wenaweser's willingness to talk about alternatives to the ICC was refreshing. He warned against 'sleep-walking through this discussion' and at the same time defended the Court as the 'most vulnerable' of all international institutions, due to the power it has. Here, Wenaweser closed the circle to the beginning of the panel and the demand to voice the support more resolutely and loudly – a demand that was reiterated by James Goldstein (Executive Director, Open Society Justice Initiative) and Anita Usacka (former ICC-judge).

⁴² The four ICC staff members released in Libya, <https://www.icc-cpi.int/Pages/item.aspx?name=pr820&ln=en>, last visited 26 October 2018.

⁴³ Harding, Bogner, Libya frees international criminal court legal team accused of spying, <https://www.theguardian.com/world/2012/jul/02/libya-releases-icc-officials>, last visited 26 October 2018. 'The deal to free Taylor was agreed late on Sunday, with the ICC's South Korean president, Sang-Hyun Song, flying to Tripoli on Monday and driving to the mountains to collect his four-person team. Taylor sat down with Song to a lunch laid on by her Zintani captors of chicken, fish, rice and a can of fizzy orange'.

3.8 *Achievements and Challenges – The Court’s Kantian Ideal and (Neo-)Grotian Tradition*

The closing remarks were reserved for Judge *Bertram Schmitt*, Judge at the ICC, and his remarks could not have been more appropriate for an event like this. Schmitt forged a bridge from the early days of the ICC to its future. His speech was divided into the achievements and challenges of the ICC. As achievements, Schmitt listed the essential contribution to the Rule of Law, victim participation (reiterating that victims give the Court its ‘right to exist’ and that there would be no International Criminal Law without victims) and the search for historical truth. Schmitt treated the latter ‘achievement’ in a nuanced way, stressing the advantages and disadvantages of historical truth finding at the ICC.⁴⁴ He explained that ‘Trials of ICC become part of broader narrative of historical truth’. As to challenges, Schmitt listed the state withdrawals, selectivity, state cooperation, and the relationship between the ICC and politics. Schmitt downplayed the threat of withdrawals from the ICC. For him, the right to withdraw is immanent in an international treaty and underlines state sovereignty. If a state decides to withdraw, the withdrawal is less of a sign of a crisis for the ICC but more in the concerned state. Schmitt also advocated for a more realistic approach to case selection and the speedy trials. Schmitt identified the blending of common law and civil law as a factor for lengthy trials and specifically mentioned the admissibility of evidence decisions before the ICC. This is hardly surprising, since Schmitt himself (or the *Ongwen* Trial Chamber respectively⁴⁵) rejected the Chambers’ previous practice⁴⁶ of deciding on admissibility issues at the moment of

⁴⁴ Some argue that the historical record and transitional justice aims should be abandoned to the extent that they conflict with domestic criminal justice aims. See, e.g., Bonomy, *JICJ* 5 (2007), 348, 353; Kwon, *JICJ* 5 (2007), 360, 372–373; see also Danner and Martinez, 93 *California Law Review* 75 (2005), 166–169 ([W]e believe that faithful adherence to criminal culpability principles is the surest path to actually achieving the human rights and transitional justice aims of international criminal law.’). See generally Galbraith, *Michigan Journal of International Law* 31 (2009–2010), 79, 96.

⁴⁵ *Prosecutor v. Ongwen*, ICC-02/04-01/15-520, Decision on Request to Admit Evidence Preserved Under Article 56 of the Statute, para. 7. In the same vein Guariglia, “Admission” v. “Submission” of Evidence at the International Criminal Court’, *JICJ*, 16 (2018), 315, at 321, who, however, cites the wrong decision in footnote 20.

⁴⁶ See e.g. *Prosecutor v. Katanga*, No. ICC-01/04-01/07-2635, Decision on the Prosecutor’s Bar Table Motions, para. 15. For a similar approach at the ICTY, see

submission and promoted an alternative approach (authorised by the *Bemba Appeals Chamber*⁴⁷) that deferred the admissibility decision ‘until the end of the proceedings’.⁴⁸

Schmitt connected the common themes of the conference: On the one hand, the Grotian or Neo-Grotian tradition of solidarity between sovereign States, reflected by withdrawal declarations, cooperation,⁴⁹ the demand for state support and of course complementarity and Article 17. On the other hand, a Kantian promotion of the Rule of Law and the protection of rights.⁵⁰ He forged a bridge between the

Footnote 46 continued

Schuon, *International Criminal Procedure* (2010), pp. 137–138 (shift from admissibility to weight/reliability).

⁴⁷ *Prosecutor v. Bemba*, ICC-01/05-01/08-1386, Appeals Chamber, Judgment on the Appeals of Mr. Jean-Pierre Bemba Gombo and the Prosecutor against the Decision of TC III entitled ‘Decision on the admission into evidence of materials contained in the prosecution’s list of evidence’, paras. 37, 41–42, 52–57.

