



The International Criminal Court at Work: Challenges and Successes in the Fight against Impunity

21st – 22nd September 2007

Conference Report

On 21st and 22nd September 2007 international experts gathered at the conference “The International Criminal Court at Work: Challenges and Successes in the Fight against Impunity” in Berlin to debate the current situation of the International Criminal Court (ICC). 21 speakers and 200 participants from around the globe engaged in intense discussions about the political challenges the Court faces to date. The following report briefly summarizes the presentations as well as the discussions. The summaries present the views of the speakers, not necessarily those of the conference hosts.

I. Opening Statements

The conference began on Friday with an opening statement by **Barbara Lochbihler**, amnesty international’s Secretary General in Germany, who welcomed the speakers and participants to Berlin on behalf of the organizers of the conference: Human Rights Watch, the German Red Cross, the United Nations Association of Germany and amnesty international. Mrs. Lochbihler highlighted the vision of the four organisations that the event might contribute to enhanced public awareness of the current practical and political obstacles the ICC is facing. She stated that all four organisations consider the ICC to be the signature instrument for ending impunity throughout the world. Even though the ICC has made extraordinary progress, human rights organisations fear that without universal ratification of the Rome Statute and increased political support the Court will undoubtedly have difficulties to achieve its mandate, she stressed. Therefore, Mrs. Lochbihler called on the international community and in particular the state parties of the Rome Statute to increase their efforts of support in order to create a strong, viable and independent institution.





Dr. Georg Witschel of the German Foreign Office addressed the audience as first key note speaker. From the perspective of a state party representative, Mr. Witschel stressed the strong commitment of the German government to the ICC. In his opinion, the Nuremberg Conference “Building a Future on Peace and Justice” in July 2007¹ clarified two things: First, the analysis of situations by the ICC has a concrete impact on the conflicts it monitors and investigates. Second, the Rome Statute has changed the parameters of peace and conflict resolution. Today, there is an emerging norm in international law that crimes of international concern cannot go unpunished, Mr. Witschel stated. At the same time he underlined that peace and justice are mutually compatible. These acknowledgements will be the basis of the Nuremberg Declaration, which is currently being drafted by international experts.

Considering the current situation of the ICC, Mr. Witschel focussed on two aspects: universality and integrity of the Rome Statute. The accession of Japan to the Rome Statute was the latest success in the ongoing process of achieving universal ratification. However, the international community should be realistic. Over half of the world’s population is still not protected against impunity. Here, the German government plays an active role by including the issue in EU agreements and international dialogue. Mr. Witschel stressed that it is not easy to keep the issue of the ICC on the radar of many states. Concerning the integrity of the Rome Statute, Germany takes a clear stand for instance against the bilateral immunity agreements concluded by the US government with third countries. Germany has also begun a dialogue with ICC representatives on cooperation issues to learn of the specific needs of the Court. In this regard, Mr. Witschel agreed that more political support for the Court is needed and called the nomination of Ahmed Haroun, the Sudanese Minister of Humanitarian Affairs against whom an arrest warrant has been issued by the ICC, as Chair of a Human Rights Committee an outrageous step on behalf of the Sudanese government.

Mr. Witschel moved on to underline Germany’s commitment to the cause of victims reparations and announced that Germany had again contributed 100.000 Euro to the Victims Trust Fund of the ICC. He also underlined the need for increased outreach activities of the Court. As the Nuremberg Conference has shown that many civilians - for instance in Uganda - are indifferent or oblivious to the Court’s work. Here, he called on civil society organisations to enhance their efforts and to spread the message of the Court.

Mr. Witschel closed his key note speech with an outlook on the upcoming Review Conference. So far, there are only informal consultations as to the date and agenda. However, he stated that the Assembly of State Parties (ASP) will definitely bring a decision in

¹ See <http://www.peace-justice-conference.info/>.

this regard he stated. Only Uganda has offered to host the event so far. The German government's focus during the Review Conference will be to bring about a decision on the crime of aggression. It will strive for a slim agenda in order not to open Pandora's Box as there should not be a reinvention of the Rome Statute. The independence of the Court must be respected, Mr. Witschel highlighted. The Security Council should be involved, but without being able to harm the independence of the ICC.



