

JUST HOW RELEVANT IS THE ICC:

A Viable Court of Last Resort - or - A Politicized Court of Low Expectations?

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I. INTRODUCTION

On 26 February 2014, I was invited by the Brown University International Organization (BRIO), at Brown University, Providence, Rhode Island, to present a lecture on the International Criminal Court (ICC) relevant to the ongoing events in Syria. It is beyond cavil that the ICC is a response to the international community's concern for mass atrocities around the world—genocide, war crimes, and crimes against humanity—designed “to put an end to impunity” and bring justice to countless victims and survivors. Merciless leaders have escaped prosecutions by threatening or corrupting their own judiciaries. The ICC is meant to be a court of last resort for victims seeking justice beyond the reach of obstruction. In its twelve year history is the ICC meeting expectations? Is the ICC rendering justice, or has it become a political tool? Today the ICC faces many complex challenges that call into question the viability of the institution.

With the Syrian conflict in full bloom and no end in sight to the mass atrocities being committed by all sides to the conflict, I settled on the topic of: *Just how relevant is the ICC: A viable court of last resort or a politicized court of low expectations?* My aim was not to lecture on international criminal law or on the establishment of the ICC, but to highlight some of the ongoing legal and political challenges relating to jurisdictional issues. After taking the students through the historical development of international justice—from pre-Nuremberg to Syria—I offered several vignettes to provoke a discussion and critical thinking. It would be up to the students to decide on the ICC's report card. Personally, I give it an overall average of D+/C-.

II. SETTING THE STAGE—HISTORICAL DEVELOPMENT

To set the stage on the emergence of international criminal law, I began with an event superbly presented by Professor William Schabas in *Unimaginable Atrocities: Justice, Politics, and*

*Rights at the War Crimes Tribunals.*¹ On 18 June 1915, Henry Morgenthau, Sr., the American Ambassador in Constantinople paid a visit to the Grand Vizier of the Ottoman Empire, to deliver a message from the European powers—Britain, France and Russia—related to the massacres of the Armenian population in the Ottoman Empire as was being reported by diplomats and other reliable sources:

In view of the new crimes of Turkey against humanity and civilization, the Allied governments announce publically to the Sublime Porte that they will hold personally responsible for these crimes all members of the Ottoman government and those agents who are implicated in such massacres.²

From the message we see that the head of State and other high level officials (and those most responsible) will be held individually responsible. We see “accountability”—a refrain, or, in diplomatic parlance, a demarche, commonly seen in UN resolutions. Were we to examine the politics of the day among these European powers, undoubtedly we would see that this demarche had political overtones. The Ottoman Empire by this point in history was commonly referred to as “the sick man of Europe” because it was disintegrating. Britain, France, Russia and others were not above committing, with impunity, what we would call today crimes against humanity—though not at the scale of the Armenian massacres as reported at that time and which remain unresolved till this day. Being on top of the power curve ostensibly gave these European countries the self-indulging moral imperative to apply a double standard. This may strike a chord today; consider the behavior of some of the P5 of the United Nations Security Council (UNSC). Canons of construction creatively applied in justifying the use of raw power, disguised as military interventions claimed to be permitted by international law.

I was trying to make a couple of points with this event. First, the message was about holding the leaders and those most responsible accountable for their actions, not the State itself; in other words, individual criminal responsibility. Second, politics—in the geo-political sense—is part

¹ WILLIAM SCHABAS, *UNIMAGINABLE ATROCITIES, JUSTICE, POLITICS, AND RIGHTS AT THE WAR CRIMES TRIBUNALS*, (Oxford 2002). This is an excellent primer for anyone interesting in international criminal justice. More generally on Morgenthau and the Armenian atrocities, see PETER BALAKIAN, *The Burning Tigris: The Armenian Genocide and America's Response*. New York: HarperCollins (2003), pp. 219–221. [ISBN 0-06-055870-9](https://www.harpercollins.com/9780060558709).

² *Id.* at 6, 7; Telegram from the Ambassador in Turkey (Morgenthau) to the Secretary of State, Constantinople, U.S. FOREIGN RELATIONS, 1915 Supplement, 982 (18 June 1915).

and parcel of international justice. Indeed, politics and policy are integral ingredients to the international justice agenda of those who set up the international war crimes tribunals. While independence and impartiality of judges and prosecutors are the hallmarks of any judicial institution established to promote the rule of law, at the international level, other agenda related to policy often obscure the real mission of a criminal court. Policy concepts such as reconciliation, and contributing to the restoration and maintenance of peace³ are often stated as the underlying reasons for holding these trials—the *raison d'être* of these tribunals. If that was not enough, you have judges and prosecutors who claim that these trials are about establishing the “historical truth”—as if that is possible in a trial.⁴ While some historical facts can be established beyond doubt, trials cannot establish *the* historical truth and judges are certainly not capable of doing so.

From there I briefly discussed the Treaty of Sèvres, negotiated in Paris in 1919, which envisaged a trial of those “responsible for the massacres committed during the continuance of the state of war on the territory which formed part of the Turkish Empire on 1 August 1914,” though ultimately nothing resulted.⁵ To round out the events leading up to Nuremberg, I touched on 1919 Treaty of Versailles, which called for the prosecution of “William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties.”⁶ The establishment of a special tribunal to try Kaiser Wilhelm was envisaged which

³ See Statute of the International Criminal Tribunal of the Former Yugoslavia, as established by S.C. Res. 808, U.N. Doc. S/RES/808 (22 February 1993) (“ICTY Statute”) (“Convinced that in the particular circumstances in the former Yugoslavia the establishment of an international tribunal ... would contribute to the restoration and maintenance of peace”); Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (17 July 1998) (“Rome Statute”), preamble (“Recognizing that such grave crimes threaten the peace, security and well-being of the world”); Agreement between the United Nations and the Royal Government of Cambodia concerning the prosecution under Cambodian law of crimes committed during the period of Democratic Kampuchea, Phnom Penh (6 June 2003) preamble.

⁴ See Address of Antonio Cassese, President of the International Criminal Tribunal for the Former Yugoslavia, to the General Assembly of the United Nations (4 November 1997) available at <http://www.icty.org/sid/7452>; See also ICTY, Establishing the Facts, ICTY.ORG, (last visited 17 March 2014). <http://www.icty.org/sid/324#establishing>. “The Tribunal’s judgements have contributed to creating a historical record, combatting denial and preventing attempts at revisionism and provided the basis for future transitional justice initiatives in the region.” See also Michael G. Karnavas, *Gathering Evidence in International Criminal Trials—The view of the Defence Lawyer*, in MICHAEL BOHLANDER ED., INTERNATIONAL CRIMINAL JUSTICE: A CRITICAL ANALYSIS OF INSTITUTIONS AND PROCEDURES 79–86 (Cameron May Ltd. 2007).

⁵ Treaty of Peace between the Allied and Associated Powers and Turkey, not ratified, 15 (supp.) AJIL 179 (10 August 1920) (“Treaty of Sèvres”), art. 230; See JENNIFER BALINT, GENOCIDE, STATE CRIME, AND THE LAW 96 (Routledge, 2012); See also Robert Melson, *A Shameful Act: The Armenian Genocide and the Question of Turkish Responsibility*, HOLOCAUST AND GENOCIDE STUDIES 22.1, 112–14 (2008), available at <http://muse.jhu.edu/>.

⁶ Treaty of Versailles, 13 AJIL Supp. 151, 385 (1919), arts. 227–30.

would be composed of five judges, appointed by the United States of America, Great Britain, France, Italy and Japan, and which would “assur[e] him the guarantees essential to the right of defence.”⁷ This tribunal would be “guided by the highest motives of international policy, with a view to vindicating the solemn obligations of international undertakings and the validity of international morality.”⁸ The Treaty of Versailles, in employing victors’ justice language, noted that the German government recognized “the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war,” and this right would “apply notwithstanding any proceedings or prosecution before a tribunal in Germany or in the territory of her allies.”⁹ We would come to see such a provision in the statutes of future international tribunals.¹⁰

The Tribunal was never established. Queen Wilhelmina of the Netherlands granted Kaiser Wilhelm political asylum. On 23 January 1920, the government of the Netherlands refused to extradite him on the grounds that the prosecution would amount to retroactive punishment.¹¹ On this point I mused that it would tempting to wonder whether the Dutch government ever regretted not turning over the Kaiser when considering the mass destruction and suffering of the Dutch at the hands of Nazi Germany. This is the boomerang effect of aiding and abetting impunity, though, assuredly, convicting and punishing Kaiser Wilhelm in an international court of sorts would not have deterred Hitler and all those who supported his policies, goals and the means in achieving them.

As for the establishment of an international criminal court, that idea would also die on the vine. The League of Nations in 1937 adopted an agreement to establish an international criminal court,

⁷ *Id.*, art. 227; see also TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBURG TRIALS—A PERSONAL MEMOIR* 16 (Little, Brown & Co. 1992).

⁸ Treaty of Versailles art. 227.

⁹ *Id.*, art. 228.

¹⁰ ICTY Statute, art. 10; Rome Statute, art. 20; Statute of the International Criminal Tribunal for Rwanda, S/Res/955 (8 November 1994), art. 9 (“ICTR Statute”); Statute of the Special Court of Sierra Leone (“SCSL Statute”) (15 August 2000), art. 9.

¹¹ TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBURG TRIALS—A PERSONAL MEMOIR* 16 (Little, Brown & Co. 1992); See YORAM DINSTEIN, *WAR, AGGRESSION AND SELF DEFENSE* 117 (Cambridge University Press, 2005); See also Nigel J. Ashton, *Anglo-Dutch relations and the Kaiser Question, 1918-20*, in NEIGEL J. ASHTON AND DUO HELEMA EDS., *UNSPOKEN ALLIES: THE ANGO-DUTCH RELATIONS SINCE 1780* 85–100 (Amsterdam University Press).

but the treaty never entered into force.¹² It would take nearly 70 years for this noble idea to be realized – at least as an institution, as opposed to a judicial institution paragon.

This brought the discussion to 1945, when during the London Conference, the Allies agreed to form the International Military Tribunal (the Nuremberg Tribunal), with a jurisdiction to try the key leaders of the Nazi regime¹³ for: crimes against peace, war crimes, and crimes against humanity, and with a fourth crime of conspiracy for leaders, organizers, instigators and accomplices who participated in the formation or execution of a common plan or conspiracy to commit any of the other three crimes.¹⁴ A similar tribunal would also be established for Japan: the International Military Tribunal for the Far East.¹⁵

Before getting to the substance of the Nuremberg trials, I thought it would be good to reflect a bit on one proposal circulated at the time that Schabas recounts; an interesting vignette worth pondering. In April 1945, just before the London Conference, the British government circulated a memorandum, which stated in part:

HMG assume that it is beyond question that Hitler and a number of arch-criminals associated with him (including Mussolini) must, so far as they fall into allied hands, suffer the penalty of death for their conduct leading up to the war and for the wickedness which they have either themselves perpetrated or have authorized in the conduct of the war. It would be manifestly impossible to punish war criminals of a lower grade by a capital sentence pronounced by a Military court unless the ringleaders are dealt with equal severity. . . .

It being conceded that these leaders must suffer death, the question arises whether they should be tried by some form of a tribunal claiming to exercise judicial functions, or whether the decision taken by the allies should be reached and enforced without the machinery of a trial. HMG thoroughly

¹² Convention for the Creation of an International Criminal Court, League of Nations OJ Spec. Supp. No. 156 (1936), LN Doc.C.547(I).M.384(I).1937.V (1938); United Nations, Historical Survey of the Question of International Criminal Jurisdiction—Memorandum submitted by the Secretary-General: Question of international criminal jurisdiction, A/CN.4/7/Rev.1, 16, available at http://legal.un.org/ilc/documentation/english/a_cn4_7_rev1.pdf.

¹³ Some 24 defendants were identified, with 21 actually being tried. See TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS—A PERSONAL MEMOIR 227, 654 (Little, Brown & Co. 1992).

¹⁴ Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal (IMT), Annex, (1951) 82 UNTS 279, art. 6.

¹⁵ Charter of the International Military Tribunal for the Far East, 19 January 1946, 4 BEVANS 21, (as amended 26 April 1946), art. 6.

appreciates the arguments which have been advanced in favour of some form of preliminary trial. But HMG are also deeply impressed with the dangers and difficulties of this course, and they wish to put before their principle allies, in a connected form, the arguments which have led them to think that execution without trial is the preferable course.¹⁶

It is chilling to think back to where we could be today if the British position had won the day; if summary executions were carried out of individuals who, at least in the minds of the British, were guilty beyond any doubt. Also interesting is some of the language of this memorandum, which seems to suggest that even if trials were to be held, they would in fact be a charade by “claiming to exercise judicial functions.”

The Nuremberg Tribunal, for all intents and purposes, gave birth to the new branch of law, International Criminal Law, which developed out of Customary International Law (State practice and *opinio juris*: the belief that such practice is required, prohibited or allowed, depending on the nature of the rule, as a matter of law), International Human Rights Law, International Humanitarian Law and National law. However, the results of the Nuremberg Tribunals and those that followed have been considered *victors' justice*.¹⁷ This term was by no means created for Nuremberg; in fact, the term goes back to ancient times.¹⁸ However, the phrase was made

¹⁶ WILLIAM SCHABAS, UNIMAGINABLE ATROCITIES, JUSTICE, POLITICS, AND RIGHTS AT THE WAR CRIMES TRIBUNAL 9–10 (Oxford 2002) *citing* Aide-Memoire from the United Kingdom, 23 April 1945 in Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials, US GOVERNMENT PRINTING OFFICE 18 (1949); *See also* TELFORD TAYLOR, THE ANATOMY OF THE NUREMBURG TRIALS—A PERSONAL MEMOIR 32–34. (Little, Brown & Co. 1992). Taylor notes that the British plan died early on. Early in April 1945, President Theodor Roosevelt sent his advisor Judge Samuel Rosenman to discuss war crime questions in London. Rosenman met with Charles de Gaulle who stated that he favored trials rather than summary execution. Soon after, Roosevelt died. President Harry Truman made clear that he was opposed to the summary execution and supported the establishment of a tribunal to try the Nazi leaders.

¹⁷ *See* TELFORD TAYLOR, THE ANATOMY OF THE NUREMBURG TRIALS—A PERSONAL MEMOIR 167–68 (Little, Brown & Co. 1992); *See also* Raymond M. Brown, *The American Perspective on Nuremberg: A Case of Cascading Ironies*, in LAWRENCE RAFUL ED., THE NUREMBURG TRIALS: INTERNATIONAL CRIMINAL LAW SINCE 1945 24 (K. G. Saur Verlag GmbH, 2006) ; *See also* Victor Peskin, *Beyond Victor's Justice? The Challenges of Prosecuting the Winners at the International Criminal Tribunals for the Former Yugoslavia and Rwanda*, 4 J. HUMAN RIGHTS 213, 214 (2006).

