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The International Criminal Court: Independence in a Context of Interdependence

**Frederick K. Cox Lecture in Global Legal Reform
Case Western Reserve University School of Law
Cleveland, Ohio, 7 November 2005**

I. INTRODUCTION

Thank you, first of all, to Professor King and Professor Scharf for the kind introductions.

I would also like to thank Case Law School and the Cox International Law Center for presenting me with the International Humanitarian Award. It is a great honour. I see this award as being more than a personal recognition. It is also an acknowledgement of the significance of the creation and establishment of the International Criminal Court.

I've been looking forward for some time now to visiting Cleveland during its renaissance. It is hard to believe this is the same city once known for the Cuyahoga River catching on fire and featured in the movie "Major League." This well-renowned international law center is symbolic of the new, reborn Cleveland.

Today, I would like to speak to you about another rebirth: that of international criminal justice. First developed in the aftermath of World War II, the idea of international criminal justice languished for approximately fifty years. It was reborn with a flurry of activity in the 1990s. As a result, there is now a new system of international criminal justice, with the International Criminal Court standing at its center.

I will focus my remarks on the following four aspects of this system and its development: the efforts which eventually culminated with the establishment of the International Criminal Court; the features of the Court; the Court today; and what we should expect from the Court in the future.

II. THE ESTABLISHMENT OF THE ICC

I would start the story of the ICC during the latter years of the Second World War, when the Allied powers were debating what to do with high-ranking Nazi officials. In large part due to the insistence of the U.S. government, in particular the chief negotiator and Supreme Court Justice Robert Jackson, the Allies decided to conduct trials for those accused of crimes against peace, crimes against humanity, and war crimes. These trials would protect the due process rights of the accused.

Eventually, these trials included the International Military Tribunal at Nuremberg, its sister tribunal at Tokyo, and other trials, such as those conducted by Professor King and his colleagues under Control Council Law Number 10. These trials established two overarching principles: first, individuals, and not only States, can be held accountable for serious atrocities. Second, individuals *should* be held accountable for such atrocities. Impunity cannot be allowed to prevail. The trials also established important precedents in substantive and procedural law. We all owe a great debt to Robert Jackson, Professor King, and all those who invested so much effort to make those trials a success.

Following these trials, the international community sought different ways to enshrine what is often called the “Nuremberg legacy” in international law. For example, the Genocide Convention and the early work of the International Law Commission envisioned the establishment of a permanent international criminal court to try perpetrators of the most serious international crimes. However, the onset of the Cold War prevented the creation of any such tribunal. During this time, horrible atrocities were committed around the world – Cambodia under Pol Pot is just one example. National courts all too often were either unwilling or unable to punish the perpetrators. Without an international tribunal to act where national courts could not or would not, the perpetrators of the most serious international crimes were protected with impunity.

With the end of the Cold War, the idea of a system of international criminal justice was reborn. In 1989, the same year that the Berlin Wall fell, the United Nations resumed its work on the establishment of a permanent international criminal court. While the UN’s International Law Commission was debating a statute for the International Criminal Court, the world witnessed

two genocides – first in the Former Yugoslavia, and then in Rwanda. In response to the massive crimes committed in these situations, the United Nations Security Council established an *ad hoc* tribunal for each country.

Like their predecessors, these *ad hoc* tribunals were intended to contribute to a number of goals, including: restoring international peace and security; punishing individuals responsible for the most serious international crimes; bringing justice to victims; and, over time, contributing to the deterrence of potential perpetrators. While the tribunals have contributed to these goals in their respective situations, relying on *ad hoc* tribunals faces several limitations: such tribunals are geographically limited; they respond primarily to events in the past; their establishment may involve substantial costs and delays; their creation depends on the political will of the international community of the day. A permanent, truly international court was necessary to respond to the most serious international crimes, and to overcome the limitations of the *ad hoc* tribunals. Therefore in the summer of 1998, the UN General Assembly convened the Rome Conference which would establish the ICC.

The Rome Conference was charged with agreeing to a treaty which would establish the ICC. I must underscore the importance of the ICC being established through a treaty. All States were able to participate in the drafting of the Statute and subsidiary texts. States are also free to join or not join the ICC as they see fit. Because a treaty only binds the States which ratify it, it was essential to build widespread and deep support for the Statute. All States were invited to participate in the Rome Conference, and the vast majority – 160 in all – did so. In negotiating the Statute, States sought wide agreement, without compromising the key values and objectives behind a fair and impartial Court. Efforts towards universal acceptance were largely achieved, and on 17 July 1998, the Statute was approved by 120 States, with 7 voting against and 21 abstaining.