Fatou Bensouda, the Deputy Prosecutor of the ICC for Prosecutions, gave an inside view of the work of the Office of the Prosecutor (OTP). She presented a summary of the status of the investigations in the Democratic Republic of the Congo (DRC), Darfur in Sudan, Uganda and the Central African Republic (CAR). Concerning the OTP's work in the DRC, she announced that another investigation would be opened concerning crimes in the Ituri region and that the situation is being continuously analysed. In Uganda, she said, the OTP is conducting investigations on all sides of the conflict not only against the leaders of the LRA. She highlighted that the ICC has made a profound impact on the peace process in Uganda as the arrest warrants have contributed to the loss of safe havens for the commanders of the Lords Resistance Army (LRA) and brought them to the negotiation table. She also underlined that there is a right to peace, but not at the expense of justice.

Concerning the Darfur-Situation, the ICC has received a list of 51 names by the UN experts who conducted an analysis of the crimes committed. However, the Court does not feel bound by these names. She explained that the OTP conducts all investigative activities outside Darfur due to a denial of cooperation on part of the Sudanese authorities. The investigations are proving to be difficult as the conflict is complex. However, evidence has been gathered and lead to the issuance of two arrest warrants. Cooperation on part of the Sudanese authorities has not been entirely lacking. For instance, the report of the national commission of inquiry was made available to the OTP. In addition, a written report was issued concerning military and security structures of Sudan responding to questions posed by the OTP.



In the situation of the CAR the referral of the government to the ICC has been confirmed by the National Court of Appeal, Mrs. Bensouda stated. The Court held that the CAR was unable to deal with the crimes within the national judicial system. This investigation is the first which deals only with systematic sexual violence.

Mrs. Bensouda went on to explain that the ICC is analysing and monitoring several other situations around the globe. The OTP has developed criteria for the selection of cases. On the basis of these criteria it has dismissed communications concerning alleged crimes in Iraq and Venezuela. The analysis continues with respect to a possible investigation in Ivory Coast. She stated that the ICC receives around 800 communications per year. She summarised that the case against Lubanga will not be the last case in Ituri, that the investigation into the Darfur situation has already revealed a system of cruel attacks against the civilian population, and that the investigation in Uganda has shown that the LRA commanders are personally responsible for many attacks against the civilian population.

Mrs. Bensouda closed her remarks by highlighting that the main challenge the OTP faces today is the enforcement of the arrest warrants. States must now uphold their promise and implement the Rome Statute, she said. The victims of the crimes cannot wait. Many are in severe danger and face reprisals. She called on the UN and the State Parties to implement a consistent and sustainable approach to the ICC. This consistent approach should especially be upheld in peace negotiations. The notion that peace negotiations come first and justice later is ignoring the law and the facts uncovered by the ICC.

II. The need for increased political support for the ICC

The first panel on Friday dealt with ways of generating increased political support for the ICC. Chair of the panel was **Marianne Heuwagen**, Director of the Human Rights Watch Office in Germany.



The first speaker was **Professor Herta Däubler-Gmelin**, Chair of the Human Rights Committee of the German Parliament. She made several important remarks. First, she concentrated on what the Court should do to generate more support. Here, she stated that outreach is one meaningful tool to generate increased support for the Court in countries such



as Uganda, where the peace process is ongoing. In her opinion, the OTP should also publish guidelines for the work of the Prosecutor so that his decisions become more transparent. Concerning other actors, she stated that unfortunately the ICC is hardly a priority on the agenda of many states. The Bundestag, however, is now conducting a hearing on the German Code against International Crimes (Völkerstrafgesetzbuch). She personally is active in mobilising for the ratification of the Rome Statute by the Czech Republic. Professor Däubler-Gmelin then launched an appeal to arrest Ahmed Haroun.

Following her statement, **David Donat Cattin** of the Parliamentarians for Global Action (PGA) opened his intervention by applauding the German government for taking up the cause of the crime of aggression. He then went on to describe the status of ratifications. Considering the abusive, ideological agenda of the US government, Mr. Cattin stated that this policy has also helped the ratification process as it generated interest in the ICC. He said that those countries who are involved in ongoing military conflict are not ratifying the Statute, for which Russia and China are primary examples. Thus, the focus of the campaigns, which PGA is conducting, lies with post-conflict states such as Indonesia and Nepal. The Review Conference should be used to mobilise for universal ratification. Finally, Mr. Cattin focused on the question of deterrence, for which universal ratification is key in his opinion. Deterrence can already be witnessed he said. In the case of the Ivory Coast the monitoring work of the ICC has led to a decrease of violence.