¹⁸ MARCUS TULLIUS CICERO, DE OFFICIIS, Translated by Walter Miller, (Harvard University Press, 1913), paras. 34, 36, available at http://www.constitution.org/rom/de_officiis.htm.

Legal constraints on the conduct of war in ancient Rome appear in Cicero: “As for war, humane laws touching it are drawn up in the fetial code of the Roman People.” Specifically, “no war is just, unless it is entered upon after an official demand for satisfaction has been submitted or warning has been given and a formal declaration made. “Breaches of this duty by Roman citizens were adjudicated at trial. But to enemies of war, Roman law attributed neither duties nor rights, hence judgment and punishment of defeated foes was at Roman discretion. Still, the exercise of that discretion, as argued by Cicero, must serve justice.”

popular in reference to Nuremberg's failings.¹⁹ Nuremberg was considered laudable for bringing the top Nazis to trial and paving the road for future international courts such as the ICTY, the International Criminal Tribunal for Rwanda (ICTR), and eventually the ICC. However, the pursuit of justice at Nuremberg was seen by some to be a sham, as an example of high politics masquerading as law.²⁰ To make my point, I invited the students to consider Harlan Fiske Stone's observation, the Chief Justice of the US Supreme Court at the time when another US Supreme Court Justice, Robert Jackson, was the Chief Prosecutor at Nuremberg:

[Chief Prosecutor] Jackson is away conducting his high-grade lynching party in Nuremberg.... I don't mind what he does to the Nazis, but I hate to see the pretense that he is running a court and proceeding according to common law. This is a little too sanctimonious a fraud to meet my old-fashioned ideas.²¹

This quote provoked a reaction from the students; hard to dismiss the criticism of Nuremberg when considering the source of the quote. It also reinforced, in part, one of the themes of this lecture: the inescapable and often deserved perception that international criminal trials are excessively political. Selective prosecution seems to be the contributing factor for this perception. Take for instance the ICTR. There were never any prosecutions of Tutsis because the Rwandan authorities (President Paul Kagame in particular) had made it clear that the ICTR Office of the Prosecutor would be stymied in any of its work in Rwanda, should there be any

¹⁹ Hermann Göring, Reichsmarschall and Nazi party leader, reacting to the Nuremberg indictment, cynically wrote: "The victor will always be the judge, and the vanquished the accused." G.M. GILBERT, NUREMBERG DIARY 4 (Da Capo Press 1947); The "victor's justice" criticism, made famous by Nuremberg, was addressed in one of the earliest proceedings in the ICTY. See *Prosecutor v. Tadić*, IT-94-1-T, Decision on the Prosecutor's motion Requesting Protective Measures for Victims and Witnesses (10 August 1995), para. 21 "The Nuremberg and Tokyo trials have been characterized as 'victors' justice' because only the vanquished were charged with violations of international humanitarian law and the defendants were prosecuted for crimes expressed defined in an instrument adopted by the victors at the conclusion of the war. Therefore, the International Tribunal is distinct from its closest precedents."

²⁰ For example, US Federal Judge Charles E. Wyzanski of the US District of Massachusetts remarked: "At the moment, the world is most impressed by the undeniable dignity and efficiency of the proceedings and by the horrible events recited in the testimony. But, upon reflection, the informed public may be disturbed by the repudiation of widely accepted concepts of legal justice. It may see too great a resemblance between this proceeding and others which we ourselves have condemned. If in the end there is a generally accepted view that Nuremberg was an example of high politics masquerading as law, then the trial instead of promoting may retard the coming of the day of world law." Charles E. Wyzanski, *Nuremberg: A Fair Trial? A Dangerous Precedent*, THE ATLANTIC, 1 April 1946, available at <http://www.theatlantic.com/magazine/archive/1946/04/nuremberg-a-fair-trial-a-dangerous-precedent/306492/4/>.

²¹ Harlan Fiske Stone, *quoted in* ALPHEUS THOMAS MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 176 (Viking 1968).

investigations, let alone prosecutions, against any Tutsis.²² While the ICTR trials *per se* should not be seen as victors' justice since the ICTR was established under Chapter VII of the UN Charter and was purportedly established to prosecute "persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighboring States between 1 January 1994 and 31 December 1994,"²³ the Prosecution operated as if it were seeking victors' justice by prosecuting only the vanquished. Accusations of selective prosecution and disparate treatment were further explored when the discussion turned to the African Union's perception of the ICC.²⁴

The discussion then turned to the legacy of the Nuremberg and Tokyo trials. It seemed that the global community had come to the realization of the need for permanent mechanisms and modalities in dealing with mass atrocities resulting from human rights and humanitarian violations in peacetime or in war, during internal armed conflicts or international armed conflicts. For decades there were discussions and position papers on the need to establish a permanent international criminal court, and of course on what law and procedure it would apply. This was a rather Herculean task when considering that a general consensus needed to be reached by the drafters who were jurists, academics and diplomats from all over the globe, from different legal traditions, with different agendas—all while the Cold War was being waged psychologically and by proxy—with no end in sight.

²² CARLA DEL PONTE, *MADAME PROSECUTOR, CONFRONTATIONS WITH HUMANITY'S WORST CRIMINALS AND THE CULTURE OF IMPUNITY*, A MEMOIR 224–25 (Other Press, New York 2009). Del Ponte, former Chief Prosecutor at the ICTR recalls President Kagame's interference with the ICTR Prosecutions: "The Tutsi-dominated Rwandan government was effectively blackmailing the tribunal, sabotaging its trials of accused Tutsis in order to halt the Office of the Prosecutor's Special Investigation of crimes allegedly committed by Tutsi-dominated Rwandan Patriotic Front (RPF) in 1994"; see also COLIN M. WAUGH, *PAUL KAGAME AND RWANDA: POWER, GENOCIDE AND THE RWANDAN PATRIOTIC FRONT* 171, (McFerland & Co., 2004); See generally Rory Carroll, *Genocide Tribunal Ignoring Tutsi Crimes*, THE GUARDIAN, 13 January 2005, available at <http://www.theguardian.com/world/2005/jan/13/rwanda.rorycarroll>. "The international tribunal for Rwanda was criticised . . . for its failure to charge Tutsis suspected of killing Hutus in the 1994 genocide. Filip Reyntjens, a Belgian historian and expert witness on the genocide, said he would stop cooperating with the tribunal because no Tutsis from the Rwandan Patriotic Front rebel army had been indicted."

²³ See ICTR Statute art. 1.

²⁴ For discussion of the African Union's relationship with the ICC, see *infra* part h (Kenya and Africa); see also Kenneth Roth, *Africa Attacks the International Criminal Court*, N.Y. BOOKS, 6 February 2014, available at <http://www.nybooks.com/articles/archives/2014/feb/06/africa-attacks-international-criminal-court/>; See also Max du Plessis et al., *Africa and the International Criminal Court*, CHATHAM HOUSE 2 (2013) available at http://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/0713pp_iccafrica.pdf.

What emerged from Nuremberg—referred to as the Nuremberg Principles—continue to be controversial today.²⁵ What exactly did in fact emerge and to what extent did it then, or at some later point, or even today, express binding customary international law? With the establishment of the United Nations, significant global and purportedly universal legislation was passed in the form of conventions, as well as other internationally recognized legal instruments. But no international court. Aside from Nuremberg, there were trials at the State level dealing with atrocities committed by the Nazis and Japanese, including the Eichmann trial in Israel, which, for all its limitations, has in fact contributed to the advancement of international criminal justice.²⁶

Creating a permanent international criminal court remained an elusive dream to those who truly wanted one. Looking back it is doubtful whether the US was ever really committed to the concept of an international court where US military and political leaders could potentially be sitting in the dock. For that matter, I would say the same for the USSR / Russia and China. After all, who could blame the Soviets during the Cold War? In 1952 a committee of the US Congress investigated the well-known (and currently acknowledged) massacre of Polish officers and political leaders at Katyn, recommending that those responsible be tried before the

²⁵ See G.A. Res. 488(V), U.N. Doc. A/RES/488(V) “Formulation of the Nuremberg Principles” (12 December 1950); International Law Commission, Report of the International Law Commission to the General Assembly, A/1316 (July 1950) (“Spiropoulos Report”) 367–73; Report of the International Law Commission on its Second Session, 5 June to 29 July 1950, Official Records of the General Assembly, Fifth Session, Supp. No. 12, U.N. Doc A/1316 (1950). Resolution 488(V) provides that “The international law commission has formulated *certain* principles recognized according to the Commission, in the charter and the judgment of the Nuremberg Tribunal.” However, the Nuremberg principles formulated by the ILC, and set out by the Spiropoulos Report, and reinforced by the Second ILC report, do not include common plan liability for war crimes and crimes against humanity. While they do for other principles, no mention is made of common plan liability for crimes against humanity and war crimes; See also MACHTELD BOOT, GENOCIDE, CRIMES AGAINST HUMANITY, WAR CRIMES 461 (Intersentia, 2002). “From the views expressed by governments after the adoption of the Nuremberg Principles by the UN General Assembly, it appears that much difference of opinion existed about the formulation of ‘crimes against humanity’ and its relation with the crime of genocide, Brazil, for example, stated that the acts constituted international crimes only when committed in connection with other crimes falling within the category of crimes against peace or war crimes.”; See also TELFORD TAYLOR, THE ANATOMY OF THE NUREMBURG TRIALS—A PERSONAL MEMOIR 626 (Little, Brown & Co. 1992). Telford Taylor, American counsel for the Prosecution at Nuremberg, reflecting on the Nuremberg trials remarked that what was done in Nuremberg was “revolutionary” in the sense that its makers adopted several novel criminal principles.

²⁶ For an excellent, yet controversial analysis of the Eichmann trial see HANNAH ARDENT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL 2 (Penguin, 2006). An example of one of Ardent’s controversial views was that “Ben-Gurion’s intentions from the beginning when he ordered Eichmann kidnapped and brought to trial in Israel and in his public statement afterward certainly gave credence to the view that it was indeed a show trial.” The Eichmann trial, in which Adolf Eichmann was kidnapped from Argentina, continues to be discussed in modern international criminal law relating to extraterritorial jurisdiction. See also Danielle Ireland-Piper, *Does the Long Arm of the Law Undermine the Rule of Law?*, 13 MELB. J. INT’L L. 122, 125 (2012).

International World Court of Justice.²⁷ As Professor Schabas notes, discussions were “tinged with Cold War rhetoric” and “if Nuremburg had left the Soviets with any lingering taste for the international criminal justice project, that was quickly dampened by the initiatives like those of the United States Congress concerning Katyn.”²⁸

The fact is that many States simply did not (and do not) trust such international institutions to be fair and objective, particularly when there is little if any oversight and lots of space for abuse and disparate treatment. Not to mention the highly subjective selection process in international prosecutions. No wonder it took nearly 50 years to establish the ICC, despite the relatively concerted efforts by the UN International Law Commission (ILC) in drafting an international criminal code—the *Draft Code of Offences Against the Peace and Security of Mankind*.²⁹

In 1989 the General Assembly—perhaps because of the fall of the Berlin wall and the end of the Cold War and breakup of the Soviet Union—encouraged the ILC to finalize a criminal code for an international criminal court to be established.³⁰ But it would take another war—in the heart of Europe no less—with more atrocities, more condemnations from the international community, and the establishment of the ICTY by the UN Security Council to revive the imperative for a permanent international criminal court.³¹

In 1998, 160 countries gathered in Rome to negotiate the Statute for the ICC, which had been completed three years earlier.³² When it was put to vote, 120 countries voted for it, with the

²⁷ Select Committee to Conduct an Investigation and Study of the Facts, Evidence, and Circumstances on the Katyn Forest Massacre, H.R. Rep. No. 2505 (1952).

²⁸ WILLIAM SCHABAS, UNIMAGINABLE ATROCITIES, JUSTICE, POLITICS, AND RIGHTS AT THE WAR CRIMES TRIBUNALS 13 (Oxford 2002).

²⁹ Draft Code of Offences against the Peace and Security of Mankind, 1954, Yearbook of the International Law Commission, vol. II. (1954).

³⁰ G.A. Res. 44/32, U.N. Doc. A/RES/44/32 (4 December 1989).

³¹ United Nations, The Statute of Rome, Overview (1989), available at <http://legal.un.org/icc/general/overview.htm>.

³² See Judge Sang-Hyun Song, President of the International Criminal Court, *The International Criminal Court: A Global Commitment to End Impunity*, 3, (22 May 2013), available at <http://www.icc-cpi.int/iccdocs/presidency/130522-ICC-President-lecture-at-Istanbul-Bilgi-University.pdf>; See also Coalition for the International Criminal Court, History of the ICC, Rome Conference, Coalition for the International Criminal Court, available at <http://www.iccnw.org/?mod=icchistory>.

United States, China, Israel, and others voting against it and twenty-one abstentions.³³ The Rome Statute entered into force on 1 July 2002 after 60 countries ratified, accepted or acceded to it.³⁴ It would take another year or so to select the judges and prosecutors and for the ICC to be operational. It would take another twelve years to complete the sum total of two trials.³⁵

By the time the ICC was ready for business, the ICTY had been steadily advancing—though not always in the right direction—international criminal law and procedure. There were other tribunals as well, such as the ICTR, Special Panels for Serious Crimes at the District Court of Dili (East Timor),³⁶ the Special Court for Sierra Leone (SCSL) and shortly thereafter the Extraordinary Chambers in the Courts of Cambodia (ECCC),³⁷ followed by the Special Tribunal for Lebanon (STL),³⁸ a court that I suspect will not fare well in time to come, it being a real anomaly.³⁹ A body of international criminal law and procedure began to emerge, on which, presumably, the ICC would capitalize.⁴⁰ Thus, any examination of the ICC cannot ignore or gloss over the fact that it did not have to re-invent the wheel: it had a considerable body of law and procedure, and administrative practices that it could draw from the other tribunals.

³³ Coalition for the International Criminal Court, History of the ICC, Coalition for the International Criminal Court, History of the ICC, Rome Conference, Coalition for the International Criminal Court, *available at* <http://www.iccnw.org/?mod=icchistory>.

³⁴ Rome Statute, art. 126; Coalition for the International Criminal Court, Fact Sheet: States Parties to the Rome Statute of the ICC, http://www.iccnw.org/documents/RATIFICATIONSbyRegion_15Feb2013_eng.pdf. Australia and Honduras both ratified the statute on 1 July 2002.

³⁵ International Criminal Court, Situations and Cases, International Criminal Court, http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx (last visited 8 March 2014).

³⁶ United Nations Transitional Administration in East Timor, Regulation No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, UNTAET/REG/2000/15 (6 June 2000).

³⁷ Agreement between the United Nations and the Royal Government of Cambodia concerning the prosecution under Cambodian law of crimes committed during the period of Democratic Kampuchea, Phnom Penh (6 June 2003).

