

## **Ms. Tiina Intelmann**

### ***"QUO VADIS ICC: ASSESSING THE INTERNATIONAL CRIMINAL COURT'S FIRST TEN YEARS AND PLANNING FOR THE FUTURE"***

**New York, May 4th, 2012**

Madam President, Mrs. Viinanen,  
Ladies and Gentlemen,

At the outset, allow me first of all to thank you for inviting me to address this Forum today. Having had the opportunity to speak with some of you before the beginning of our meeting, and having had a look at the series of highly distinguished speakers who have stood at this podium before me, I would just like to say that it is a true honor to be able to address a few words to you here today about the birth, childhood and future of the International Criminal Court (ICC). The ICC is perhaps the most important international organization to enter the stage of international affairs since establishment of the United Nations itself. It investigates and prosecutes the three crimes that are considered by the international community to be the most heinous: genocide, war crimes and crimes against humanity(1). It is a permanent Court and as such has jurisdiction over widespread or systematic commission of those three crimes starting 1 July 2002. It is also a treaty -based Court, which means this Court has jurisdiction only if such crimes are committed on the territory of a State that has joined the Rome Statute or if the alleged perpetrator is a national of such a State. We can therefore say the system created by the Rome Statute is a consent-based system, with one major exception: the United Nations Security Council has the power to refer situations which occur in non - States Parties to the ICC and it has indeed done so in two cases, Darfur and Libya.(2) It is also worth remembering that the ICC is a court of last resort. This means that only if the State with the primary jurisdiction over the crimes proves to be unable or unwilling genuinely to carry out the investigation or prosecution can the ICC take up these cases.(3) This is known as the complementarity principle and forms the bedrock of the Rome Statute system.

*(1) It is also foreseen that it will gain jurisdiction over the Crime of Aggression, see more below.*

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Seen in historical terms, the thought of applying judicial mechanisms to international relations is a relatively new idea. But whereas a permanent court for disputes between States has existed since the establishment of the League of Nations in 1920 (4) the idea of an international court holding individuals accountable for international crimes is quite a recent concept, stemming from the end of the Second World War, and the trials and Nuremberg and Tokyo. The optimism that followed the end of the war and the establishment of the United Nations found expression in the Genocide Convention, which referred to a prospective "international penal tribunal,"(5) the establishment of which never took place due to the onset of the Cold War. The 1990s

and the end of the Cold War again ushered in a time of optimism, which was, however complemented by horrendous crimes committed in the Balkans, in Rwanda, in Sierra Leone and elsewhere. But the international community, having been unable to stop the commission of these crimes, felt obliged to follow-up by creating the ad hoc International Criminal Tribunals for Rwanda and the Former Yugoslavia and the Special Court for Sierra Leone. At least the perpetrators of these crimes would be held accountable.

*(2) Rome Statute, article 13, paragraph b.*

*(3) Ibid, article 17, paragraph 1 (a).*

*(4) It was then called the Permanent Court of International Justice and is now called the International Criminal Court.*

*(5) Genocide Convention, article VI.*

We cannot deny that this was a step in the right direction, the flaws in this system were palpable. The ad hoc tribunals were created by the Security Council utilising its powers under Chapter VII of the Charter and could thus be seen as being “imposed from above” by the powerful 15. Also, nobody denied that grave crimes had been committed elsewhere – were victims of these not just as deserving of justice as those in the few countries that had caught the attention of the Security Council? The answer was yes. On a more prosaic front, it is also horribly inefficient to build a new court from the ground up every time serious crimes occur: one has to find a new prosecutor, new judges, never mind a new building, new computers etc. It became quite clear to many that in the long run, a permanent international court to try individuals for the gravest crimes was needed. What shape should this court take? If you asked the main sponsor of the initiative in the UN General Assembly, Trinidad and Tobago, the answer you would get would be that this court should deal with transnational crime, such as drug trafficking, that often tests the capacity of national judiciaries. Others insisted that the Court should only deal with crimes that were already prohibited under international law, and only the most serious ones<sup>(6)</sup>. While questions as to the scope of the Court certainly took time and effort to thrash out the more difficult question was how an ICC investigation and subsequent prosecution should be triggered. The United States and other permanent members of the Security Council said that given the Security Council’s primary responsibility for international peace and security,<sup>(7)</sup> only the Security Council could grant the authority to proceed with an investigation. Others argued that a referral by a State could also trigger an investigation. There was a Likeminded Group, finally, insisted that while those two triggers were well and good, the Prosecutor himself must also have the authority to open investigations on his own motion or, known as proprio motu powers.