Golzar Kheiltash, an independent International Justice Expert in Washington D.C., concentrated her intervention on the current US policy towards the ICC. Her central premise was that what some have called “benign” opposition at the Administration’s level is in fact not benign at all. Rather, the waivers that were witnessed in the last 18 months are demonstrative of a shift in attitude, not policy. She described how the majority of the American population supports the ICC in polls and that this support is one across party lines. There have been some significant congressional achievements such as the Child Soldiers Act and the Genocide Prevention Act. Three factors will lead to an increase of US support for the ICC in the future according to Ms. Kheiltash: First, time will show that the ICC is not open for political abuse; second, ICC practice will be a convincing instrument; third, media attention in the US will strengthen public support for a ratification process. Thus, Ms. Kheiltash concluded the ICC must enhance its efforts to reach the American public and include this element into its outreach program.

Following this intervention, **Annette Weber** described the reactions of the governments of Sudan, DRC and Uganda to the ICC’s work and the expectations of the affected populations. In Uganda, people are not happy with the ICC’s work. Compared to Sudan the psychological



destruction caused by the conflict is much deeper in Uganda. Also, one must keep in mind that hardly anyone exists who was not affected by the decades of conflict. In Uganda it is the children of the Acholi community who are being investigated for crimes, she stated.

The expectations are nonetheless extremely high. The people expect the ICC to solve a multitude of problems such as establishing the rule of law and ending impunity. The ICC must therefore be careful not to raise false expectations. On the other hand, the ICC should expand its work and broaden its mandate to fulfil a minimum of the expectations of the affected populations. The ICC officials should also engage in political discourse in the countries under investigation to learn about the views present in the respective regions. Mrs. Weber called for a less selective approach by the international community in bringing cases before the ICC, which is threatening the support for the ICC in her opinion. At the moment, the international community is not setting standards, which are able to convince people that the rule of law is actually being established. In her view, there is a need for a more rights-based foreign policy and less *realpolitik*.

The following **discussion** focussed on suggestions for national prosecutions in Uganda, the Crime of Aggression and universal ratification of the Rome Statute. Mr. Cattin made the point that one should not be obsessed with possible ratification of the US but should rather focus on other countries at the moment. Here, Germany has a crucial role to play vis-à-vis Russia and China. In his view, India poses the largest problem at the moment in the ratification process. All panellists agreed that the relevant state actors such as the ASP, the EU and the UN should increase their efforts to enhance public and political support for the Court. In this process the ICC, however, also has a crucial role to play by increasing its outreach efforts and directing its prosecutions against all actors involved in the commission of international crimes under the jurisdiction of the Rome Statute.

III. Institutional challenges of the Court

The first panel on Saturday strove to identify some of the main policy and institutional issues facing the Court as it aims to fulfil its mandate in prosecuting grave crimes and bringing those to justice who bear greatest responsibility. Chaired by **Sabine Birken**, President of the United Nations Association of Germany in North-Rhine Westphalia the panel addressed prosecutorial strategy, the participation of victims and the role of the defence.



In his presentation **Morten Bergsmo**, former Senior Legal Advisor to the Prosecutor of the ICC, described the challenges prosecutors face in selecting cases concerning international crimes for prosecution. He outlined the strategic practice of the OTP from 2003 until 2007 and concluded that the Prosecution has avoided making some mistakes we have seen from other international criminal courts. However, he explained that current trends show that there is an inclination to thematic prosecution, which means that prosecutors single out certain crimes for prosecution. As examples of thematic prosecution he enumerated the current prosecution against Thomas Lubanga for war crimes with regard to the enlisting of child soldiers in Congo and the prosecution of sexual violence committed in Foča, a town in Bosnia. Positive aspects of thematic prosecution are that the victims of these specific crimes are addressed, that the law develops concretely in specific areas, that there is an increase in public awareness concerning these specific crimes, and that the defence can focus their resources. However, thematic prosecution has its downsides. The victims of other crimes are sidelined and the truth-telling function of international justice is not fulfilled.