³⁸ Agreement between the United Nations and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon, S.C. Res. 1715, U.N. Doc S/RES/1757, Annex (2007) (“STL Statute”).

³⁹ The Special Tribunal for Lebanon allows for trials in absentia. *See* STL Statute art. 22. On 16 January 2014 trial proceedings against the four accused commenced. Yet none of the defendants appeared in court. While the Tribunal has asked for the handing over of the indicted individuals, the Lebanese authorities have been unable (or unwilling) to do so. *See* STL Press Release, Ayyash et al. case opens at the Special Tribunal for Lebanon (16 January 2014), <http://www.stl-tsl.org/en/media/press-releases/16-01-2014-ayyash-et-al-case-opens-at-the-special-tribunal-for-lebanon>; Mark Kersten, *Trials and Tribulations of the Special Tribunal for Lebanon*, JUSTICE IN CONFLICT (28 January 2014).

⁴⁰ Before the ICC had opened its doors, the ICTY had already completed 30 cases in 2002. *See* ICTY, Judgment list, ICTY.ORG, <http://www.icty.org/sid/10095> (last visited 17 March 2014).

But the ICC was going to be different—or so it was thought. It would have its own detailed statute where the crimes were clearly listed with their specific elements—thus no need to scurry about to figure out what constitutes a particular crime, and whether the elements are identified unquestionably reflective of customary international law. The ICC would also learn—or at least so it was thought—from the mistakes made by the *ad hoc* tribunals. It would be circumspect when deciding whether to launch an investigation and whether to charge. It would not just take on any case even from one of the members of the Assembly of State Parties; complementarity would come into play. The ICC would serve as the Court of Last Resort: if a state was unable or unwilling to investigate and prosecute then it would intervene, and then, only rarely.⁴¹

With this as the backdrop, it was time to consider whether, after being in operation for twelve years, it was too soon or fair to evaluate whether the ICC was living up to the expectations of its founders. Since the focus of the lecture was on whether the ICC was proving to be the court of last resort, the question as to what sort of jurisprudence the ICC was generating was not addressed.

To familiarize the students with the jurisdiction of the ICC and how a case generally gets to the ICC, I briefly walked them through Article 13 of the Rome Statute, which lays out three ways in which the ICC can exercise jurisdiction over a case:

- (a) referral of a situation by a state party;
- (b) a referral by the Security Council acting under Chapter VII of the UN Charter; and
- (c) The prosecutor initiating an investigation *proprio motu*.

For a State party to refer a case to the ICC, or for the prosecutor to initiate an investigation *proprio motu*: (i) the accused person needs to be a national of a State party, or (ii) the conduct must have occurred in a State party.

⁴¹ ICC Assembly of States Parties, Report on the Bureau on Complementarity, ICC-ASP/11/24 (14-22 November 2012) “It is important to recall, that issues arising from the admissibility of cases before the Court under article 17 of the Rome Statute all remain a judicial matter to be addressed by the judges of the Court. Initiatives by State Parties to strengthen national jurisdictions to enable them to genuinely investigate and prosecute the most serious crimes of concern to the international community as a whole should always preserve the integrity of the Rome Statute and the effective, independent functioning of its institutions.”

I also discussed complementarity in a very cursory fashion, explaining that the ICC was intended as a court of last resort, investigating and prosecuting only where national courts have failed. The principle of complementarity, which places limits on what cases may be *admissible* to the ICC, is set out in Article 17, which provides:

The Court shall determine that a case is inadmissible where:

- (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
- (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
- (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;
- (d) The case is not of sufficient gravity to justify further action by the Court.

With the history and legal framework in mind, it was time for the vignettes I had selected which would hopefully lead to questions, comments and reflection.

III. VIGNETTES AND DISCUSSION

Now it was time to go through some examples—vignettes as I like to call them—and see just how relevant the ICC may be. As noted, the ICC is meant to be a court of last resort for victims to seek justice beyond the reach of obstruction by the political authorities generally complicit to the crimes being alleged and who by virtue of their power and authority, control the national courts and thus the outcomes. The ICC is expected to step into the breach where national courts are unable or unwilling to prosecute crimes of a universal nature: war crimes, crimes against humanity, genocide. I had hoped that the vignettes would lead to questions, comments and reflection on whether in its twelve year history the ICC has met expectations; whether it was rendering justice, or whether has it had the makings of a political tool?

To get the discussion going, I thought I would start with a few complaints or requests for investigation to the ICC Prosecutor to show the various reasons certain actors were trying use the ICC to advance seemingly political agenda – not exactly why the ICC was set up – and why certain non-signatories may have legitimate concerns for not signing on to the Rome Statute.

a. The Reprieve Complaint

The first vignette was a complaint that had only been filed a few days prior to the seminar by Reprieve, a UK based NGO whose mission is to “deliver justice and save lives from death row to Guantanamo Bay.”⁴² On 19 February 2014, Reprieve filed a complaint with the ICC accusing NATO member States of war crimes for their participation in the US’s covert drone program in Pakistan.⁴³ According to the Executive Summary of the Complaint, the UK, Germany, Australia and other NATO partners were supporting the US drone program by sharing intelligence.⁴⁴ And since these countries are signatories to the Rome Statute, Reprieve asserted that the ICC had jurisdiction.⁴⁵ According to the complaint, the US has immunized itself from legal accountability over drone strikes⁴⁶, while the UK—pointing to a decision from the Court of Appeal in London in which it ruled that it would not opine on the legality of British agents’ involvement in the US drone war in Pakistan—had closed its domestic courts to foreign drone victims.⁴⁷ It also noted that neither the courts in Pakistan where the strikes occur or in Afghanistan, where the strikes originate, are able or willing to investigate and prosecute these war crimes and/or crimes against humanity.⁴⁸ Claiming that the gravity test is met by the number of victims alleged in the complaint and the fact that no courts are able or willing to

⁴² REPRIEVE, <http://www.reprieve.org.uk/> (last visited 9 March 2014).

⁴³ REPRIEVE, Communication to the Office of the Prosecutor, the Situation in Afghanistan: The use of Drone Strikes in Pakistan (19 February 2014) *available at* http://www.reprieve.org.uk/media/downloads/2014_02_19_PUB_Communication_to_ICC_on_drone_strikes_in_Pakistan.pdf (“Reprieve Complaint”).

⁴⁴ *Id.* at 11.

⁴⁵ Rome Statute art. 12(2).

⁴⁶ Reprieve Complaint at 24.

⁴⁷ *See Khan v. Secretary of State for Foreign and Commonwealth Affairs*, [2012] EWHC Civ. 24.

⁴⁸ Reprieve Complaint at 24.

provide any redress, Reprieve asserted that the ICC is the only available venue for seeking justice.⁴⁹

The Reprieve complaint proved to be useful in showing what would be expected in a complaint, i.e., meeting the criteria set out in Articles 13 and 17 of the ICC Statute. Without going into a discussion on the utility of using drones on the so called war on terror, the discussion turned on whether the ICC was meant to deal with this sort of a case, particularly when there is sufficient evidence from which to conclude that the strikes are carried out against what is reasonably believed to be legitimate military targets and any innocent deaths resulting from the strikes are unintentional.⁵⁰ Though the limits or contours for sanctioned targeted killings is less than settled, the U.N. Special Rapporteur has observed that targeted killings are lawful when the target is a combatant or fighter or, a civilian when directly participating in hostilities, provided the killings comply with the requirements of international humanitarian law.⁵¹

The Reprieve complaint – at least as presented by the press release – also begged the question whether this is more of an attention-getting strategy for advancing non-ICC related agenda, than a genuine application for an ICC investigation for alleged crimes over which the ICC has jurisdiction.⁵²

⁴⁹ *Id.* at 38.

⁵⁰ See Mark Mazzetti and Eric Schmitt, *U.S. Debate Drone Strike on American Terrorism Suspect in Pakistan*, N. Y. TIMES, 10 February 2014, available at http://www.nytimes.com/2014/02/11/world/asia/us-debates-drone-strike-on-american-terror-suspect-in-pakistan.html?_r=0.

⁵¹ See U.N. Hum. Rts. Comm., *Report of Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston, Addendum Study on Targeted Killings*, para 30, U.N. Doc. A/HRC/14/24/Add.6 (28 May 28 2010).

⁵² Though the ICTY functions differently than the ICC, especially concerning issues of jurisdiction, the ICTY Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, 39 ILM 1257 (2000) is instructive. In order to assess the information on war crimes allegedly committed during the NATO bombing, the Prosecutor of the ICTY set up a committee on 14 May 1999. It was mandated to advise the Prosecutor whether there was sufficient basis to start an investigation. The advice of the Committee was that no investigation be conducted. The Report of the Committee was a mere recommendation and the Prosecutor is not obliged to follow it. The report came to the conclusion that “NATO has admitted that mistakes did occur during the bombing campaign; errors of judgment may also have occurred. Selection of certain objectives for attack may be subject to legal debate. On the basis of the information reviewed, however, the committee is of the opinion that neither an in-depth investigation related to the bombing campaign as a whole nor investigations related to specific incidents are justified. In all cases, either the law is not sufficiently clear or investigations are unlikely to result in the acquisition of sufficient evidence to substantiate charges against high level accused or against lower accused for particularly heinous offences; see also Natalino Ronziti, *Is the non liquet of the Final Report by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia acceptable?*, INT’L REV. OF THE RED CROSS 840 (2000).

b. President Obama's Mali Memorandum

Since the US was at the center of the Reprieve complaint, I thought it would be good to segue to President Obama's 31 January 2014 memorandum, asserting that members of the US Armed forces participating in the United Nations Multidimensional Integrated Stabilization Mission in Mali were "without risk of criminal prosecution or other assertion of jurisdiction by the International Criminal Court (ICC) because the Republic of Mali ha[d] entered into an agreement in accordance with Article 98 of the Rome Statute preventing the ICC from proceeding against members of the Armed Forces of the United States present in that country."⁵³ The memorandum was issued based on section 2005 of the 2002 American Service-Members' Protection Act (22 U.S.C. 7424), which states:

Effective beginning on the date on which the Rome Statute enters into force pursuant to Article 126 of the Rome Statute, the President should use the voice and vote of the United States in the United Nations Security Council to ensure that each resolution of the Security Council authorizing any peacekeeping operation under chapter VI of the charter of the United Nations or peace enforcement operation under chapter VII of the charter of the United Nations permanently exempts, at a minimum, members of the Armed Forces of the United States participating in such operation from criminal prosecution or other assertion of jurisdiction by the International Criminal Court for actions undertaken by such personnel in connection with the operation.

Before discussing the memorandum, it was necessary to introduce Article 98 of the Rome Statute; an incongruity in that it actually provides for the frustration of the Rome Statute by its signatories. Article 98 reads:

The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.

The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to

⁵³ U.S. OFFICE OF THE PRESS SECRETARY, Presidential memorandum—Certification Concerning U.S. Participation in the United Nations Multidimensional (31 January 2014).

surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

The purpose for using this example was to show how the US is effectively undermining the ICC. Mali had objected to signing a Bilateral Immunity Agreement with the Bush Administration, triggering retaliatory measures.⁵⁴ According to a 2003 Human Rights Watch 2003 report:

[T]he United States' long-standing opposition to the ICC intensified since mid-2002. The Bush administration has engaged in a widespread campaign to undermine and marginalize the ICC to prevent it from becoming an effective instrument of justice. After 'unsigned' the Rome Statute, the Bush administration threatened the future of United Nations peacekeeping operations and negotiated a Security Council resolution that provides limited, one year exemption for citizens of non-state parties of the Rome Statute – this includes U.S. personnel – participating in UN peacekeeping missions or UN authorized operations. Following this abuse of the Security Council, the Bush administration launched a worldwide campaign to negotiate bilateral immunity agreements that would exempt U.S. nationals from ICC jurisdiction.⁵⁵

The US normally enters into multilateral or bilateral agreements known as Status of Forces Agreement (SOFA) on “the rights and privileges of U.S. personnel present in a country in support of the larger security arrangement,” i.e., “how domestic laws of the foreign jurisdiction apply toward U.S. military personnel in that county.”⁵⁶ This is understandable considering that in many countries where U.S. military personnel are stationed and operating, the domestic courts hardly function as they should. The Mali example is telling, especially since Mali, a signatory of the ICC, had sought ICC assistance.⁵⁷

⁵⁴ Kevin John Heller, *Article 98 Agreements and the War on Terror in Africa*, OPINIO JURIS, (25 July 2006, 12:00 AM), <http://opiniojuris.org/2006/07/25/article-98-agreements-and-the-war-on-terror-in-africa/>; Mark Kersten, *Update and Clarification—Mali and the US: But What Bilateral Immunity Agreement?*, JUSTICE IN CONFLICT (4 February 2014), <http://justiceinconflict.org/2014/02/04/mali-and-the-us-but-what-bilateral-immunity-agreement>; Mark Mazzetti, *U.S. Cuts in Africa Aid Said to Hurt War on Terror*, N.Y. TIMES, 23 July 2006, available at http://www.nytimes.com/2006/07/23/world/africa/23terror.html?_r=3&hp&ex=1153627200&en=c16efe83bb2ca27f&ei=5094&partner=homepage&oref=slogin&.

⁵⁵ Human Rights Watch, *Bilateral Immunity Agreements* (20 June 2003).

⁵⁶ See R. Chuck Mason, *Status of forces Agreement (SOFA): What Is It, and How Has It Been Utilized?* U.S. CONGRESSIONAL RESEARCH SERVICE (15 March 2012).

⁵⁷ Referral letter from the Republic of Mali to the ICC, No. 0076 (13 July 2012) available at <http://www.icc-cpi.int/NR/rdonlyres/A245A47F-BFD1-45B6-891C-3BCB5B173F57/0/ReferralLetterMali130712.pdf>.

Mali has an obligation to abide by its commitments under the Rome Statute. Article 18 of the Vienna Convention on the Law of Treaties requires a State to abide by the terms of a treaty the State has signed but not yet ratified, and that obligation remains in effect until the State makes “its intentions clear not to become a party to the treaty.”⁵⁸ By “unsigned”⁵⁹ the Rome Statute the US is not bound to any international obligations it may have had, but what about Mali? As Ryan Goodman aptly puts it:

[W]hat about the legal obligations of states (such as Mali) that are parties to the ICC? If an article 98 agreement defeats the object and purpose of the ICC treaty, it would be invalid for Mali to enter it. Additionally, Mali has presumably entered the agreement with the US after Mali ratified the ICC Treaty—making this an even more legally dubious agreement than other article 98 agreements such as the one the US entered with Afghanistan.⁶⁰

Professor Nina Tannenwald⁶¹ who was in the audience and was quite engaging at times, pointed out during the discussions that the Obama Administration had been less hostile towards the ICC than the Bush administration, as if this made these sort of agreements more palatable or less subversive. In style and tone Obama has been measured, not in substance. Of course, even if Obama were all for the US signing on to the Rome Statute—which is highly doubtful at best when considering how lamely he has pursued the closing of Guantanamo⁶² and his politically pragmatic decision not to prosecute the authors of the legal memorandum and advice to Bush on justifying torture⁶³—Congress would be unlikely to go along⁶⁴ and there would certainly be

⁵⁸ Vienna Convention on the Law of Treaties art. 38, 23 May 1969, 1155 U.N.T.S. 331.