*(6) Leaving aside such crimes as piracy, for which clear international prohibitions have existed in customary international law for at least a century.*

*(7) United Nations Charter, Article 24, paragraph 1.*

The Statute that was adopted in Rome on 17 July 1998, in a non-recorded vote called by the United States reflected a compromise<sup>(8)</sup>. Regarding the scope, a decision was made to limit the Court to the most serious crimes already illegal under international law, namely genocide, war crimes and crimes against humanity. The definition of the elements of these crimes, however, was extremely progressive, especially as concerns

the inclusion of crimes of sexual violence in the definitions of war crimes and crimes against humanity. The crime of aggression was also included, but only as a placeholder, with the agreement that the exact definition and the conditions for the exercise of the Court's jurisdiction over this crime would be negotiated later. The Statute provided for situations to be brought before the Court either through referral by a State Party, referral by the Security Council or by the Prosecutor's proprio motu powers. In the case of a proprio motu investigation, however, the assent of a Pre-Trial Chamber was first required. The Statute itself is a fairly balanced blend of the civil and common law tradition. The jury is still out, however on efficiency of the system the Statute created for trials. Besides a main Trial Chamber, which hears the case, and an Appeals Chamber, which deals with both interlocutory and final appeals, a Pre-Trial Chamber was introduced. This Pre - Trial Chamber checks the Prosecutor's proprio motu powers and also confirms the charges brought by the Prosecutor. This creates a somewhat time-consuming system. Besides the Court itself, the Statute also created a (voluntary) Trust Fund for Victims and an Assembly of States Parties, which was to elect the Prosecutor and judges, to adopt amendments to the Statute and its Rules of Procedure and to oversee the Court's administration.

*(8) Though officially non-recorded, we know that 120 States voted in favour, 7 against with 21 abstaining.*

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The Statute was opened for signature on 17 July 1998. Many of those who signed the Statute on that sweltering day in Rome thought they might not live to see it enter into force. All of the skeptics were proven wrong when, less than four years later, on 1 July 2002 the Rome Statute entered into force. Now, nearly ten years later, is as good a time as any to reflect on the successes of the Court, and those of its Assembly of States Parties.

The ICC's first Prosecutor, Luis Moreno -Ocampo, likes to say that when he was elected as Prosecutor many of his colleagues at Harvard, where he was teaching at the time, thought he had taken leave of his senses: with the US actively working against the Court, surely, it was doomed to fail. Certainly, he should not expect to actually work on real cases during his nine-year tenure. Reality, fortunately, has been somewhat kinder to the ICC. Nearly nine years after Ocampo took his solemn undertaking as the ICC's first Prosecutor, the Court has before it 15 cases in seven situations. This March, the Court rendered its first verdict, finding Thomas Lubanga Dyilo guilty of enlisting and conscripting child soldiers. This case will now enter the reparations phase, a mechanism that is unique among the international tribunals. Having found the defendant guilty, the Court can order reparations to be paid to his victims. Such reparations disperse, first and foremost, the assets of convicted persons. These assets can also be complemented by funds from the Trust Fund for Victims, especially if, as in the case of Mr. Lubanga, the convicted person is indigent.

One of the great successes of the Rome Statute system has been the implementation of the rights it grants to victims. Victims participate in all the trials currently before the Court, where their legal representatives are called upon to make observations as well as cross-

examine prosecution and defense witnesses and to call witnesses of their own. Victims therefore no longer rely exclusively on the Prosecution to defend their interests, but are able to directly participate in the proceedings. It seems that this is appreciated by the victims and that Word about this has gotten out. Whereas in the Court's first case, the trial of Mr. Lubanga, only 129 victims registered to participate, 560 victims were authorized to participate in the Kenya cases, which are the latest cases to be committed to trial. Beyond the courtroom, the Trust Fund for Victims, through programmes targets the specific needs of the victims of the conflicts. To give you an example of its work, a project in the Ituri region of the Democratic Republic of the Congo provides education, day care and basic healthcare services to 67 girls who had been abducted by the armed forces and had borne children while in captivity. Given the financial situation of the Trust Fund, it has to focus on very specific projects, but it nevertheless does very important work to bring the issue of justice to the victims themselves. If you will permit me, I should also like to mention that the Trust Fund does receive contributions from individuals and that bank information is available on its website(9).