Mr. Bergsmo went on to highlight the main architectural problem of the current system of international justice: the impunity gap. In most situations where international crimes are committed there are too many crimes and too many perpetrators to be investigated by either the national judicial system or the ICC. The impunity gap therefore points to the main strategic problem of the ICC. However, the reinforcement of national capacities may help to minimise the impunity gap. Mr. Bergsmo gave the example of the current initiative in Bosnia, where the challenge lies in mapping the open case files, selecting and prioritising cases for prosecution. Mr. Bergsmo emphasised that only the sustained assistance to national judicial systems by the international community will help diminish the impunity gap. Here, abbreviated national criminal procedures may speed judicial proceedings and enhance the work of national jurisdictions prosecuting international crimes. This sustained assistance and criminal law reform is especially necessary in order not to lose ground to more political solutions to international crimes such as truth commissions or amnesties.

Following Mr. Bergsmo, Professor **Hadi Shalluf**, former Counsel in the Darfur-Situation before the ICC, presented his view of the current situation of the defence before the ICC. Mr.



Shalluf underlined the importance of the legal paradigm of equality of arms in international law. However, in his opinion equality of arms is not being realised before the ICC. First, the defence is not endowed with the same resources as the prosecution. Second, the defence is unable to investigate alongside the prosecution in the situations concerned and not provided with equal security measures. This should be changed in his view to create equality of arms.

George Gebbie, Victims Counsel before the ICC, highlighted the legal framework and practice of victims participation before the ICC. Under Art. 68 (3) ICC-Statute victims have the possibility to participate at every stage of the proceedings. How this participation will be organized and enabled is a matter of legal interpretation by the Judges of the Court, Mr. Gebbie explained. So far there is only one decision in the Lubanga case where victims have been granted participation in the pre-trial phase. Mr. Gebbie explained that in practice victims participation is not more intensive than the participation of the public in the proceedings. For example, victims are excluded from non-public sessions of the Court. He also highlighted the conflict between victims' participation and witness protection. Witness' protection can almost lead to the eradication of victims' participation, he stated.

The representative of the ICC Registry, **Sam Shoamanesh**, outlined the current situation of the defence before the ICC from the perspective of the Registry. The Registry is under a positive obligation to enable an effective realisation of the rights of the defence, he stated. In order to realise these rights the Registry has implemented a number of measures. A special division of support as been established, which assists defence counsel in their work. The Legal Aid System enables payment in advance directly through the Court and is not comparable to the lump sum payment system of the *ad hoc* Tribunals. An independent entity of review has been established, which enables peer review in situations of professional misconduct. The defence counsels have separate offices, the necessary technical facilities and a library for their purposes. Mr. Shoamanesh stated that no other international criminal tribunal has invested so much time and energy in establishing a viable criminal defence structure as the ICC. Exemplary for the continued support of the defence are also the regular consultations between the Registry and the defence counsels, he said.

The following **discussion** centred on a variety of issues. At the heart of the participants' interest was how judicial capacities can be strengthened in order to minimise the impunity gap Morten Bergsmo had mentioned. Mr. Bergsmo said that national jurisdictions have a crucial role to play in ending impunity. Universal jurisdiction is an important tool in this regard; however, the cases brought to courts under universal jurisdiction will remain small in number. The emphasis must be placed on enabling national justice systems where the crimes are committed to take the lead. Answering to a question concerning the inclusion of medical



treatment for victims of international crimes in the prosecution, Mr. Bergsmo replied that there is little connection in this regard so far; however, often it is the prosecutors and investigators who hear the victim's story for the first time. Telling their story is a crucial part of the healing process and vital for the judicial process, he said. Mr. Bergsmo recounted his experience from Bosnia concerning capacity building of national justice systems. At the moment the new War Crimes Chamber in Sarajevo will be able to process around 15 cases per year. However, with a reform of criminal procedure and the development of a coherent prosecution strategy the number of cases may be brought to 30. Asked whether plea bargains are an option to speed up the process, Mr. Bergsmo replied that plea bargains have become a practice in Bosnia, but won't solve the problem. The emphasis should lie on a reform of criminal procedure, which could help to speed up cases, while at the same time enables the respect for human rights and the traditions of the national legal context. A representative of the Max Planck Institute of International Law in Heidelberg asked whether we should not also address the question of a possible victims' gap before the ICC. Mr. Gebbie agreed to this assumption stating that the Lubanga case has already shown that certain victims are singled out to participate and others are left out. For instance, all the child soldiers who are participating are male. Thus, there is also a respect gap in his opinion. The discussion ended with a closing statement by Professor Hadi Shalluf, in which he reiterated that the defence has too little time to prepare their cases and no possibility to travel for investigative purposes.