⁵⁹ President Bill Clinton signed the Rome Statute on 31 December 2000. President’s Statement on the Rome Treaty on the International Criminal Court, 37 WEEKLY COMP. PRES. DOC., 31 December 2000, para. 4, *available at* <http://www.gpo.gov/fdsys/pkg/WCPD-2001-01-08/pdf/WCPD-2001-01-08-Pg4.pdf>. “In signing, however, we are not abandoning our concerns about significant flaws in the treaty.” However, John Bolton under the Bush Administration, “unsigned” the treaty on 6 May 2002. *See* Press Statement, U.S. Department of State, International Criminal Court: Letter to UN Secretary General Kofi Annan from Under Secretary of State for Arms Control and International Security, John. R. Bolton (6 May 2002), *available at* http://cdn.ca9.uscourts.gov/datastore/library/2013/02/26/Abagninin_bolton.pdf.

⁶⁰ Ryan Goodman, President Certifies US Forces in Mali Not at Risk of International Criminal Court, but is that Legally valid?, JUST SECURITY (3 February 2014), <http://justsecurity.org/2014/02/03/president-certifies-armed-forces-mali-risk-international-criminal-court-legally-valid/>.

⁶¹ Biography, Professor Nina Tannenwald, Brown University, <http://watson.brown.edu/people/faculty/tannenwald> (last visited 16 March 2014).

⁶² *See generally* Mark Kersten, *Obama and the ICC – Four Reasons Not to Hold Your Breath*, JUSTICE IN CONFLICT (7 November 2012), <http://justiceinconflict.org/2012/11/07/obama-and-the-icc-four-reasons-not-to-hold-your-breath/>.

⁶³ Memorandum from the Deputy Attorney General on Decision Regarding the Objections to the Findings of Professional Misconduct in the Office of Professional Responsibility’s Report of Investigation into the Office of

significant push-back from the US Armed Forces.⁶⁵ Abu Ghraib comes to mind. A white wash of sorts considering that then Secretary of Defence Donald Rumsfeld took the Guantanamo template for “enhanced integration”—a code word for torture, which the Bush administration claimed was permissible since the Guantanamo detainees were “unlawful combatants” and thus not protected by the Geneva Conventions—and had it applied in US detention facilities in Iraq, where the Geneva Conventions were recognized to be in effect.⁶⁶

The students were asked to consider to what extent the ICC can be seen as a credible judicial institution if the US, a P5 member of the UN Security Council prone to sermonizing the world over on the virtues of the rule of law, is undermining the ICC’s credibility and viability. If the ICC is so flawed an institution that US military personnel and officials should not be prosecuted by it (a matter that may not be too far off the mark), then how could the US ever suggest that others, such as Assad, be taken to the ICC for prosecution? Is this a characteristic of American *exceptionalism*?⁶⁷

Legal Counsel’s Memoranda Concerning Issues Relating to the Central Intelligence Agency’s Use of “Enhanced Interrogation Techniques” on Suspected Terrorists (5 January 2010) *available at* <http://dspace.wrlc.org/doc/get/2041/73988/03108text.txt>.

⁶⁴ Lauren Carasic, *Human Rights for Thee but not for Me*, AL JAZEERA, 12 March 2014, *available at* <http://america.aljazeera.com/opinions/2014/3/the-us-lacks-moralauthorityonhumanrights.html>. However, in recent years, the US has seemed slightly less hostile towards the ICC. *See* Alexis Arieff, Rhoda Margesson, Marjorie Browne, Matthew Weed, *International Criminal Court Cases in Africa: Status and Policy Issues*, CONGRESSIONAL RESEARCH SERVICE, 3 (22 July 2011). Secretary of State before the Senate Foreign Relations Committee in January 2009, Hillary Clinton said, “Whether we work toward joining or not, we will end hostility toward the ICC and look for opportunities to encourage effective ICC action in ways that promote U.S. interests by bringing war criminals to justice.” In August 2009, Secretary of State Clinton said that it was a “great regret” that the United States was not a party to the ICC, but that the United States has supported the Court and “continue[s] to do so.” Obama Administration officials have indicated that the Administration is “considering ways in which we may be able to assist the ICC, consistent with our law, in investigations involving atrocities.” A January 2010 review by the Department of Justice concluded that diplomatic or “informational” support for “particular investigations or prosecutions” by the ICC would not violate existing laws.

⁶⁵ *See* Eric Leonard, *One Step Forward, Two Steps Back: New Developments in the US-ICC Relationship*, JURIST (23 February 2014, 11:02 AM), <http://jurist.org/hotline/2014/02/eric-leonard-us-icc.php>.

⁶⁶ *See* U.S. Department of Justice, Office of Legal Counsel, Memorandum for William J. Haynes II, General Counsel of the Department of Defense, *Re: Military Interrogation of Alien Unlawful Combatants Held Outside the United States* (14 March 2003). Unsurprisingly—and why the US remains adamantly opposed to signing the Rome Statute—the events of Abu Ghraib, the failure to meaningfully prosecute those responsible for torture and the ongoing cover-up shenanigans, *see* Ari Melber, *Our fierce fight over torture*, REUTERS, 13 March 2014, *available at* <http://blogs.reuters.com/great-debate/2014/03/13/our-fierce-fight-over-torture/>.

⁶⁷ The term American exceptionalism dates back to Alexis de Tocqueville’s trip to American and book *Democracy in America*. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA*, Part II (1840) (University of Michigan Press, 1836). American exceptionalism is used to prompt the notion that the United States was “born” different, and continues to be different from other nations. *See* Byron E. Schaffer, *American Exceptionalism*, 2 ANNU. REV. POL.

At this point in time it was also necessary to point out that the ICC, in its current form, is by no means a well-run judicial institution. Setting aside how decisions are made as to who should be targeted for prosecution, the Prosecutor effectively is unchecked (the first one, Luis Moreno-Ocampo proved by most accounts to have been an unmitigated disaster),⁶⁸ and many of the judges, who are political appointees, have little or no experience in judicial matters.⁶⁹ So maybe there is cause for not signing on to the ICC.

c. The M.V. Mavi Marmara Incident

To add a bit more fuel to debate, I moved on to the ICC preliminary inquiry into the Israeli raid on the Gaza bound flotilla—the *M.V. Mavi Marmara* incident. On 31 May 2010, the Free Gaza Flotilla, carrying humanitarian aid and more than 600 pro-Palestinian activists, attempted to break Israel’s naval blockade.⁷⁰ Israeli commandos boarded (or, as some put it, assaulted) one of the vessels, the *M.V. Mavi Marmara*, resulting in nine deaths.⁷¹ According to the referral filed by the Union of the Comoros, some 600 passengers were also victimized by the conduct of Israeli Defence Forces (IDF), in violation of international humanitarian law, human rights law and international criminal law.⁷²

The Referral is an excellent example of how a formal request to the ICC Prosecutor for an investigation should be structured. It cogently covers the matter being referred, why and how the ICC has jurisdiction based on complementarity and gravity, the operative facts, the legal characterization, and the international crimes allegedly violated.

SCI. 445, 447 (1999). Lately this aphorism has been used by some US politicians in suggesting US’s preeminence and manifest destiny.

⁶⁸ See Ben Schiff, *Evaluating the International Criminal Court*, WORLD POLITICS REV. (2011), available at <http://www.worldpoliticsreview.com/articles/10146/evaluating-the-international-criminal-court>.

⁶⁹ Michael Bohlander, *The International Criminal Judiciary Problems of Judicial Selection, Independence and Ethics in INTERNATIONAL CRIMINAL JUSTICE—A CRITICAL ANALYSIS OF INSTITUTIONS AND PROCEDURES* 325–90, 3, 4, (London: Cameron 2007).

⁷⁰ U.N. Secretary General, Report of the Secretary-General’s Panel of Inquiry on the 31 May 2010 Flotilla Incident, (September 2011), para. 93.

⁷¹ *Id.*, para. 1.

⁷² See Referral of the Union of Comoros with respect to the 31 May 2010 Raid on the Humanitarian Aid Flotilla bound for Gaza Strip and attached Letter from Elmadağ Law Firm to Fatou Bensouda, Prosecutor of the International Criminal Court, 14 May 2013. (“Comoros Referral”), para. 25, available at <http://www.icc-cpi.int/iccdocs/otp/Referral-from-Comoros.pdf>.

To set the backdrop of the discussion, I briefly went over some of the facts. The *M.V. Mavi Marmara* vessel was registered in Comoros.⁷³ Comoros does not recognize Israel, and therefore it would be “impractical for Comoros to initiate investigations and prosecutions against the perpetrators of the crimes in question.”⁷⁴ Comoros has signed and ratified the Rome Statute, whereas Israel has done neither.⁷⁵ The referral argues that the ICC has jurisdiction based on the fact that the crimes were committed within the territorial jurisdiction of Comoros, on board the *M.V. Mavi Marmara* vessel.⁷⁶

According to the Referral, the Israeli courts were either unwilling or incapable of objectively investigating and prosecuting the alleged crimes committed by members of the IDF since there were past occasions when the Israeli government had not cooperated with UN fact finding missions.⁷⁷ Israeli courts were unlikely to objectively carry out their obligations because, since the birth of the State of Israel, the Israeli public has been very supportive of the IDF since it has heroically protected the homeland:

First and foremost, the highly political and sensitive nature of Israeli socio-political reality on the ground does not enable the Israeli legal system to act independently and pursue and try those responsible . . . for the commission of crimes aboard the abovelisted vessels on May 2010. Moreover, there is no political will to allow for independent and impartial investigations and prosecutions to take place. This of course emanates from the fact that (i) given the turmoil history of Israel since its creation, the IDF is highly praised as an important arm of the state for the important role it plays in the defence of the country, and (ii) it could very well be that individuals at the highest echelons of power in Israel may ultimately be found responsible for authorizing the raid and the commission of the crimes which ensued (knowingly or ought to have known). On these aspects alone, the Court cannot

⁷³ *Id.*, para. 1.

⁷⁴ *Id.*, para. 23.

⁷⁵ U.N. Treaty Collection, Rome Statute of the International Criminal Court, Ratifications and Signatories, (last visited 10 March 2014), https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=XVIII-10&chapter=18&lang=en.

⁷⁶ Comoros Referral, para. 19: “It is acknowledged that, pursuant to Article 12(2)(a) of the Rome Statute of the ICC, Comoros has territorial jurisdiction on *M.V. Mavi Marmara*, meaning, the crimes occurred on board the *M.V. Mavi Marmara*, as a result of the IDF attacks, falls within the jurisdiction of the Court.”

⁷⁷ Human Rights Council, Report of the international fact-finding mission to investigate violations of international law, including international humanitarian and human rights law, resulting from the Israeli attacks on the flotilla of ships carrying humanitarian assistance, Fifteenth Sess., 27 September 2004, A/HRC/15/21, para. 268. “The Mission is aware that this is not the first time that the Government of Israel has declined to cooperate with an inquiry into events in which its military personnel were involved.”

reasonably rely on the Israeli authorities to willingly or genuinely carry out comprehensive, independent and impartial investigations and prosecution of crimes committed as a result of the flotilla raid. The lack of cooperation on behalf of the Israeli authorities with the UN International Fact-Finding Mission is a testament to the veracity of the position that it is unlikely that the Israeli authorities will initiate or carry out proceedings at the national level independently, impartially with a genuine and *bona fides* intent to bring the perpetrators of the crimes committed on 31 May 2010 to justice.⁷⁸

What struck me as significant for discussion purposes was a passage in the Referral where it appears that the scope of the investigation requested exceeds the events surrounding the *Mavi Marmara* incident, and actually calls for an investigation into Israel's overall conduct and activities in Gaza.⁷⁹ It does so subtly by noting that the ICC could also have jurisdiction over this matter:

[I]f it decides to accept the declaration made by the Palestinian Authority under Article 12(3) of the Rome Statute in January 2009. This submission is based on the fact that the attack on the flotilla has serious consequences for, and effect, on the situation in Gaza. In essence, the Flotilla is directly linked to then Gaza situation. These consequences resulted in the commission of Crimes Against Humanity and War Crimes.⁸⁰

I noted that the ICC Prosecutor had already decided on the whether the Government of Palestine could be recognized as a State, for the purposes of Article 12 of the Rome Statute. In a decision titled Situation in Palestine, dated 3 April 2013, the ICC Prosecutor opined that the Rome Statute confers no authority on the ICC Prosecutor "to define the term 'State' under article 12(3) which would be in variance with that established for the purpose of article 12(1)," and that even though Palestine had been recognized by more than 130 governments, including UN organizations, it

⁷⁸ Comoros Referral, para. 21.

⁷⁹ See Human Rights Council, Report of the international fact-finding mission to investigate violations of international law, including international humanitarian and human rights law, resulting from the Israeli attacks on the flotilla of ships carrying humanitarian assistance, Fifteenth Sess., 27 September 2004, A/HRC/15/21, para. 275, wherein it states: "The Mission is not alone in finding that a deplorable situation exists in Gaza. It has been characterized as 'unsustainable'. This is totally intolerable and unacceptable in the twenty-first century. It is amazing that anyone could characterize the condition of the people there as satisfying the most basic standards. The parties and the international community are urged to find the solution that will address all legitimate security concern of both Israel and the people of Palestine, both of whom are equally entitled to 'their place under the heavens'."

⁸⁰ Comoros Referral, para. 20.

had only been granted observer status by the UN General Assembly.⁸¹ Surely this would have been known by the highly qualified law firm hired by Comoros to file the Referral on its behalf. And surely this could be viewed by some as a backdoor effort to broaden the scope of the investigation, thus politicizing the matter to deal with the overall humanitarian situation in Gaza as a result of the Israel's overall conduct and activities related to Gaza.

It remains to be seen what the ICC Prosecutor does. Nonetheless, this example shows how some parties to the Rome Statute may be using the referral procedures as a pretext for pursuing political agenda. But there was another interesting twist worth teasing out of this example: the two UN reports associated with the *Mavi Marmara* incident.