*(9) [www.trustfundforvictims.org/](http://www.trustfundforvictims.org/)*

There are others who are much more qualified than I to speak about the achievements of the ICC's first trials from a legal point of view. Let us, therefore, briefly examine the two situations referred to the Court by the United Nations Security Council. The first referral came in 2005, when the Security Council, with eleven votes in favor and four abstentions, referred the situation in Darfur to the Court. The resolution (10) was the result of month-long negotiations – some of you might recall the difficult discussion about the exact definition of genocide. In the end, no consensus could be reached, so Algeria and Brazil joined China and the US in abstaining. This referral was very difficult. By way of contrast, when the Security Council referred the situation in Libya to the Court in February 2011, it did so unanimously, after only a few days of deliberations. It is true that the referrals reflected to a large extent the political situation in the Security Council at the time, which at least partially explains the Security Council's unwillingness to follow up on these decisions. The mere fact that they happened at all, however, shows the extent to which the international community – even the non-States Parties – trust the Court to properly investigate and prosecute the crimes they refer to it. It is noteworthy that there was no serious discussion in either case of setting up an ad hoc tribunal along the lines of the Yugoslavia and Rwanda tribunals. The Security Council has come to acknowledge that if it chooses to apply a justice mechanism to a situation under its consideration, the way to do so is by referring it to the International Criminal Court.

*(10) S/RES/1593 (2005)*

That said, both referrals contained a number of problematic provisions. For example, while the territorial State in question was compelled to cooperate with the ICC in both cases, other States were not. By contrast, all UN Members had an obligation to cooperate with the Rwanda and Yugoslavia tribunals. The second problem is the "recognition" in both resolutions, that the ICC must bear all expenses associated with the

situation. While there is currently no agreement to reimburse the Court for such expenses, article 115 of the Rome Statute certainly leaves the door open for future arrangements to this effect. I truly hope that these issues can be solved differently in future referrals.

Before turning to the future, allow me to briefly dwell upon the achievements of the body over which I preside, the Assembly of States Parties. The number of its membership has grown significantly over the past few years. As I mentioned previously, it took 60 ratifications for the Rome Statute to enter into force on 1 July 2002. Since then, our membership has grown to 121 States Parties and has surpassed the number of States that voted in favor of the adoption of the Rome Statute. The largest constituency of States Parties comes from Africa (33) followed by Latin America and Caribbean States (27) with Western Europe and Other States in third place (25).

As I briefly mentioned before, the crime of aggression was initially included in the Rome Statute only as a placeholder. Much to the regret of many who participated in the negotiations in Rome, no agreement had been reached on the definition of the crime. Deliberations were taken up again in the Special Working Group on Aggression, but frankly, few people thought that an agreement could be reached (11).

However, in June 2010 in Kampala, Uganda, States Parties not only adopted the definition of the crimes and laid down the conditions for the exercise of the Court's jurisdiction over this crime, they did so by consensus. True, the consensus did come at a price. Unlike all other Rome Statute crimes, States Parties are allowed to opt out of the Court's jurisdiction over the crime of aggression. This opt-out provision is somewhat unique (12). Other steps also have to be taken by the Assembly of States Parties before the Court can exercise jurisdiction over these crimes.

*(11) When the time came to consider the logistics of the Review Conference, at least one delegation suggested a one-day event. Under this model, having listened to speeches by dignitaries, concluded that nothing could be done about the crime of aggression and noted the absence of other business, representatives of States Parties would be at the pub by 6pm at the latest.*

*(12) Article 124 of the Statute allows States Parties defer acceptance of the Court's jurisdiction over war crimes only for a period of seven years. The crime of aggression opt-outs contain no such temporal limit.*

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Time does not suffice at this point to give an entirely comprehensive overview of the achievements of the Court's first ten years. I hope I was able to convey the sense, however, that the Court is now very much up and running. Yes, we have the Rome Statute, which was revolutionary in many ways, but we have moved far beyond that and now have a living, breathing institution in place. This international institution, though, is still in its adolescence and the future will bring many challenges as well as opportunities.

In the coming years, the Court will have to come to terms with the criticisms of being too Africa-centric. The basis for this claim is the fact that all seven situations before the Court today are in Africa, and that every single person wanted by or on trial at the ICC is African. There are a number of ways to respond to this argument, all of which have their specific merits. One would be to note, as many do, that had the Court been founded in the 1940s, it would have been concerned chiefly with Europe. Had it been established in the 1970s, it would have been concerned with the crimes of the military dictatorships in South America and had it been founded in the early 1990s, it would have been concerned with the crimes committed in the Balkans. It just so happens that now, a majority of the worst crimes under international law are being committed in Africa.

There are other reasons as well. First of all, in each of those periods, there were Rome Statute-type crimes committed in other places as well, just as there have certainly been Rome Statute crimes committed outside of Africa since the Court's inception. Why has the Court done nothing about these crimes? The problem is that crimes can be investigated by the Court only if they have been committed by nationals of States Parties or on the territory of States Parties or if they have been referred to the Court by the Security Council. If one is a leader of a country that is in the process of perpetrating crimes that fall under the Rome Statute, all it takes to immunize oneself is not to join the Rome Statute and to ensure that no referral by the Security Council will take place. So, for want of jurisdiction, the Court has been completely powerless to investigate the crimes committed in non-States Parties. Let us look, then at the situations currently before the Court: of the seven situations in Africa, two have been referred to the Court by the Security Council (13) and three have been referred by the States in question themselves (14). Only in two situations has the Prosecutor used his proprio motu powers (15). This shows that African States have a lot of trust in the Court, and entrust it to investigate and prosecute these cases which are difficult to deal with domestically.