IV. Strengthening cooperation with the ICC

Building on the theme of the first panel on Friday evening, this panel focussed on the specific challenges facing the Court in seeking assistance from states parties, the international community as a whole and within situations under investigation. The panel was chaired by **Dr. Beate Wagner**, Secretary General of the United Nations Association of Germany.



The opening remarks were made by **Miriam Spittler** of the Office of the Prosecutor. As the ICC has no police force to enable law enforcement, she appealed to states to enhance their



cooperation efforts vis-à-vis the Court. She stated that logistical and practical support mechanisms are forms of cooperation the Court is especially in need of. Investigators need to have secure transportation during their missions to the field. States must assist in providing evidence. Most importantly, states must ensure that those who are indicted are arrested and transferred to the Court. The OTP has created a centralised institution responsible for negotiating and working out cooperation mechanisms: the Jurisdiction, Complementarity and Cooperation Division (JCCD). This division oversees the judicial assistance and takes care that all instruments are inline with the Rome Statute.

The state parties to the Rome Statute have a crucial role to play in ensuring cooperation with the Court, Ms. Spittler said. In this sense she emphasised the importance of the newly created Working Group on Cooperation Issues. In sum, she listed five areas of cooperation with the Court, which will be crucial to the success of its work: diplomatic support, arrest and surrender, logistics and security, personnel, and crime analysis.

Christopher Hall, Senior Legal Advisor to amnesty international gave an NGO perspective on cooperation issues. The duty to cooperate with the Court is outlined in Art. 86 ICC-Statute. In addition, there are numerous bilateral cooperation agreements. However, the cooperation regime of the ICC has its faults, Mr. Hall stated. One main problem is that states have complete discretion to refuse to cooperate. This can lead to legal obstacles to the investigations and may also harm the rights of the suspects. The two major agreements between the ICC and the EU on the one hand and the ICC and the UN on the other must now be implemented, he said. Diplomatic support must ensure that the accused are arrested and surrendered to the Court, as states harbouring the accused need to give their consent. In addition, states must develop new ways of cooperation and begin using international peace forces such as MONUC to assist the Court. MONUC should establish a law enforcement entity, Mr. Hall argued. The current situations in Uganda and Sudan where accused are involved in peace negotiations or are part of the government show how a lack of political will can undermine the Court's mandate.

Building on the previous presentations **Richard Dicker** of Human Rights Watch concentrated on two questions: The effect of forceful diplomacy and the conflict between peace and justice. He began his statement by outlining that much has been accomplished in favour of an effective International Criminal Court. However, this optimism should not lead to cheerful blindness. The ICC is a new kind of Court, which requires new modalities of cooperation. The weaknesses of the Rome Statute can at the same time become its strengths. There are lessons to be learned from the International Criminal Tribunal for the Former Yugoslavia (ICTY). This Court was established by the Security Council under Chapter VII UN Charta.



But the power of the Security Council does not explain why 20 Bosnian Serbs have surrendered themselves to the ICC for trial, Mr. Dicker said. The Resolution was the legal foundation of the ICTY, but the political will of Croatia and Serbia to accede to the EU was the central factor in achieving cooperation with the Tribunal. The same can be said with regard to the success of the Special Court for Sierra Leone. International political pressure also led to the surrender of Charles Taylor. This case shows how crucial forceful diplomacy is for international justice. Concerning the issue of peace negotiations, Mr. Dicker stressed that peace and justice are mutually reinforcing themes. However, the Nuremberg Conference has shown that the voices among peace negotiators claiming a peace exemption to international law are still strong. Mr. Dicker therefore outlined several situations, in which it can be shown that a peace built on blood and with the exemption on justice will not hold. Possible exceptions may be Mozambique and Namibia; however, these can and should not overpower the general trend, he said.

Stéphane Hankins of the International Committee of the Red Cross (ICRC) described the unique mandate of the ICRC and its modes of operation. The first prerogative of the ICRC is to assist and protect the victims of armed conflict. The second is to investigate crimes. However, with respect to cooperation with international criminal courts, the ICRC needs to uphold its neutrality and confidentiality as a humanitarian organisation, he said. The participation in proceedings before the ICC is thus problematic. Nevertheless, Mr. Hankins put to discussion a reverse form of participation: Can the ICC assist the ICRC? Mr. Hankins alluded especially to the question of locating missing persons, which is part of the ICRC's work. The ICC will no doubt encounter information about the whereabouts of missing persons for example through the exhumations which it conducts. The ICRC is in need of such information, as the bodies should be returned to the relatives, Mr. Hankins underlined.