On 27 September 2010, the UN Human Rights Council issued a report which had been prepared by a fact-finding mission (the Mission) it had established in Resolution 14/1 of 2 June 2010 “to investigate violations of international law, including international humanitarian law and human rights law, resulting from the interception by Israeli forces of the humanitarian aid flotilla of ships carrying humanitarian assistance to Gaza” resulting in nine people being killed and many others injured.⁸² The Mission concluded that violations of international humanitarian and human rights law had been committed by the IDF when it intercepted the flotilla and during the subsequent detention of the passengers by Israel before they were deported.⁸³ When reading the report, however, it appears that these fact-finders appointed by the President of the Human Rights Council went well beyond their mandate. In other words, they used the opportunity to address more than the narrow issue of what had occurred on the *M.V. Mavi Marmara* and the ensuing events.⁸⁴

⁸¹ ICC Office of the Prosecutor, Statement on the Situation in Palestine, (3 April 2012), paras. 6, 7, *available at* <http://www.icc-cpi.int/NR/rdonlyres/C6162BBF-FEB9-4FAF-AFA9-836106D2694A/284387/SituationinPalestine030412ENG.pdf>.

⁸² Human Rights Council, Report of the international fact-finding mission to investigate violations of international law, including international humanitarian and human rights law, resulting from the Israeli attacks on the flotilla of ships carrying humanitarian assistance, Fifteenth Sess., 27 September 2004, A/HRC/15/21, para 1.

⁸³ *Id.* at 1 (summary).

⁸⁴ *Id.*, para. 263. For example, this paragraph makes references to “the firing of rockets and other munitions of war into Israeli territory from Gaza. . . .”

Under their mandate, the members of the Mission indicated to the Council that they would “focus on the events that took place in international waters on 31 May 2010 as well as the way in which the Israeli authorities dealt with the aftermath of the operation and the repatriation of those participating in the flotilla.”⁸⁵ Nowhere in the mandate was there authority to conduct, or even mention of, an investigation into the wider human rights and humanitarian situation in Gaza.

In assessing the legality of the blockade, the Mission found that the blockade was illegal:

[I]t is clear that there was no reasonable suspicion that the Flotilla posed any military risk of itself. As a result, no case could be made for intercepting the vessels in the exercise of belligerent rights or Article 51 self-defence. Thus, no case can be made for the legality of the interception and the Mission therefore finds that the interception was illegal.⁸⁶

Further, the Mission came to the conclusion that a humanitarian crisis existed in Gaza, and the actions of the IDF in intercepting the *M.V. Mavi Marmara*—the excessive use of force, detention conditions, and killings—were clearly unlawful.⁸⁷ Going beyond the mandate, the Mission then addressed the wider conditions in Palestine, including the general humanitarian and human rights implications stemming from the 2007 blockade on the Gaza strip,⁸⁸ finding that that the blockade was part of a wider “overall closure” regime, which inflicted disproportionate damage to civilians:

The Mission finds that the policy of blockade or closure regime, including the naval blockade imposed by Israel on Gaza was inflicting disproportionate civilian damage. The Mission considers that the naval blockade was implemented in support of the overall closure regime. As such it was part of a single disproportionate measure of armed conflict and as such cannot itself be found proportionate.⁸⁹

The Mission is not alone in finding that a deplorable situation exists in Gaza. It has been characterized as ‘unsustainable’. This is totally intolerable and unacceptable in the twenty-first century. It is amazing that anyone could characterize the condition of the people there as satisfying the most basic standards. The parties and the international community are urged to find the

⁸⁵ *Id.*, Annex I, para. 5.

⁸⁶ *Id.*, para. 58.

⁸⁷ *Id.*, paras. 261–62.

⁸⁸ *Id.*, paras. 37–44.

⁸⁹ *Id.*, para. 59.

solution that will address all legitimate security concern of both Israel and the people of Palestine, both of whom are equally entitled to ‘their place under the heavens’. The apparent dichotomy in this case between the competing rights of security and to a decent living can only be resolved if old antagonisms are subordinated to a sense of justice and fair play. One has to find the strength to pluck rooted sorrows from the memory and to move on.⁹⁰

It would appear that the report was prepared for the purpose of making a referral to the ICC Prosecutor, which would address the entire situation in Gaza spanning several years, as opposed to what occurred during the interception of the *M.V. Mavi Marmara*. This becomes rather obvious when considering some of the members of the Mission who authored the report: Judge Karl T. Hudson-Phillips, Q.C., retired Judge of the International Criminal Court and former Attorney General of Trinidad and Tobago, Sir Desmond de Silva, Q.C. of the United Kingdom, former Chief Prosecutor of the United Nations-backed Special Court for Sierra Leone and Ms. Mary Shanthi Dairiam of Malaysia, founding member of the Board of Directors of the International Women’s Rights Action Watch Asia Pacific and former member of the Committee on the Elimination of Discrimination against Women.⁹¹ Surely a former ICC judge and a former international prosecutor would know exactly what was needed in the report in order to meet the ICC jurisdictional requirements – specific to the issue of gravity, which on its face, the events of *M.V. Mavi Marmara* assuredly did not meet. The Mission did not make reference to the ICC or international prosecution of those responsible for the *M.V. Mavi Marmara* incident, though it expressed its expectations for Israel’s cooperation with a view to prosecuting those culpable.⁹² Though not explicitly stated, it would appear that the this report was written with the purpose of international prosecution in mind for the overall situation in Gaza, should the Israeli government falter in investigating and prosecuting those responsible for any crimes resulting from the *M.V. Mavi Marmara* incident. And unsurprisingly this report is eventually significantly relied on in the Referral.

And as an aside, if we were to hark back to the seminar discussion on Red Lines and Game Changers, were military strikes lawfully permitted as part of a humanitarian intervention absent

⁹⁰ *Id.*, para. 275.

⁹¹ *Id.*, para. 265.

⁹² *Id.*, para. 267, wherein it states: “The Mission sincerely hopes that there will be cooperation from the Government of Israel to assist in their identification with a view to prosecuting the culpable and bringing closure to the situation.”

UN Security Council approval, as the UK has expressed based in part on the Kosovo precedent (see link), it could be envisaged that a neighboring country or set of countries could use this report as a pretext to strike Israel as part of a humanitarian intervention, since the UN Security Council is unlikely to authorize the use of force.⁹³ As remote as this scenario may seem, these dangers were explored during the Red Lines and Game Changers seminar, when addressing the justification by the US, UK and others on the use of force for humanitarian purposes, as an exception to Article 2(4) of the UN Charter.

The second UN report seems measured and focused. On 2 August 2010, the Secretary General established a Panel of Inquiry on the 31 May 2010 *M.V. Mavi Marmara* incident. Its report was issued on September 2011.⁹⁴ The panel of experts, unlike the Human Rights Council fact-finders, concluded that the Israeli “naval blockade was imposed for legitimate security measures in order to prevent weapons from entering Gaza by sea and its implementation complied with the requirements of international law.”⁹⁵ However, it found that Israel’s decision to board the flotilla with substantial force, and with no final warning, was excessive and unreasonable.⁹⁶ It further concluded that the loss of life and injuries resulting from the IDF’s take-over of the *M.V. Mavi Marmara* was unacceptable.⁹⁷ Further, the panel found significant mistreatment of passengers by Israeli authorities, including physical mistreatment, harassment, intimidation, unjustified confiscation and the denial of consular assistance.⁹⁸

In assessing the same incident, the two UN bodies produced conflicting reports. The Secretary-General’s panel, which limited itself to the incident, found that the blockade was legal, but the forceful response of the IDF, including the subsequent treatment of passengers was unlawful. On the other hand, the Human Rights Council’s report found that the blockade itself was illegal. Going well beyond the *M.V. Mavi Marmara* incident, the Human Rights Council’s report attempted to tie the incident into a wider systematic assessment of human rights violations in

⁹³ Michael G. Karnavas, *Red Lines and Game Changers—The Legality of Unilateral or Collective Use of Force in Syria*, http://www.michaelgkarnavas.net/files/BrownUSeminar_27Feb14.pdf.

⁹⁴ U.N. Secretary General, Report of the Secretary-General’s Panel of Inquiry on the 31 May 2010 Flotilla Incident, (September 2011).

⁹⁵ *Id.* at 4.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 5.

Gaza; possibly to set up a future referral to the ICC. This inconsistency was offered as a concrete example to demonstrate why Israel has legitimate reasons, in general, for distrusting UN-commissioned reports, and more specifically why it cannot accept as a given that the ICC will be fair and impartial in its treatment of Israel's military personnel and political leaders.

d. The Situation in Egypt

I then moved on to a couple of other vignettes that also called into question the motivation for seeking ICC intervention. The first one dealt with an application by the Muslim Brotherhood to get the ICC Prosecutor to initiate an investigation based on evidence its legal team had gathered showing that members of “military police and political members of the military regime have committed crimes against humanity.”⁹⁹

Since the focus of the lecture was on jurisdiction, this example was interesting in that Egypt has not signed onto the Rome Statute.¹⁰⁰ Nonetheless, the Muslim Brotherhood claimed that the ICC would have jurisdiction in that it had been the duly elected government and that Mohammed Morsi, as the legitimate—albeit deposed—President of Egypt, had it within his authority to accept the ICC's jurisdiction to prosecute the crimes alleged in the request for referral.¹⁰¹ Of course, nothing would prevent the ICC from acting on such a request from a legitimate Head of State acting on behalf of the State, as was done with the Côte d'Ivoire.¹⁰² But the question here is which is the legitimate government in Egypt? The Muslim Brotherhood won the elections fair and square, but there was—not to sugar coat it—a *coup d'état*. Also, though western liberal democracies extoll the virtues of democratic governance based on fair and inclusive elections, in the case of Egypt, since the “wrong” party won and/or was not governing as hoped by many of

⁹⁹ Kevin John Heller, *Good Luck with the ICC, Muslim Brotherhood*, OPINIO JURIS, (3 January 2014, 9:59 PM), <http://opiniojuris.org/2014/01/03/good-luck-icc-muslim-brotherhood/>; Middle East Monitor, *Democratically elected Government of Egypt submits complaint to the International Criminal Court*, MIDDLE EAST MONITOR, 6 January 2014, available at <https://www.middleeastmonitor.com/news/europe/9077-democratically-elected-government-of-egypt-submits-complaint-to-the-international-criminal-court>.

¹⁰⁰ U.N. Treaty Collection, Rome Statute of the International Criminal Court, Ratifications and Signatories, (last visited 10 March 2014), https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en.

¹⁰¹ Paul Waldie, *Egypt's Muslim Brotherhood Appeals to World Criminal Court*, THE GLOBE AND MAIL (6 January 2014, 9:38 AM), <http://www.theglobeandmail.com/news/world/lawyers-file-claim-in-icc-against-egypts-military-backed-regime/article16204039/>.

¹⁰² See *infra*, part g (Kenya and Africa).

the electorate (and some other countries), the international community, including the UN, considers the coup leadership as the legitimate governing authority in Egypt.¹⁰³ So much so in fact, that the US has resumed its shipments of military hardware to Egypt, thus directly recognizing and propping up the unelected coup government of General Mansour.¹⁰⁴

Even assuming the gravity test can be met—which is not a given—the real issue here is whether the ICC Prosecutor will find the Morsi declaration to be legally sufficient to confer *ad hoc* ICC jurisdiction in order to commence an investigation. This poses a real dilemma: how do you not recognize a duly elected Head of State who has been unconstitutionally removed by a military coup? What sort of message would the ICC (and UN for that matter—since the Security Council could refer the matter to the ICC Prosecutor) be sending if it were to conclude that only the unelected and unconstitutionally self-installed coup leader is the sole rightful representative of Egypt for the purpose of conferring jurisdiction to the ICC? Viewed from another perspective, is the Morsi declaration a genuine request for the ICC Prosecutor to investigate crimes against humanity of significant gravity, or is this a ploy to garner international support for the delegitimization of the Mansour government? The ICC Prosecutor will in all likelihood examine the Morsi declaration, though I suspect the result will most like follow the Palestinian precedent: leave it up to others to determine since the Rome Statute does not explicitly authorize the ICC Prosecutor to define the narrow issue at hand.

e. Cambodia

I next turned to a vignette from Cambodia since it seemed to nicely compliment the Egyptian one. On 7 January 2014, the Cambodia National Rescue Party (CNRP) issued a press release that it had engaged an international lawyer to lead a team of international lawyers to “analyse the

¹⁰³ Nabil Fahmy, Egyptian Minister of Foreign Affairs for the interim government represented Egypt at the 68th Session of the United Nations General Assembly despite opposition from Morsi. See U.N. G.A.O.R., 68th Sess., Speech of Nabil Fahmy (28 September 2013), <http://gadebate.un.org/68/egypt>; See also Ozan Varol, *Guest Post: Egypt's Non-Democratic Coup d'Etat*, OPINIO JURIS (16 July 2013, 5:59 PM), <http://opiniojuris.org/2013/07/16/guest-post-egypts-non-democratic-coup-detat/>; Jose Esposito, *Living in denial: US policy & Egypt's military coup*, AL JAZEERA, 15 July 2013, available at <http://www.aljazeera.com/indepth/opinion/2013/07/2013715105014165446.html>.

¹⁰⁴ Jeremy M. Sharp, *Egypt: Background and U.S. Relations*, CONGRESSIONAL RESEARCH SERVICE, 33–35 (10 January 2014); Anjali Kamat and Nicole Salazar, *In US military aid to Egypt, business as usual*, AL JAZEERA, 11 October 2013, available at <http://america.aljazeera.com/articles/2013/10/11/in-us-military-aidtoegyptbusinessasusual.html>.

evidence of crimes committed by Cambodian security forces and, if justified, file a request to the Prosecutor of the International Criminal court to initiate investigations into the situation in Cambodia under Article 15 of the Rome Statute.”¹⁰⁵ Seemingly, the trip wire for this investigation was an incident where military police dedicated effectively to the ruling party, the Cambodian People’s Party (CPP), shot dead five civilians, injured more and imprisoned demonstrating garment factory workers on 3 January 2014.¹⁰⁶ The investigation is expected to go well beyond this incident, since the CNRP is alleging that the CPP security forces “commit illegal violent acts as part of a widespread or systematic attack against the civilian population” amounting to crimes against humanity.¹⁰⁷ On the same day, the international lawyer chosen to spearhead the investigation was quoted saying that the underlying criminal acts are “likely to include murder, arbitrary imprisonment, forced transfer and persecution on political grounds,” with the likelihood of there being “tens or even hundreds of thousands of victims.”¹⁰⁸

To put this investigation commissioned by the CNRP into perspective, it was necessary to briefly discuss the ongoing political situation in Cambodia. On 28 July 2013, Cambodia held its last elections. The CPP, which has been for all intents and purposes the ruling party since the overthrow of the Khmer Rouge regime in 1979, won the elections. However, the elections according to some observers have been declared seriously flawed, with CNRP being the actual winner.¹⁰⁹ The CNRP has refused to participate in the National Assembly, though at one point it

¹⁰⁵ CNRP Press Release, International Lawyer Engaged to Assess Crimes Committed by Cambodian Security Forces, Cambodia National Rescue Party (7 January 2014), English Translation *available at* <http://www.globaldiligence.com/9-january-2014-cambodia-global-diligence-lawyers-engaged-to-conduct-investigation-into-fatal-shootings-and-other-possible-international-crimes/> (“CNRP Press Release”).