⁴⁸ *Prosecutor v. Bemba*, ICC-01/05-01/08-1386, para. 37; in the same vein, *Prosecutor v. Bemba et al.*, ICC-01/05-01/13-1285, Decision on Prosecution Requests for Admission of Documentary Evidence, para. 9. The Defence’s request for leave to appeal was rejected, mainly for being ‘premature’, by TC VII; see *Prosecutor v. Bemba et al.*, ICC-01/05-01/13-1361, Decision on Babala and Arido Defence Request for Leave to Appeal the Trial Chamber’s ‘Decision on Prosecution Requests for Admission of Documentary Evidence’; *Prosecutor v. Gbagbo and Blé Goudé*, ICC-02/11-01/15, Admission of Evidence Decision, paras. 12 et seq. with dissenting opinion Judge Henderson *Prosecutor v. Gbagbo and Blé Goudé*, ICC-02/11-01/15, Admission of Evidence Decision Dissenting Opinion Judge Henderson, paras. 13, 16 et seq. See generally vein Guariglia, *JICJ*, 16 (2018), 315.

⁴⁹ The fact that States remain the key actors in co-operation in criminal matters reflects a Grotian solidarist international society, see Ralph, ‘International Society, the International Criminal Court and American Foreign Policy’, in *Review of International Studies*, 31 (2005), pp. 27, 32.

⁵⁰ According to Kant, ‘[the] universal law of Right [*Rechtsgesetz*], so act externally that the free use of your choice can coexist with the freedom of everyone in accordance with a universal law, *is indeed a law* [*Gesetz*], which lays an obligation on me, but it does not at all expect, far less demand, that I myself should limit my freedom to those conditions just for the sake of this obligation; [...]’ Kant, *The Metaphysics of Morals*, translation by Mary J. Gregor, p. 56, emphasis added. Furthermore, ‘if (as must be the case in such a constitution) the agreement of the citizens is required to decide whether or not one ought to wage war, then *nothing is more natural* than that they would consider very carefully whether to enter into such a terrible game, since they would have to resolve to bring the hardships of war upon themselves [...]’, Kant, *Perpetual Peace*, in *Political Writings*, translation by H.B. Nisbet [351], emphasis added. With this conception, Kant laid the foundations for all current conceptions of human dignity and world peace, an ‘international rule of law’, Huntley, ‘Kant’s Third Image’, *International Studies Quarterly*, 40 (1996), pp. 45, 49;

beginnings of International Criminal Law and its future, between the mothers and fathers of the Rome Statute and those who are, in his view, the hope for a future Court: Young generations of students who take part in ICC moot court competitions such as the Nuremberg Moot Court, where students all over the world participated.

IV CONCLUSION

The celebration of the 20th anniversary of the Rome Statute, hosted by the International Nuremberg Principles Academy, was neither a pat on the back of actors involved in the International Criminal Justice nor a symbolic celebration of the Rome Statute. It was an open and critical dialogue about the ICC. The hosts, especially Klaus Rackwitz and Viviane Dittrich – who formally closed the conference – demonstrated good instincts in their decision whom to invite to present. Many panelists were courageous enough to voice constructive criticism and concrete reform recommendations (Song/Corell: only select judges with criminal trial experience; Scheffer: create a ‘Select Committee of ICC State Party Representatives’; Keita: introduce an investigative judge; DeGuzman: embrace discretion (and political factors) and emphasise gravity in selection decisions; Dicker/Song: don’t be political; and so on). The scene of Courtroom 600 was a constant reminder that without victims, there would be no International Criminal Justice. It could not have been more fitting to end the conference with the screening of a movie about Thomas Buergenthal (Honorary President of the Advisory Council of the Nuremberg Academy), a survivor of the Holocaust at the age of eleven, who was reunited with his mother in Göttingen,⁵¹ where he lived until 1951, where he received a honorary doctorate by the Georg-August-University of Göttingen and where the city library is named after him.⁵² Buergenthal later became a judge on

Footnote 50 continued

Sweet, ‘A Cosmopolitan Legal Order’, *Global Constitutionalism*, 1 (2012), pp. 53, 58; Fulda, ‘Eine legitime Globalverfassung? Die US-Hegemonie und die weltgesellschaftlich gerechte Vollendung des Kantischen Projektes’, in *Archiv des Völkerrechts*, 54 (2016), pp. 334, 345.

⁵¹ ‘Vielen Dank Herr Buergenthal’, *Göttinger Tageblatt*, available at <http://www.goettinger-tageblatt.de/Die-Region/Goettingen/Holocaust-Ueberlebender-Thomas-Buergenthal-besucht-Goettingen>, last visited 29 October 2018.

⁵² Buergenthal’s astounding story was captured by himself in his memoir *Ein Glückskind (A Lucky Child)* (2007), that has been translated into almost a dozen languages.

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many international courts, including the International Court of Justice, the Inter-American Court of Human Rights, the United Nations Truth Commission for El Salvador and the U.N. Human Rights Committee.