The work to set up the Court was not, however, finished. Following the Rome Conference, a Preparatory Commission met over 3 1/2 years. The Preparatory Commission was charged with developing the Court's subsidiary instruments – the Rules of Procedures and Evidence and the Elements of Crimes. These texts provide more detail to and supplement what was agreed in the

Statute. Like the Rome Conference, the Preparatory Commission was driven by States. All States were invited to participate in the Preparatory Commission. For your information, the U.S. was an active participant both in the Rome Conference and in the Preparatory Commission's drafting of the Rules and the Elements. All decisions in the Preparatory Commission were taken by consensus. By building consensus around the Court's essential texts, the Preparatory Commission contributed significantly to international support for the Court. 139 States signed the Statute before the deadline for signature expired at the end of 2000. 4 other States who did not sign have since acceded to the Statute. In just seven years since the adoption of the Rome Statute, 100 countries – representing broad geographical diversity – have ratified or acceded to the Statute. This is a remarkable pace for a treaty establishing an international institution.

III. Features of the Court

I would now like to turn to the features of the Court created by the Rome Conference and the Preparatory Commission. As a first matter, I would like to address one common, but fundamental misconception. The ICC does not have universal jurisdiction. Its jurisdiction is limited to crimes committed on the territory or by nationals of States which have voluntarily consented to its jurisdiction. These bases of jurisdiction – territory and the nationality of the perpetrator are the most firmly established bases of criminal jurisdiction.

The Court's jurisdictional regime also recognizes the special role of the Security Council in maintaining peace and security. Under the Statute, the Security Council may now refer situations to the Court. It no longer has to create *ad hoc* tribunals as it did for the Former Yugoslavia and Rwanda. The Security Council has already used this power. Earlier this year, it referred the situation in Darfur, Sudan to the Court. In addition, the Security Council, acting under Chapter VII of the UN Charter, may defer an investigation or prosecution for a period of one year.

The Court's jurisdiction is further limited temporally. The Court has jurisdiction only over events since its Statute entered into force on 1 July 2002.

The Court's subject matter jurisdiction covers the most serious international crimes: genocide, crimes against humanity, and war crimes. These crimes are well-established in customary and conventional international law, as well as national laws. The ICC Statute defines these crimes with significantly more detail than the statutes of previous tribunals. States took great care in defining the crimes which could apply to their nationals or offences on their territory. These definitions are supplemented by a text called the "Elements of Crimes" to which I referred earlier. This text – an initiative of the U.S. delegation at Rome – sets forth the elements of each crime, providing additional detail and clarity to the definitions in the Statute. These detailed elements will assist the judges in interpreting and applying the detailed definitions of crimes.

The Statute also provides that the Court has jurisdiction over the crime of aggression. However, the Court will not exercise this jurisdiction until both a definition of aggression and conditions for the exercise of jurisdiction are agreed upon. This must happen through an amendment to the Statute, agreed by the States Parties. Such amendment could occur at the earliest at a Review Conference to be held in 2009.

The Rome Conference also recommended that the Review Conference consider including the crime of terrorism in the Statute, if a definition can be agreed upon.

Even where the Court has jurisdiction, it will not necessarily act. The ICC is a Court of last resort, intended to act where national courts are unwilling or unable. This is known as the "principle of complementarity." Under this principle, a case will be inadmissible if it is being or has been investigated or prosecuted by a State with jurisdiction. There is an exception for when the State is unwilling or unable genuinely to carry out the investigation or prosecution. For example: if the proceedings were undertaken solely to shield the person from criminal responsibility; or if the proceedings were carried out in a manner inconsistent with an intent to bring the person to justice. In addition, a case will be inadmissible if it is not of sufficient gravity to justify action by the Court. States and the accused have the right to challenge the admissibility of a case.

I will not comment on the procedural regime of the ICC, save to say that, like any international court, it necessarily contains elements of different legal systems. The Statute and Rules of Procedure contain detailed protections of the rights of the accused and the principle of a fair and public trial.

IV. The Court Today

I would like to turn next to the Court today.

Three States Parties have referred situations occurring on their territories to the Court. In addition, the Security Council has referred the situation in Darfur, Sudan – a non-State Party. After analyzing the referrals for jurisdiction and admissibility, the Prosecutor began investigations in three situations – Uganda, Democratic Republic of the Congo, and Darfur, Sudan. On 8 July of this year, the Court issued the first arrest warrants in the situation in northern Uganda. Arrest warrants have been issued for five members of the Lord's Resistance Army, including its leader Joseph Kony. The alleged crimes against humanity and war crimes contained in the warrants include sexual enslavement, rape, intentionally attacking civilians, and the forced enlistment of child soldiers. The arrest warrants were initially issued under seal because of concerns about the security of victims and witnesses. The warrants were only made public on 13 October, after the Pre-Trial Chamber which issued the warrants was satisfied that the Court had taken adequate measures to ensure security. The Court will face such security concerns wherever the Prosecutor is investigating situations of ongoing conflict. As soon as the wanted persons are arrested and surrendered to the Court, a hearing will be held to confirm the charges. If the charges are confirmed, trials will then commence.