¹⁰⁶ Mech Dara and Kevin Dyole, *Police Kill 5 During Clash with Demonstrators*, CAMBODIA DAILY, 10 March 2014, *available at* <http://www.cambodiadaily.com/archives/military-police-kill-5-during-clash-with-demonstrators-50081/>.

¹⁰⁷ CNRP Press Release.

¹⁰⁸ Collin Meyn and Mech Dara, *Lawyers to Assess Whether Government Crimes Worthy of ICC*, CAMBODIA DAILY, 8 January 2014, *available at* <http://www.cambodiadaily.com/archives/lawyer-to-assess-whether-government-crimes-worthy-of-icc-50303/>.

¹⁰⁹ Human Rights Watch, *Cambodia: Ruling Party Orchestrated Vote Fraud*, HRW.ORG (31 July 2013), <http://www.hrw.org/news/2013/07/31/cambodia-ruling-party-orchestrated-vote-fraud>. The CPP briefly shared power with the purported winner of the 1993 elections, the FUNCINPEC party until the attempted coup/counter coup of 1997. There is semi-reliable evidence that FUNCINPEC was fixing to overthrow the CPP, though the CPP in anticipation overthrew FUNCINPEC when it seemingly learned of this what was to occur. See Jeffrey Gallup, *Cambodia’s Electoral System: A Window of Opportunity*, ELECTORAL POLITICS IN SOUTH EAST ASIA 31–2 (Singapore: FES, 2002). See e.g. Northern Illinois University Center for Southeast Asian Studies, *The July 5-6 1997 “Events”: When is a coup not a coup?*, SEASITE.NIU.EDU, http://www.seasite.niu.edu/khmer/ledgerwood/july_56_1997_events.htm (last visited 10 March 2014).

had proposed sharing power with the CPP; a proposal not accepted by the CPP.¹¹⁰ The CNRP party leaders, Sam Rainsy and Kem Sokha, have since been holding demonstrations and most recently have been supporting various union leaders who have called for their members to strike over low wages and working conditions.¹¹¹ That brings us to the events leading up to the demonstrations of 3 January 2014 and the violent response by the military police resulting in death, injuries and imprisonment of some of the demonstrators.

Cambodia, unlike Egypt, has signed on to the Rome Statute; hence the ICC has jurisdiction.¹¹² Since the courts in Cambodia have been deemed in the past to be neither fair nor impartial,¹¹³ and since the likelihood of an objective investigation and prosecution by the national authorities is rather remote, there is a strong case for ICC intervention, provided of course the gravity test is met. And herein lies the rub. This may explain why the CNRP is calling for a wide-ranging investigation, covering years, if not decades, and including a variety of human rights violations packaged as part of a “widespread or systematic attack against civilians.”

For those of us who are familiar with the situation in Cambodia (I have been closely involved in judicial reform projects and have been an avid observer of Cambodian politics for the past 20 years), it is rather clear that human rights abuses do take place with relative impunity,¹¹⁴ while the institutions which are responsible for ensuring the rule of law are substandard, even on a good day.¹¹⁵ That said, it is obvious that the CNRP is using the violent crackdown on the

¹¹⁰ Mech Dara and Colin Meyn, *Slow Start for Joint Electoral Reform Commission*, CAMBODIA DAILY, 4 March 2014, available at <http://www.cambodiadaily.com/news/slow-start-for-joint-electoral-reform-commission-53427/>.

¹¹¹ Stuart White and Meas Sokchea, *Leadership of CNRP Digging In*, PHNOM PENH POST, 6 January 2014, available at <http://www.phnompenhpost.com/national/leadership-cnrp-digging>.

¹¹² U.N. Treaty Collection, Rome Statute of the International Criminal Court, Ratifications and Signatories, (last visited 10 March 2014), https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en.

¹¹³ Human Rights Council, Rep. of the Special Rapporteur on the Situation of Human Rights in Cambodia, Twenty-Fourth Sess., A/HRC/24/36 (5 August 2013), para. 16 “Overall, the situation of the judiciary in Cambodia has not fundamentally changed since 2010. Despite some progress, the pace of judicial reform remains very slow. The challenges are the same, namely lack of independence, problems of capacity, lack of resources, widespread corruption, all resulting in a lack of confidence by the general public in the ability of the court system to provide effective remedies when human rights violations do occur.”

¹¹⁴ For example, Human Rights Watch released an article stating that 6 men were arrested without credible evidence during the recent post-election civil unrest. Human Rights Watch, *Cambodia: Free 6 Randomly Arrested During Unrest*, HRW.ORG (20 February 2014), available at <http://www.hrw.org/news/2014/02/19/cambodia-free-6-randomly-arrested-during-unrest>

¹¹⁵ An article released in the Phnom Penh Post, on 6 March 2014, states that Cambodia is ranked 91st out of 99 nations regarding its devotion to the rule of law: “The World Justice Project yesterday ranked Cambodia 91st out of

demonstrators as a pretext to score politically against the CPP. It would be cynical not to conclude that the leaders of CNRP are attempting to use the ICC for their own political gains. If the CNRP was sincerely concerned (which begs the question why did they not act these ongoing humanitarian abuses prior to being declared the election loser), then why hire a law firm / NGO and engage in a public relations campaign, when it could have turned to the UN Human Rights Council and request it to establish a commission of inquiry on human rights, as was done for North Korea.¹¹⁶ But then the CNRP could not control the message or the messenger. Suffice it to say, while it is within their right to do so, it merits questioning whether the ICC is viewed by the likes of these politicians as a political instrument to be used to even up scores or pursue personal agenda.

The central question is whether using the ICC for domestic politics when party bosses have an axe to grind is limited to Cambodia, or whether this is a broader trend. While it may be too early to answer this question, the ICC / Assembly of States Parties should consider adopting modalities to combat or at least limit abusive attempts to drag the ICC into the sordid quagmire of domestic politics of member and non-member States alike.

f. The Situation in Libya

This brought me to my next vignette, the schizophrenic complementarity decision in the Libya case—*The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*. It is hard to say to what extent this was a politically motivated decision with respect to *Al-Senussi*. Talk about drawing the short straw.

99 nations and at the bottom of the barrel regionally in terms of its devotion to the rule of law, despite its midlevel performance in terms of providing order and security,” Stuart White and May Titthara, *Low Ranking for Rule of Law*, PHNOM PENH POST, 6 March 2014, available at <http://www.phnompenhpost.com/national/low-ranking-rule-law>.

¹¹⁶ See Human Rights Council, Rep. of the Detailed Findings of the Commission of Inquiry on Human Rights in the Democratic People’s Republic of Korea, Twenty-Fifth Sess., A/HRC/25/CRP.1 (7 February 2014). The United Nations Human Rights Council at its 22nd session held on 21 March 2013, established the Commission of Inquiry on Human Rights in the Democratic People’s Republic of Korea (DPRK). Human Rights Council Resolution 22/13 (A/HRC/RES/22/13) mandated the Commission to investigate claimed systematic, widespread and grave violation of human rights in the DPRK, to ensure accountability for any crimes against humanity.

Briefly, Libya challenged the admissibility of the case against both Saif Al-Islam Gaddafi and Abdullah Al-Senussi, claiming that Libyan courts were functioning appropriately and that Libya was prepared to try them for more or less the same crimes they would be tried for at the ICC.¹¹⁷ Libya submitted that the case was “of historic importance to the Libyan people” as part of its historic transition, and that the Libyan courts were “genuinely committed to pursuing the prosecution of both accused.”¹¹⁸ Based on the principle of complementarity, Libya maintained that the national system was actively investigating Mr. Gaddafi and Mr. Al-Senussi.¹¹⁹

Both accused have not been able to meet with their counsel of choice. There is little credible evidence from which to conclude that the courts in Libya, whether in Zintan or Tripoli, are functioning properly. The impartiality and the independence of the Libyan courts is dubious. There is little to suggest that they are capable of providing the fair trial rights guaranteed under the International Covenant on Civil and Political Rights or the Libyan Constitution:¹²⁰ to a fair and public hearing by a competent independent and impartial tribunal;¹²¹ to enjoy the presumption of innocence;¹²² to be promptly informed of the nature and cause of the charges;¹²³ to have adequate time and facilities for the preparation of one’s defense and to communicate with counsel of one’s own choosing;¹²⁴ to be tried without undue delay;¹²⁵ to be tried in one’s

¹¹⁷ *Prosecutor v. Gaddafi and Al-Senussi*, ICC-01/11-01/11, Motion on Behalf of the Government of Libya Requesting an Oral Hearing in Respect of its Admissibility Challenge Pursuant to Article 19 of the ICC Statute (2 May 2012).

¹¹⁸ *Id.*, paras. 8–10.

¹¹⁹ *Prosecutor v. Gaddafi and Al-Senussi*, ICC-01/11-01/11-343, Libyan Government’s Response to the Saif Al-Islam Gaddafi “Addendum to the ‘Urgent Defence Request’ of 21 January 2013, and Request for Finding of Non-Compliance”, (29 May 2013).

¹²⁰ Transitional National Council (TNC) of Libya, Draft Constitutional Charter For the Transitional Stage: The Constitutional Declaration” (Benghazi, 3 August 2011), arts. 31–33. Art. 31: There shall be no crime or penalty except by virtue of the text of the law. Any defendant shall be innocent until he is proved guilty by a fair trial wherein he shall be granted the guarantees necessary to defend himself. Each and every citizen shall have the right to recourse to the judiciary authority in accordance with the law. Art. 32: The Judiciary Authority shall be independent. It shall be exercised by courts of justice of different sorts and competences. They shall issue their judgments in accordance with the law. Judges shall be independent, subject to no other authority but the law and conscience. Establishing Exceptional Courts shall be prohibited. Art. 33: Right of resorting to judiciary shall be preserved and guaranteed for all people. Each and every citizen shall have the right to resort to his natural judge. The State shall guarantee to bring the judiciary authorities near the litigants and shall guarantee the swift determination on lawsuits. Laws shall not provide for the prohibition of judiciary authority to control any administrative decree.

¹²¹ International Covenant on Civil and Political Rights, 999 UNTS 171, 1057 UNTS 407, 6 ILM 368 (1967). (“ICCPR”), art. 14(1).

¹²² *Id.*, art. 14(2).

¹²³ *Id.*, art. 14(3)(a).

¹²⁴ *Id.*, art. 14(3)(b).

presence or through legal assistance of one's own choosing;¹²⁶ to examine witnesses and to obtain the attendance of witnesses;¹²⁷ not to be compelled to testify against oneself;¹²⁸ to appeal;¹²⁹ and not to be tried or punished again for an offense for which one has already been convicted or acquitted.¹³⁰ There is nothing to suggest that these trials, were they to go forward in Libya, would be anything other than a charade, an absurdity.

The Pre-Trial Chamber rejected Libya's challenge to the admissibility of the case against Gaddafi, and rightly so. Gaddafi is being detained in Zintan by the Zintan Brigade, a local militia.¹³¹ The Pre-Trial Chamber noted the efforts of the Libyan Government in attempting to secure Gaddafi's transfer, but found that there had been no concrete progress, and the Chamber was not persuaded that the issue would be resolved in the near future.¹³² This, as well as other concerns—the inability to obtain necessary testimony—led the Court to determine that the Libyan authorities were “unable,” within the meaning of Article 17 of the Rome Statute, to carry out the prosecution of Gaddafi:

In light of the above, although the authorities for the administration of justice may exist and function in Libya, a number of legal and factual issues result in the unavailability of the national judicial system for the purpose of the case against Mr. Gaddafi. As a consequence, Libya is, in the view of the Chamber, unable to secure the transfer of Mr. Gaddafi's custody from his place of detention under the Zintan militia into State authority and there is no concrete evidence that this problem may be resolved in the near future. Moreover, the Chamber is not persuaded that the Libyan authorities have the capacity to obtain the necessary testimony. Finally, the Chamber has noted a practical impediment to the progress of domestic proceedings against Mr. Gaddafi as Libya has not shown whether and how it will overcome the existing difficulties in securing a lawyer for the suspect.¹³³

¹²⁵ *Id.*, art. 14(3)(c).

¹²⁶ *Id.*, art. 14(3)(d).

¹²⁷ ICCPR art. 14(3)(e).

¹²⁸ *Id.*, art. 14(3)(g).

¹²⁹ *Id.*, art. 14(5).

¹³⁰ *Id.*, art. 14(7).

¹³¹ *Prosecutor v. Gaddafi and Al-Senussi*, ICC-01/11-01/11, Decision on the Admissibility of the Case Against Saif Al-Islam Gaddafi (31 May 2013), para. 206.

¹³² *Id.*, para. 207.

¹³³ *Id.*, para. 215.

Because Libya was found to be “unable” to conduct the proceeding against Gaddafi—making the case admissible—the Pre-Trial Chamber did not find it relevant to discuss the willingness of the Libyan authorities to try the case.¹³⁴ The Libyan Government seems powerless to place him under State custody to be tried in Tripoli, let alone being able to transfer him to The Hague.

Al-Senussi, who is in State custody and at the time was waiting for his trial to begin in Tripoli, would suffer a different fate.¹³⁵ In contrast to the Gaddafi proceedings, the Pre-Trial Chamber granted the Libyan government’s request to try Al-Senussi, finding that Libya was not genuinely unwilling or unable to carry out proceedings against Al-Senussi.¹³⁶ The Pre-Trial Chamber considered that the fact that Al-Senussi had not yet met with an attorney did not justify a finding of unwillingness or inability to conduct a proceeding.¹³⁷ The Chamber seemed to take Libya’s word on the matter that “many local lawyers from Mr. Al-Senussi’s tribe have indicated their willingness to represent Mr. Al-Senussi. . . .”¹³⁸

The Pre-Trial Chamber was obviously convinced (and here is where politics may have carried the day) that Al-Senussi had nothing to fear; that he would get a fair trial in Tripoli by independent and impartial judges with all of his fair trial rights respected. To appreciate the irrationality of this decision, I pointed to the cogent declaration by Judge Christine Van den Wyngaert in the Gaddafi decision:

I agree with my colleagues that, on the basis of the record as it stands today, the case against Mr. Al-Senussi is inadmissible within the meaning of article 17 of the Statute. In particular, I agree with the proposition that Libya is only ‘unable to carry out its proceedings’ under article 17(3) of the Statute if the evidence demonstrates that Libya is unable to carry out the proceedings against Mr. Al-Senussi specifically. Accordingly, generalised security concerns in Libya, even those which lead to a substantial collapse of the national judicial system, only become dispositive under article 17(3) of the Statute if Libya is unable to proceed against Al-Senussi ‘due to’ these concerns.¹³⁹

¹³⁴ *Id.*, para. 216.