You will forgive me for dwelling on this point for quite some time, but the magnitude of the problem should not be downplayed. The Rome Statute does not leave States Parties a margin of appreciation in determining whether to arrest a person against whom warrants of arrest have been issued, even if that person happens to be the head of a friendly State. Indeed, the system is reliant on the execution of such arrest warrants by States. This rigid disrespect for official positions and immunities has led to a deep-rooted frustration among some members of the African Union (AU), which has found expression in the AU Summit repeatedly taking a number of decisions that are not helpful for the Court and relations between the Court and States Parties. I think we have to be blunt here and say that several African States, some of them States Parties to the Rome Statute, are deeply uncomfortable with the idea of a sitting head of State being indicted by the Court. This has created an increasingly difficult atmosphere which is entirely at odds with the reality at the technical level, where African States receive a majority of the Court's cooperation requests and comply with 85% of them. Despite the hope of many ICC observers, the mere fact that an African will soon become Prosecutor will not and cannot change the way the Rome Statute system is set up and the way it works. There has to be a sustained effort by States Parties to address these most complicated and delicate issues. I hope to do my part and engage with the African States Parties and other States during my tenure.

*(13) Darfur and Libya*

*(14) Central African Republic, Democratic Republic of the Congo and Uganda*

*(15) Côte d'Ivoire and Kenya.*

In the coming years, States Parties will be called upon to make their contribution to improving the Court. Item 1 on the agenda in this regard will be the effective follow-up to the decisions taken at the Review Conference at Kampala and the ratification of the Rome Statute amendments.

You will know only too well that international organizations like to speak in euphemisms. The Assembly of States Parties is no different ; we call the drive to get more States to join the statute the “universality campaign”. I have already mentioned the considerable successes we have had. We must, however, be aware that the period of rapid growth of membership of the Rome Statute is over. We focus on States that have no substantive opposition to joining the Rome Statute, but may have technical problems – often revolving around head of state immunity – that can be solved as they have been solved in the case of other States Parties . We also continue our dialogue with those States that do have substantive problems with the Statute, to broaden awareness and appreciation of the work the Court is doing even if joining the Statute is not an option in the near future. Like my predecessor, I am doing my part, both here in New York and elsewhere, to drive the universality campaign forward. The key to success here lies in closer cooperation and information sharing between States Parties, the Court and, of course, the NGOs.

Through campaigns such as Kony 2012, increasing attention has been given to the need for execution of arrest warrants issued by the International Criminal Court. It is true that the Court issues a large volume of cooperation requests on a daily basis, many of them, no doubt, very important. It must be here that the execution of arrest warrants is the most important manner of cooperation for States Parties. The ICC's 121 States Parties – as well as Sudan and Libya by virtue of the Security Council referrals – have an inescapable obligation to execute arrest warrants. While I will certainly continue doing my part to address and prevent instances of non-cooperation, I believe that quiet diplomacy among States Parties themselves is indispensable.

In the beginning of the year, I had the pleasure of giving a lecture at the University of New South Wales in Australia, where I said that to a certain extent, the challenge of the Court is to become a boring international institution. Having had a ten-year long pioneering phase, where a number of things were tried out for the first time, the challenge now lies very much in standardizing so that States Parties know how to apply standard procedures. I think it is just as important , however, for States Parties not to forget that the Court is a unique organization. While an international court combines attributes of both a national court and a UN-system international organization, the fact of the matter is that is unique, and as such has unique requirements. If the Court faces more situations, as it did last year when three new situations were added to its docket (bringing the total to seven) , it follows naturally that it will require increased resources. It is important for States Parties to deliver.

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By way of conclusion, we can say that the International Criminal Court has certainly arrived on the scene. It is now a mature international organization with all the inherent problems and benefits. However, it is also clear that the Court has not yet reached a stadium in its evolution that would allow States Parties and the Assembly to sit back and let the Court do its job. The Court depends on the active support and cooperation of its States Parties, and I hope that, during my three-year term of office, I will be able to mobilize all States Parties in active support to the Court. It is important that we do not forget our reasons for joining the Rome Statute in the first place, and that we continue to live up to our commitment to work together to fight impunity for the gravest international crimes.

I thank you.