As last speaker on this panel, **Helen Ahrens** of the German Technical Cooperation (GTZ) outlined ways, in which national judicial capacities can be strengthened through development aid. One key instrument to minimising the impunity gap on the national level may in future be the Justice Rapid Response (JRR) initiative, which provides cost-effective judicial assistance for war crimes investigations on short hand notice. Another key area is international cooperation mechanisms, where states request direct assistance from development agencies. Practical issues surrounding the JRR initiative are questions of who should deploy the experts and who will retain ownership on the evidence. However, this initiative may pave the way to overcoming the shortcomings of national judicial systems, Mrs. Ahrens said.

The **discussion** focussed on an analysis of the current cooperation mechanisms at the Court's disposal and whether the Court is actually using these mechanisms effectively. The

panellists agreed that much more can be done and that states are only now awakening to the newly defined challenge surrounding the practical realisation of the Court's mandate. Mr. Dicker was asked how the peace and justice conflict can be resolved. He stated that this may not be a simple issue with simple answers; however, states need to retain firmness on the international principle. They should strive to end conflicts, but can make absolutely no undercutting of international law. If the international community starts from the assumption of a peace exemption from human rights, it is going down the wrong path. In this sense he stated that any national judicial process in Northern Uganda must match international standards including penalties for international crimes. Whether the Court may back down from the case in the event of a national judicial process is for the judges to decide only.

V. Complementarity and effective implementation of the Rome Statute

The fourth and final panel addressed the question of how international criminal law norms can be integrated into national legislations in order to strengthen the evolving system of international criminal justice. Germany has implemented the Rome Statute through its Code of Crimes against International Law ("Völkerstrafgesetzbuch"), which allows the Federal Prosecution to bring cases of war crimes, crimes against humanity and genocide to German courts under the principle of universal jurisdiction. The Chair was Dr. **Heike Spieker**, Senior Legal Advisor of the German Red Cross.



Starting the last panel, Professor **Andreas Paulus** from the University of Göttingen outlined the evolution of universal jurisdiction in international law. He argued that the support for the prosecution of international crimes in domestic law is growing, in particular within Europe; but also emphasized the important limits imposed on the exercise of universal jurisdiction in many countries. The main limit is the requirement of the presence of the accused on the territory of the state. The current practice regarding the exercise of German jurisdiction and the interpretation of § 153 f of the German Code of Criminal Procedure by the Office of the Federal Prosecution is in line with this restriction.

Following Professor Paulus, **Geraldine Mattioli** of Human Rights Watch presented the results of a study on universal jurisdiction in Europe conducted by Human Rights Watch. She



stated that universal jurisdiction is far from dying out as many may believe. She has monitored a steady rise of cases involving low and mid level perpetrators of international crimes. Unfortunately, little is known about these cases. The study shows, however, that it is possible to implement universal jurisdiction if the right instruments are put in place by the national authorities. Several European countries have developed instruments to enable implementation of their universal jurisdiction laws such as the creation of specialized war crimes units and screening procedures in immigration practice. Especially, the Netherlands have developed a pro-active approach to universal jurisdiction. Ms. Mattioli concluded that Germany is lacking such an initiative. She recommended creating a specialized war crimes unit to assist the Federal Prosecution Office with its work.

Frank Selbmann of amnesty international outlined the current practice of universal jurisdiction in Germany. He explained that in only two of the cases, which were brought to the attention of the Federal Prosecution Office under the Code of Crimes against International Law, investigations were opened. Especially in cases with serious political repercussions the Federal Prosecutor has declined to act. Mr. Selbmann focused on the Almatov case in particular. In this case the Federal Prosecutor had declined to open an investigation against the former Interior Minister of Uzbekistan for crimes against humanity arguing that Germany had no means of actually obtaining valid information and evidence without investigating in Uzbekistan. In addition, the Federal Prosecutor applied the provision allowing for prosecutorial discretion by emphasising that the suspect must be present in Germany to enable investigations to commence. The arguments applied by the Federal Prosecution show that it declines to open investigations for political reasons, argued Mr. Selbmann. He called for enhanced cooperation between the Prosecution and the human rights organisations involved, for increased resources and the establishment of a specialized war crimes unit. In his opinion, the German Code will remain a law without a case if policy makers do not act soon.