To truly understand the role and significance of the Court today, one must look beyond its investigations and prosecutions. In the preamble to the Rome Statute, States Parties have expressed a number of objectives for the Court. The punishment of perpetrators is the most immediate goal. Through punishment, it is envisioned that the Court will contribute to the

prevention of crimes. Other aims expressed in the preamble include the maintenance of peace and guaranteeing lasting respect for and the enforcement of international justice.

To what extent the Court contributes to these goals is an important empirical questions which cannot yet be answered. I would not presume to offer a definitive answer on the final impact of the Court. I would, however, like to share some indications of the possible impacts of the Court today. According to some observers [i.e. the U.N. Secretary-General in his August 2004 Rule of Law Report], through its mere existence, the Court is already being credited with having a deterrent impact on future perpetrators. I would note that discussions of the impact of the Court increasingly appear in newspaper articles and other media reports. This is particularly so in connection with the situations under investigation by the Prosecutor.

In addition, the Human Security Report – a recent empirical study of the causes of conflict undertaken by the Human Security Centre at the University of British Columbia with the support of governments and academics – lists the establishment of the ICC as one of the factors leading to a decline in civil wars. The establishment of the Court is also contributing to the strengthening of national mechanisms to investigate and prosecute serious crimes. Many States, including both States Parties and non-States Parties, have chosen to review and amend their domestic legislation in light of the Rome Statute. The impact of the ICC can also be seen in a renewed and strengthened international dialogue on the need to prevent and punish serious international crimes. The ICC is now a regular feature of debates on a wide range of related issues such as children in armed conflict, transitional justice, and the rule of law. At the recent U.N. World Summit, governments affirmed their responsibility to protect civilian populations against serious international crimes, such as those included in the ICC Statute.

V. The Future of the Court

I would like to turn now to what we can expect from the Court – and from this wider system of international justice – in the future.

As investigations and trials proceed, the Court will continue to demonstrate its credibility in practice. However, the Court will never be able to end impunity alone. Its success will depend

upon the support and commitment of States, international organizations, and civil society. Because the Court's jurisdiction is limited to the nationals and territory of States Parties, continued ratification of the Statute is essential to the Court having a truly global reach. Because the Court is complementary to national jurisdictions, States will continue to have the primary responsibility to investigate and prosecute crimes. Where the Court does act, it will require cooperation from States at all stages of proceedings, such as by executing arrest warrants, providing evidence, and enforcing sentences of the convicted. For example, without sufficient support in arresting and surrendering persons, there can be no trials. Not only the States where crimes were committed or wanted persons are located, but all States in a position to provide cooperation, can assist the Court.

International organizations also provide critical support the Court. The support of the United Nations is particularly important in this regard. The UN and the Court cooperate on a regular basis, both in our field activities and in our institutional relations. The Court is also developing its cooperation with regional organizations, such as the African Union and the European Union.

Non-governmental organizations [NGOs], and civil society more broadly, are also instrumental to the work of the Court. To date, NGOs have played a large role in urging ratification of the Statute. They have also assisted States in developing legislation implementing the Rome Statute. Local NGOs may possess knowledge which is directly relevant to the Court's work in the field. NGOs also have a critical role in disseminating information about and building awareness of the ICC.

Academic institutions have a particularly important role in relation to the Court. It is my experience that ignorance is one of the biggest obstacles to the success of the Court. Often, opposition to the Court is based on misconceptions which can be easily avoided. I believe that the more people understand the Court, the more it will be accepted. That is why I am pleased to see Case Law School take a lead in educating faculty, students, and the broader community about the Court. I am impressed by the extent to which the Cox Center, in particular, has included issues of international criminal justice in its activities. I am also happy to note that

your summer study program has incorporated visits to the Court in its agenda, and we look forward to welcoming you each year.

VI. Conclusion

In my remarks, I have outlined how the Court is one part within a larger system. I would like to conclude by reflecting again on the experience of Robert Jackson at the Nuremberg Tribunal. In his opening statement, Jackson told the Tribunal: “The usefulness of this effort to do justice is not to be measured by the law or your judgment in isolation. This trial is part of the great effort to make the peace more secure.” This too applies to the ICC. As the recent Human Security Report indicated, the ICC and other recent developments to prevent and end conflicts “have achieved only modest success in terms of their own goals. But taken together, their impact has been highly significant.”

The ICC is not in itself a panacea. It alone will not put an end to grave atrocities. But it is an essential part of the system of international criminal justice which will over time lead to a culture of accountability, and to make the peace more secure. For this system is to succeed, we need the ICC.

Thank you.