¹³⁵ *Prosecutor v. Gaddafi and Al-Senussi*, ICC-01/11-01/11, Decision on the Admissibility of the Case Against Abdullah Al-Senussi (11 October 2013), para. 176.

¹³⁶ *Id.*, para. 311.

¹³⁷ *Id.*, para. 292.

¹³⁸ *Id.*, para. 308.

¹³⁹ *Prosecutor v. Gaddafi and Al-Senussi*, ICC-01/11-01/11, Decision on the admissibility of the case against Abdullah Al-Senussi (11 October 2013), Separate Declaration of Judge Van den Wyngaert, para. 1.

Nevertheless, I cannot help but note the widely reported abduction and release of Libyan Prime Minister Ali Zeidan on 10 October 2013. It is unclear, at this point in time, what effect these events might have on the already precarious security situation in Libya. Further deterioration of the security situation could extend to Mr. Al-Senussi's legal proceedings and, accordingly, affect Libya's ability to carry out those proceedings.¹⁴⁰

Judge Van den Wyngaert suggested that parties to the case and Libya submit further information regarding the security situation in Libya and whether Libya is sufficiently stable to carry out proceedings against Al-Senussi.¹⁴¹ Further showing the absurdity of the Al-Senussi decision, the Security Council passed Resolution 2095 on 14 March 2013 recognizing the human rights violations and abuses in detention centers, arbitrary detentions, lack of due process, torture, and extrajudicial executions taking place in Libya:

[The Security Council e]xpresses grave concern at continuing reports of reprisals, arbitrary detentions without access to due process, wrongful imprisonment, mistreatment, torture and extrajudicial executions in Libya, calls upon the Libyan government to take all steps necessary to accelerate the judicial process, transfer detainees to State authority and prevent and investigate violations and abuses of human rights, calls for the immediate release of all foreign nationals illegally detained in Libya, and underscores the Libyan government's primary responsibility for the protection of Libya's population, as well as foreign nationals, including African migrants....¹⁴²

Recently, the independent panel of experts for the Security Council's Libya sanctions committee reported that non-State armed actors have been ineffective and that Libya has become a primary source of illicit weapons, noting a wide range of trafficking and terrorism problems:

Today, Libya faces two threats in the security domain. The first concerns extremist groups with international associations and linkages that seek, by all possible means, to restructure the State based on their own vision. They use violence and terrorism to prevent the emergence of any legitimate force they perceive as a threat.¹⁴³

¹⁴⁰ *Id.*, para. 2.

¹⁴¹ *Id.*, para. 3.

¹⁴² S.C. Res. 2095, U.N. Doc. 2095 (14 March 2013).

¹⁴³ U.N. S.C. Rep. of the Security Council, 10 March 2014, U.N. Doc. S/P.V.7130, 6 (2014).

The Security Council (which referred the Libya situation to the ICC) has clearly recognized the Libyan judicial system as dysfunctional. What indication is there that General Al-Senussi, a political opponent of the transitional government, would receive a fair trial, or that the Libyan judicial system is capable of conducting a criminal trial up to international standards?¹⁴⁴ Who among us, or better yet, which of the judges on the Pre-Trial Chamber would honestly wish to be tried in the manner in which Al-Senussi will be tried in Tripoli? It is hard to reconcile the Al-Senussi decision with the Gaddafi decision, even though factually there are differences. What is constant and common is that Libya, at least for the time being, is unable to hold a fair and credible trial. And for those reasons the ICC as the court of last resort was created in the first place. Placing the word “international” in front of the words “criminal court” conjures up images of a grand, lofty and cutting edge judicial institution. This little vignette served as a cold dose of reality, to provoke thinking on just what sort of an institution the ICC is and to what extent, if any, the US should be engaged with it.

g. Kenya and Africa

My next vignette dealt with the Kenya case and the African Union (AU)’s reaction to the ICC, focusing exclusively on Africa, and in particular, the ICC efforts to prosecute sitting Heads of State. Kenya has had a long history of election violence.¹⁴⁵ On 30 December 2007, following the announcement of the Kenyan election results, large-scale political violence broke out amid claims that the electoral commission of Kenya had rigged the elections in favor of incumbent Mwai Kibaki.¹⁴⁶ Two months of bloodshed between the two rival coalitions (Ralia Odigna’s Orange Democratic Movement [“ODP”] and Mwai Kibaki’s Government/Party for National Unity [“PNU”]) left an estimated 1,000 people dead, and as many as 500,000 internally displaced persons.¹⁴⁷ In the midst of the violence, former UN Secretary General Kofi Annan

¹⁴⁴ Human Rights Watch, *Libya: Gaddafi Son, Ex-Officials, Held Without Due Process*, HRW.ORG, (13 February 2014), available at <http://www.hrw.org/news/2014/02/13/libya-gaddafi-son-ex-officials-held-without-due-process>.

¹⁴⁵ Human Rights Watch, *Ballots to Bullets, Organized Violence and Kenya’s Crisis of Government*, HUMAN RIGHTS WATCH, Volume 20, No. 1(a), 11 (March 2008).

¹⁴⁶ Kenyan Independent Review Committee (IREC) and Commission of Inquiry on Post-Election Violence (CIPEV), *The Kriegler and Waki Reports on 2007 Elections, Summarized Version viii* (Rev. ed 2009) (“Kriegler and Waki Reports”).

¹⁴⁷ Human Rights Watch, *Ballots to Bullets, Organized Violence and Kenya’s Crisis of Government*, HUMAN RIGHTS WATCH, Volume 20, No. 1(a), 11 (March 2008).

received a call from President Kufor of Ghana, then Chairman of the AU, asking Kofi Annan to mediate the crisis in Kenya.¹⁴⁸ Kofi Annan led the Panel of African Eminent Personalities through 41 days of mediation and the political violence ended upon the two parties signing a peace agreement: *The Agreement on the Principles of Partnership of the Coalition Government*.¹⁴⁹ On 4 March 2008, the parties agreed to form two fact-finding commissions: the Independent Review Committee and the Commission of Inquiry on Post-Election Violence (CIPEV).¹⁵⁰ The CIPEV made a number of recommendations to the government, and findings were presented to Kofi Annan, the appointing authority for the commission.¹⁵¹ The CIPEV recommended investigation, and eventual prosecution of certain persons alleged to have masterminded the violence and recommended that a Special Tribunal adjudicate serious crimes: particularly, crimes against humanity.¹⁵² The names were placed in a secret envelope and were kept with the Panel led by Kofi Annan and pending the establishment of a Special Tribunal.¹⁵³ If the government failed to establish the Tribunal, the Panel would forward the names of the perpetrators to the ICC.¹⁵⁴ The Kenyan parliament failed—due to political stalemate¹⁵⁵—to establish the Tribunal and Kofi Annan handed over the sealed envelope to the ICC Chief Prosecutor, Luis Moreno-Ocampo.¹⁵⁶

¹⁴⁸ Kofi Annan, *Kofi Annan's Opening Remarks at The National Dialogue and Reconciliation Conference: One Year Later*, KOFI ANNAN FOUNDATION (March 2009), available at <http://kofiannanfoundation.org/newsroom/speeches/2009/03/kofi-annans-opening-remarks-kenya-national-dialogue-and-reconciliation>. Other prominent individuals who visited Kenya with a view to broker peace included former Presidents Ahmad Tejan Kabbah of Sierra Leone, Benjamin Mkapa of Tanzania, Ketumile Masire of Botswana and Kenneth Kaunda of Zambia. Others included Archbishop Desmond Tutu of South Africa and the then Assistant Secretary of State for Africa, Jendayi Fraser. See Report of the Kenya Truth, Justice and Reconciliation Commission (TJRC), Volume I, ISBN: 987-9966-1730-3-4 (2013) (“Kenya TJRC Report”).

¹⁴⁹ Kenya TJRC Report; Agreement on the Principles of Partnership of the Coalition Government between the Orange Democratic Movement and the Kabiki Government (28 February 2008), available at <http://rescuekenya.files.wordpress.com/2008/03/annan-mediated-agreement-v-2-3.pdf>.

¹⁵⁰ The Kriegler and Waki Reports on 2007 Elections, Summarized Version viii (Rev. ed 2009). The IREC investigated all aspects of the 2007 presidential election and made findings and recommendations to improve the electoral process. The CIPEV investigated facts and surrounding circumstances related to the violence that followed the elections and made recommendations to prevent the recurrence of violence in the future.

¹⁵¹ *Id.* at 69.

¹⁵² *Id.* at 69–70.

¹⁵³ *Id.* at 69.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ Report of the Kenya Truth, Justice and Reconciliation Commission (TJRC), Volume I, ISBN: 987-9966-1730-3-4 (2013).

On 31 March 2010, the ICC Pre-Trial Chamber II granted the Ocampo's request to open an investigation *proprio motu* in Kenya.¹⁵⁷ The Office of the Prosecutor initiated proceedings in two cases against six individuals: three PNU/government leaders (Francis Kirimi Muthaura, Uhuru Muigai Kenyatta, and Mohammed Hussein Ali) and three prominent ODP leaders (William Samoei Ruto, Henry Kirpono Kosgey and Joshua Arap Sang).¹⁵⁸ Kenya had ratified the Rome Statute in 2005,¹⁵⁹ but to add an interesting twist on the events, facing prosecution at the ICC, Kenyatta and Ruto—former political enemies—teamed up to win the May 2013 Kenyan presidential elections, with Kenyatta winning the Presidency and Ruto the Deputy Presidency.¹⁶⁰ Both Kenyatta and Ruto appeared voluntarily in The Hague, yet neither were in custody and remained under summons to appear on their own recognizance.¹⁶¹

The Kenyan government solicited demands from the AU in order to put political pressure on the ICC to defer the Ruto and Kenyatta cases.¹⁶² On 12 October 2013, the African Union held an Extraordinary Session to address the Kenya situation.¹⁶³ During the session there were talks of an *en masse* AU walkout, although nothing resulted.¹⁶⁴ However, the African Union agreed to back immunity for sitting African Heads of State, and recommended that Kenya write to the UN Security Council to seek a deferral of the two cases.¹⁶⁵ On 21 October 2013, the Kenyan

¹⁵⁷ *Situation in the Republic of Kenya*, ICC-01/09, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya (31 March 2010).

¹⁵⁸ *Situation in the Republic of Kenya*, ICC-01/09, Prosecutor's Application Pursuant to Article 58 as to Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali (15 December 2010); *Situation in the Republic of Kenya*, ICC-01/09, Prosecutor's Application Pursuant to Article 58 as to William Samoei Ruto, Henry Kirpono Kosgey and Joshua Arap Sang (15 December 2010).

¹⁵⁹ U.N. Treaty Collection, Rome Statute of the International Criminal Court, Ratifications and Signatories, (last visited 10 March 2014), https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en.

¹⁶⁰ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11, Decision on Mr. Ruto's Request for Excusal from Continuous Presence at Trial (18 June 2013), paras 8, 9.

¹⁶¹ *Prosecutor v. Kenyatta*, Decision on Defence Request for Conditional Excusal from Continuous Presence at Trial, ICC-01/09-02/11 (18 October 2013), para. 9.

¹⁶² African Union, Decision on Africa's Relationship with the International Criminal Court (ICC), Extraordinary Session of the Assembly of the African Union, Ext/Assembly/AU/Dec.1 (Addis Ababa, 12 October 2013) ("2013 AU Kenya Decision"); BBC NEWS AFRICA, *African Union Urges ICC to Defer Uhuru Kenyatta Case*, BBC.ORG (12 October 2013), <http://www.bbc.com/news/world-africa-24506006>.

¹⁶³ 2013 AU Kenya Decision.

¹⁶⁴ Michael Pezzi, *African Union floats ICC Walkout after Kenyatta Asks for Case to be Tossed*, AL JAZEERA, 10 October 2013, available at <http://america.aljazeera.com/articles/2013/10/10/kenyatta-asks-icc-case-to-be-tossed-while-african-union-floats-walkout.html>.

¹⁶⁵ 2013 AU Kenya Decision.

government sought a decision from the Security Council to defer the case.¹⁶⁶ On 15 November 2013, Azerbaijan, Burundi, Ethiopia, Gabon, Ghana, Kenya, Mauritania, Mauritius, Morocco, Namibia, Rwanda, Senegal, Togo and Uganda proposed a draft resolution in the Security Council that would defer the two cases.¹⁶⁷ No country voted against the draft resolution, however, it was not adopted, having failed to obtain the required number of votes.¹⁶⁸ When these methods failed, Kenya pleaded to members of the ICC Assembly of States Parties (of which African States constitute a large block) to change the rules.¹⁶⁹ On 27 November 2013, the Assembly of States Parties introduced amendments to Rule 134 of the ICC Rules of Procedure and Evidence, which allows for presence at trial via video technology, excusal from presence at trial for exceptional circumstances, and excusal from presence at trial due to extraordinary public duties.¹⁷⁰

The African Union already had a shaky relationship with the ICC, with sentiments of neo-colonialism for focusing its investigations in Africa (although only two of the eight African cases were initiated by the Prosecutor *proprio motu*, with two by Security Council referral, and the remaining four being self-referrals from AU member States).¹⁷¹ The language used in the Decision of the Extraordinary Session is particularly telling:

[The AU] REITERATES AU's concern on the politicization and misuse of indictments against African leaders by ICC as well as at the unprecedented indictments of and proceedings against the sitting President and Deputy President of Kenya in light of the recent developments in that country.¹⁷²

¹⁶⁶ U.N. S.C., Identical letters dated 21 October 2013 from the Permanent Representative of Kenya to the United Nations addressed to the Secretary-General and the President of the Security Council, U.N. Doc. S/2013/624 (22 October 2013).

¹⁶⁷ S.C. Draft Resolution 660, U.N. Doc. S/2013/660 (15 November 2013).

¹⁶⁸ S.C. Provisional Res. 7060, U.N. Doc. S/PV.7060 (15 November 2013). In favor of the resolution were Azerbaijan, China, Morocco, Pakistan, Russian, Federation, Rwanda, Togo. None were against. Argentina, Australia, France, Guatemala, Luxembourg, Republic of Korea, United Kingdom of Great Britain and Northern Ireland, and the United States of America abstained.

¹⁶⁹ Kenneth Roth, *Africa Attacks the International Criminal Court*, N.Y. BOOKS, 6 February 2014, available at <http://www.nybooks.com/articles/archives/2014/feb/06/africa-attacks-international-criminal-court/>.

¹⁷⁰ ICC Assembly of States Parties, Resolution ICC-ASP/12/Res.7 (27 November 2013), Rules 134*bis-quater*.

¹⁷¹ The Situations in Mali, Central African Republic, Uganda, and the Democratic Republic of Congo were all self-referrals. The investigations in Darfur and Libya were initiated by Security Council referral, while investigations in the situations in Côte d'Ivoire and Kenya were opened by the prosecutor *proprio motu*. See ICC Situations and Cases, International Criminal Court, http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx (last visited 10 March 2014).