Christian Ritscher, Prosecutor of the Federal Prosecution Office outlined the application of the universal jurisdiction law from the perspective of the prosecution. He stated that not everything has been perfect so far, but that he cannot agree to Mr. Selbmann's conclusions of political interference with the work of the Federal Prosecution. He stated that the criticism of human rights organisations against the work of the prosecution is unjustified. In general, Germany has subsidiary jurisdiction concerning international crimes vis-à-vis the territorial state. This must be taken into account when judging the discretionary decision of the prosecution not to proceed with investigations. However, situations may change. Concerning the Rumsfeld case the decision may have been taken differently today, he said. In the

Almatov case the prosecution felt that it was impossible to investigate the crimes without severely meddling in the internal affairs of a sovereign state. Investigations are impossible without judicial assistance by the government of Uzbekistan. However, neither the German Federal Prosecution nor the police authorities are idle. Several situations where international crimes are committed around the world are being monitored and information is gathered. Strategies for future possible investigations are being developed as well. Cooperation with human rights organisations is crucial in this regard and therefore Mr. Ritscher stated that enhanced cooperation would be welcome in future.

In their closing statements the panellists focussed on the German Code against International Crimes. Mr. Paulus restated that the presence of the accused is crucial for a trial, but should also determine the opening of an investigation. Also the question of immunity of members of state under international law must be given adequate attention. Richard Dicker recommended that the German government should enhance its capacities to upgrade the relevant judicial institutions and make them fit to deal with the universal jurisdiction law in an effective way.

VI. Closing Remarks

Leonie von Braun, Chair of the Working Group on International Justice of Amnesty International Germany, and **Dr. Robert Heinsch**, Legal Advisor to the German Red Cross, summarised the key points of discussion and the outcome of the conference on behalf of the organizers. Robert Heinsch stressed that the conference had shown that substantive and sustainable political support for the ICC is needed now. However, states must also have the courage to expand traditional means of interstate cooperation and adapt to the needs of the international criminal justice system.



Drawing from the discussions during the conference, **Judge Hans Peter Kaul** of the International Criminal Court gave an inside view on the current challenges facing the Court from the perspective of a judge and former diplomat. Judge Kaul engaged intensively in the creation of the Court and is involved in its day-to-day work as the President of the Pre-Trial Division.

Judge Kaul began his closing remarks by stating the historic meaning of hosting the conference in Berlin considering Germany's involvement in creating the Court. He then moved on to state that much has been accomplished concerning the fight against impunity with the establishment of the Court. However, the idea of the ICC is no guarantee for its success. He warned that there remain the risks of *realpolitik*. In his opinion, there is a strong desire for more justice in the world and that nothing is stronger than an idea whose time has come.



A careful review of the ICC is necessary today, for which the conference in Berlin has been an effective starting point, he said. There have been ongoing conflicts after the Rome Conference in 1998. In order to overcome these obstacles, it is necessary to engage in sustained support. Only then will the ICC be able to contribute to the strengthening of the rule of law around the world. Modern *realpolitik* is a threat to the Court, the Judge stated. It comes along in a softer, less blatant form due to contemporary political correctness as a new phenomenon. Often budgetary or procedural arguments are used as excuses when it comes down to granting concrete support. For example, there are still no permanent premises for the Court in The Hague. These are nevertheless necessary as representative premises would underline the importance of the institution and create a global recognition effect for the Court. Another example is the situation in Darfur, Judge Kaul said. Even though the Security Council has passed the resolution initiating the Court's involvement, only the states parties of the ICC pay for the investigations. Another example for a lack of concrete support is reflected in the states behaviour towards the conflict in Northern Uganda involving both the government of Uganda and the LRA.

The conference in Berlin has given many valid answers to these problems, Mr. Kaul stated:

- 1) We must continue a long march on all fronts;
- 2) We must be ready to handle future crisis;



- 3) There is a need for sustained efforts for universal ratification of the Rome Statute and the upcoming Review Conference should be used for a strong campaign in this regard.
- 4) However, we should also be sober and realistic and give the Court the time it needs to fulfil its mandate.

Judge Kaul summarised his closing remarks by stating that the Court is sending a powerful message across the world that no one is above the law. He finished his speech by stating that this message is already being heard and the clock cannot be turned back.

The hosts wish to thank all speakers and participants who attended the conference and gave their input to the difficult, but important issues, which were debated. We hope that we were able to contribute to the cause for a more effective and independent International Criminal Court with our efforts.