¹⁷² 2013 AU Kenya Decision.

The ICC's issues with the AU are not limited to the Kenyan situation. In 2003, Ugandan President Yoweri Museveni referred the situation concerning the Lord's Resistance Army (LRA) to the Prosecutor of the ICC.¹⁷³ However, as peace negotiations with the Ugandan government and the LRA moved forward, President Museveni had a change of heart towards the ICC. While addressing journalists at the Commonwealth Secretariat at Marlborough House in London, Museveni remarked that:

The government [of Uganda] can save LRA leader Joseph Kony and his co-accused from prosecution by the International Criminal Court (ICC) . . . We can save him because we are the ones who sought assistance from the ICC . . . because he was not under our jurisdiction, we sought assistance from the ICC . . . [But] if he signs the peace agreement and returns to our jurisdiction, it becomes our responsibility not any other's: including the ICC . . . the government [of Uganda] sought ICC's assistance because Kony had fled to the [Democratic Republic of] Congo . . . the ICC interve[s] . . . in case of impunity or if governments are unable or unwilling to punish those involved in crimes against humanity . . . the situation in Uganda after the peace agreement will be different.¹⁷⁴

A similar experience occurred with Côte d'Ivoire. Côte d'Ivoire accepted the jurisdiction of the ICC on 18 April 2003.¹⁷⁵ More recently, on 14 December 2010, newly elected President Alassane Ouattara reconfirmed the country's acceptance of this jurisdiction, satisfied that his political opponent, and former president, Laurent Gbagbo would be sent to The Hague to face charges of crimes against humanity.¹⁷⁶ However, Ouattara has become less keen on the ICC, as the ICC could expand investigations to cover alleged crimes committed by his own allies.¹⁷⁷

¹⁷³ ICC Press Release, *President of Uganda Refers Situation Concerning the Lord's Resistance Army (LRA) to the ICC*, ICC-20040129-44 (29 January 2004), http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/2004/Pages/president%20of%20uganda%20refers%20situation%20concerning%20the%20lord_s%20resistance%20army%20_lra_%20to%20the%20icc.aspx.

¹⁷⁴ New Vision (Uganda), *We Can Save Kony—President Museveni*, NEW VISION (11 March 2008), available at <http://www.newvision.co.ug/PA/8/12/616057>.

¹⁷⁵ Republic of Côte d'Ivoire, *Déclaration de reconnaissance de la Compétence de la Cour Pénale* (Abidjan, 18 April 2003), available at <http://www.icc-cpi.int/NR/rdonlyres/CBE1F16B-5712-4452-87E7-4FDDE5DD70D9/279779/ICDE.pdf>; All Africa, *Côte d'Ivoire: President Alassane Ouattara Says the International Criminal Court Will Provide a Fair Trial for Former President Laurent Gbagbo*, ALL AFRICA (9 July 2012), available at <http://allafrica.com/stories/201207100433.html>.

¹⁷⁶ Republic of Côte d'Ivoire, *Letter Confirming Acceptance of Jurisdiction* (14 December 2010), available at <http://www.icc-cpi.int/NR/rdonlyres/498E8FEB-7A72-4005-A209-C14BA374804F/0/ReconCPI.pdf>.

¹⁷⁷ Economist Intelligence Unit, *Côte d'Ivoire: Government Under Pressure from ICC*, THE ECONOMIST (3 October 2013),

Similarly, in the Situation in Darfur, after the ICC issued the arrest warrant¹⁷⁸ for Sudanese President Omar Al-Bashir for alleged genocide in Darfur, the African Union sought to defer the case:

[The African Union] STRESSES the need to explore ways and means to ensure that the request by the African Union (AU) to the United Nations (UN) Security Council to defer the proceedings initiated against President Bashir of The Sudan in accordance with Article 16 of the Rome Statute of ICC on deferral of cases by the UN Security Council, be acted upon and, in this regard, REITERATES its request to the UN Security Council and REQUESTS African members of the UN Security Council to place the matter on the agenda of the Council.¹⁷⁹

Notwithstanding the problems with the AU, the ICC Prosecutor has had numerous complications with the two Kenya cases. The ICC declined to confirm charges against two suspects (Ali and Kosgey)¹⁸⁰ and the current Chief Prosecutor, Fatou Bensouda dropped charges against a third accused, Muthaura.¹⁸¹ Bensouda alleged that the Government of Kenya failed to cooperate, and that several witnesses have either died or have recanted their testimony.¹⁸² One of the Prosecutor's key witnesses also admitted that he accepted bribes.¹⁸³ On 23 January 2014, the trial scheduled for February 2014 against Kenyatta was vacated with a status conference to follow addressing the various procedural issues.¹⁸⁴

This is the first case in the ICC where a sitting Head of State is being prosecuted. Actually, both the President and Deputy President were scheduled to be tried more or less during the same period, thus leaving a political vacuum in Kenya – at the highest level. However, should the

<http://country.eiu.com/article.aspx?articleid=1941027578&Country=C%20C3%B4te%20d%27Ivoire&topic=Politics&subtopic=Forecast&subsubtopic=Political+stability&u=1&pid=211522205&oid=211522205&uid=1>.

¹⁷⁸ *Prosecutor v. Al-Bashir*, ICC-02/05-01/09, Second Warrant of Arrest for Omar Hassan Ahmad Al-Bashir (12 July 2010).

¹⁷⁹ African Union, Decision on the Progress Report of the Commission on the Implementation of the Assembly Decisions on the International Criminal Court (ICC), Assembly/AU/Dec.397(XVIII) (Addis Ababa, 30 January 2012).

¹⁸⁰ *Prosecutor v. Ruto, Sang and Kogsey*, ICC-01/09-01/11 Decision of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 138 (23 January 2012); *Prosecutor v. Muthaura, Kenyatta and Ali*, ICC-01/09-02/11 Decision of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 154 (23 January 2012).

¹⁸¹ ICC Press Release, *Statement by ICC Prosecutor on the Notice to Withdraw Charges against Mr. Muthaura* (11 March 2013), http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/OTP-statement-11-03-2013.aspx.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Prosecutor v. Kenyatta*, ICC-01/09-02/11, Order Vacating Trial Date of 5 February 2014, Convening a Status Conference, and Addressing other Procedural Matters (23 January 2014).

blame rest with Kenyatta for not cooperating as alleged by the ICC Prosecution? Or should it rest with the ICC Office of the Prosecutor, which, by and large, seems incapable of effectively carrying out its duties and responsibilities? To what extent the Kenya cases, and in particular the Kenyatta case, may have impacted on the reputation of the ICC remains to be seen. Suffice it to say, the ICC foundations have been shaken. And had the ICC Prosecutor pursued the prosecution of Kenyatta, and had it resulted in an acquittal – which seemed all but certain given the dearth of credible evidence against Kenyatta, the ICC Prosecutor would have assuredly brought the ICC into disrepute.

There are also greater geo-political concerns. If trials were to commence against the two accused Heads of State, who is going to run the government of Kenya? Is it possible for a State government to manage the country while its two Heads are out of the country? The attacks on the Westgate mall in Kenya in September 2013 demonstrate the threats to Kenya, as well as to regional security. Further, Kenya is a key US ally in fighting the Al-Shabaab terrorist organization in East Africa.¹⁸⁵ Do we really want Kenya to be without its executive while terrorist organizations continue to dismantle regional security? Although everyone seems to agree that perpetrators of crimes should not enjoy impunity or immunity due to their official capacities, a real dilemma exists when removing such leaders could create a power vacuum or contribute to further regional instability. The Kenyan cases certainly demonstrate the complex practical difficulties the facing the Court. It also highlights the weaknesses of the ICC Office of the Prosecutor, no doubt giving pause to some countries that are considering why it might be in their best interests to give jurisdiction over to the ICC.

h. Syria

Finally, it was time to focus on Syria: what are the realistic prospects of Bashar Al-Assad and others being prosecuted at the ICC? Recalling how a case comes before the ICC, I noted that it was highly unlikely that Assad or others would end up at The Hague any time soon, if at all.

¹⁸⁵ Michael Pearson, Zain Verjee and Arwa Damon, *Attackers Defeated in Mall siege, Kenya's President says*, CNN, 24 September 2013, available at <http://edition.cnn.com/2013/09/24/world/africa/kenya-mall-attack/>.

Syria has not signed on to the Rome Statute.¹⁸⁶ This Syrian government is not about to agree to ICC jurisdiction. Assuming the Assad regime falls, the next government would be poised to ask the ICC to investigate and prosecute, but given that all sides to the conflict seem to be committing mass atrocities, it does call into question whether there would be a genuine desire to get the ICC involved. The Security Council is unlikely to refer the matter to the ICC Prosecutor, when it cannot even agree on the need to intervene for humanitarian reasons.¹⁸⁷ But hope springs eternal. Theoretically, nothing can be precluded.

Interestingly, two separate initiatives perhaps reveal just how ineffectual the ICC is or is perceived to be. The first one is an initiative by a so-called Blue Ribbon Panel of Experts who drafted a statute for a tribunal, which presumably would function very much like the State court in Bosnia and Herzegovina or the ECCC.¹⁸⁸ It is called the “Chautauqua Blueprint.”¹⁸⁹ In theory, this court, were it to ever be established, would be functioning in Syria with national and perhaps international judges, prosecutors and lawyers.¹⁹⁰ It would be responsible for all accused, from the very top, to the most responsible, to the middle and low range, prosecuting all sides without passion or prejudice.¹⁹¹ The Tribunal would be complementary to any criminal or military courts in Syria.¹⁹² Alternatively, it would operate as a spill-over court, prosecuting anyone that was not prosecuted by the ICC, were the ICC to be involved. Of course, this scenario is also fraught with problems, since it would require setting up an independent and impartial tribunal *in situ*; a real challenge. Were it to be set up outside Syria, the challenges would be just as daunting, when considering costs, security issues, and witness protection measures. Financing the tribunal is also a major issue. Unlike the Special Tribunal for Lebanon,

¹⁸⁶ U.N. Treaty Collection, Rome Statute of the International Criminal Court, Ratifications and Signatories, (last visited 10 March 2014), https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=XVIII-10&chapter=18&lang=en.

¹⁸⁷ Michael G. Karnavas, *Red Lines and Game Changers—The Legality of Unilateral or Collective Use of Force in Syria*, MICHAEL G. KARNAVAS BLOG (March 2014), http://www.michaelgkarnavas.net/files/BrownUSEminar_27Feb14.pdf.

¹⁸⁸ Julian Ku, *Putting the Cart Before the Horse? Top Panel of International Criminal Law Experts Proposes “Extraordinary” Criminal Tribunal for Syria*, OPINIO JURIS (27 September 2013, 9:14 AM), <http://opiniojuris.org/2013/09/27/putting-cart-horse-top-panel-international-criminal-law-experts-proposes-ad-hoc-hybrid-criminal-tribunal-syria/>.

¹⁸⁹ Blue Ribbon Panel of Experts, *The Chautauqua Blueprint for a Statute for a Syrian Extraordinary Tribunal to Prosecute Atrocity Crimes*, (27 August 2013), available at <http://publicinternationallawandpolicygroup.org/wp-content/uploads/2014/01/Chautauqua-Blueprint-2014.pdf>.

¹⁹⁰ *Id.*, art. 3.

¹⁹¹ *Id.*, art. 1.

¹⁹² *Id.*, Preamble.

the Chautauqua Blueprint or initiative envisages trying a significant number of perpetrators. Financing such an initiative over a period of years would require a very deep pocket. But as past experience shows (and the ECCC is a good example), donor fatigue sets in relatively fast even when the cause is deemed noble.¹⁹³

The other initiative is even more reflective of just how little faith some have for the ICC. It is an initiative by members of the US Congress.¹⁹⁴ The initiative calls for the establishment of an *ad hoc* tribunal similar to the ICTY and ICTR.¹⁹⁵ Of course, this too would require UN Security Council approval, since the tribunal would need to be established under Chapter VII, but then the added bonus would be that the P5 would control the jurisdiction (and budget) of the tribunal – something they are unable to do with the ICC. But here too we are talking about considerable costs and practical difficulties in setting up an entire new judicial regime including: finding the space, appointing the judges and prosecutor, and selecting all the requisite personnel. Even if this initiative is realized, is this not a duplication of what the ICC was meant to do? Would setting up a post-ICC *ad hoc* tribunal not further undermine the ICC’s credibility? Or better yet, does this initiative not speak of the little regard in which the ICC is held? Obviously, one has to consider the source of this initiative and the distrust the US officials (and military) have for the ICC as an objective, fair and well-functioning institution. Much can be said of this. But when considering that in the past 12 years the ICC has only been able to complete two trials despite the hundreds of millions of dollars spent, there are legitimate reasons to believe that the ICC is, at least for the time being, ineffectual and dysfunctional.

¹⁹³ See Joel Brinkley, Justice Squandered: Cambodia’s Khmer Rouge Tribunal, WORLD AFFAIRS (October 2013), <http://www.worldaffairsjournal.org/article/justice-squandered-cambodia%E2%80%99s-khmer-rouge-tribunal>.

Brinkley notes the donor fatigue in the ECCC, where very little money has been raised. In spring 2013, the Tribunal’s Cambodian staff went on strike as they were not paid since November of the previous year. Without staff, including court reports and translators, the court cannot function and will shut down. The Court management system promised to pay the staff “sometime soon.” The Cambodian staff went back to work but vowed to quit if the promise was not kept. International officials pointed out that the Cambodian government was responsible for paying workers. However, Cambodia not be unhappy were the court shut down.

¹⁹⁴ See H.R. Con. Res. 51, 113th Cong. (2013).

¹⁹⁵ *Id.* “Whereas ad hoc tribunals, including the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, and the Special Court for Sierra Leone, have successfully investigated and prosecuted war crimes, crimes against humanity, and genocide, and there are many positive lessons to be learned from these three ad hoc tribunals . . . the President should direct the United States representative to the United Nations to use the voice and vote of the United States to immediately promote the establishment of a Syrian war crimes tribunal, an ad hoc court to prosecute the perpetrators of such serious crimes committed during the civil war in Syria.”

III. CONCLUSION

After addressing many interesting questions and exchanging views on a number of issues, the students were asked to draw their own conclusions on just how viable the ICC is at the moment. The vignettes were provided merely to provoke thought and stimulate discourse. The ICC is being politicized despite fancying itself as the court of last resort. But is this cause to conclude that even as dysfunctional as it may be at the moment, it will morph into a politicized court of low expectations? While it is tempting to answer in the affirmative, it not only is premature, it may also be unfair to single out the ICC as being or becoming a politicized judicial institution. All of the other international tribunals, starting with Nuremberg, were highly politicized. That said, the ICC needs to get its act together. And the sooner the better.