

INTERNATIONAL CRIMINAL TRIBUNALS

Interview with Philippe Kirsch, President of the International Criminal Court*

Judge Philippe Kirsch (Canada) is president of the International Criminal Court in The Hague and is assigned to its Appeals Division. He is a member of the bar of the province of Quebec and was appointed Queen's Counsel in 1988. In 1998, Judge Kirsch served as chairman of the Committee of the Whole of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (the Rome Conference). He was also chairman of the Preparatory Commission for the International Criminal Court (1999–2002). Judge Kirsch has extensive experience in the development of international criminal law, with particular regard to issues related to terrorism. His experience in international humanitarian law includes serving as chairman of the Drafting Committee of the International Conference on the Protection of War Victims (1993), the Drafting Committee at the 26th and 27th International Conferences of the Red Cross and Red Crescent (1995, 1999) and related meetings. He also chaired the Canadian National Committee on Humanitarian Law (1998–9) and was a member of the Group of International Advisers to the International Committee of the Red Cross (2000–3).

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How do you view the development of international tribunals?

It is important to understand first of all that international justice constitutes a system; it is not a series of courts that have no connection with one another. It should also be pointed out that the basic principle remains that states are responsible for prosecuting criminals. It is up to states to exercise jurisdiction over

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crimes – all crimes, including the most serious ones such as genocide, crimes against humanity and war crimes. Having said that, it is clear that the particular experience of the twentieth century, especially the second half of the century, showed that in certain cases national jurisdictions were unable to perform their tasks fully or correctly, and that in certain cases the international community was unwilling to be satisfied with national jurisdiction. It is precisely in situations where the most serious crimes have been committed that national jurisdictions are least effective.

We began by understanding the need to set up international tribunals at Nuremberg and Tokyo, and subsequently in the former Yugoslavia and in Rwanda. But it became clear that we could not go on creating new tribunals, because these tribunals were turned towards the past and had limited geographical jurisdiction, and setting them up required a great deal of time and money. On each occasion their creation was also subject to a political decision by the international community. Immediately after the end of the Second World War, we realized that a permanent and independent court would one day be required. This process, thwarted by the cold war, was resumed at the end of the 1980s and stimulated by the creation of ad hoc tribunals.

The United Nations is made up of states and has no real executive branch, but does have international legal authority in criminal matters. Isn't a permanent criminal court getting ahead of political reality?

To begin with, it should be pointed out that the International Criminal Court is independent from the United Nations and every other political organization. An agreement does exist between the Court and the United Nations, but it is a co-operation agreement, the aim of which is to achieve concrete results, mutual recognition between the two organizations and co-operation at various levels. Co-operation is particularly important for the Court because it is a judicial institution that the states wanted to be strong, despite the lack of an executive authority. The Statute thus establishes a system of co-operation which, although demanding, is not comparable with a national system. There is no police force, no army, none of the tools normally available to a national court. This shortcoming must be remedied by other national or international mechanisms.

Returning to the central point of the question, the earlier international tribunals were imposed on states, whereas the International Criminal Court was created by states and reflects their will. If the system of co-operation is demanding, it has to be emphasized that it reflects the will of the states: the states wanted a demanding system of justice. Logically, apart from the situations imposed on the states, such as that in Darfur, the states parties are merely acting in accordance with their wishes. It is my impression, although I am not in the front line, that co-operation with the Court has been relatively good so far, with fewer of the snags and refusals to co-operate that we have seen so much of in the ad hoc tribunals.

The ad hoc international criminal tribunals for the former Yugoslavia and Rwanda will at some time cease operations, perhaps without having been able to bring the most prominent defendants to trial. Will the permanent criminal court be able to continue the work of the two ad hoc tribunals once they have ceased to exist?

No, I don't think that will be possible, for two reasons. First, because their mandate is restricted to certain situations which occurred during a given period. Both tribunals are likely to complete their work in a few years. Second, we are not part of the same system. The ad hoc tribunals belong to the United Nations. We are independent. On both sides – within the United Nations and among states party to the Statute of the International Criminal Court – I can see people being very reluctant to mix the two systems.

Were the states seeking a court that would be different from the ad hoc tribunals?

Yes, and the permanent Court offers many advantages. It gets around the shortcomings of the ad hoc tribunals that I mentioned earlier. It is a court that is available immediately. Also, one of the major practical differences between the permanent Court and the other international tribunals – and this is a difficulty – is that the tribunals handled crimes committed in the past, in the course of conflicts that were over. Although things were not always easy, they did not have the enormous practical problems confronting the International Criminal Court, which must deal with crimes that continue to be committed in the course of enduring conflicts in extremely fragile and troubled situations and regions.

The Court relies primarily on the co-operation of states, especially of those where the acts have been committed. Wouldn't a lack of co-operation on the part of a state represent a challenge to the proper operation of the Court?

If it is a state party within the framework of a referral by the state having territorial or national jurisdiction, the Court will refer the matter to the Assembly of States Parties and see what it decides to do.

And if the Security Council refers a situation to the Court, as it did in the case of Sudan?

If it is a referral by the Security Council, then the Court can refer the matter to the Security Council so that it can ask a state to co-operate and, in the event that the state fails to do so, take the necessary measures. This is rather hypothetical, because the Court is still extremely young. Two and a half years ago it did not yet exist, and it is still being built up. There are many concrete experiences that we have not had yet.

These situations are of course much more complicated, especially if the state is not yet party to the Statute of the Court and the situation concerning it was referred to the Court. The Prosecutor has his own strategy and must submit a report every few months to the Security Council. For now, he and he alone can assess co-operation. For example, the Prosecutor has publicly indicated that he is

not operating from within Sudan and that witnesses have been interviewed in a number of countries. Clearly, there are different ways of achieving a result.

Many important states, including China, India, Russia and the United States, are not party to the Statute. This creates an impression of double standards. How are you dealing with these problems? How are you maintaining the perception of the Court as an impartial body, which it must have in order to be credible?

Nationals of a state that is not party to the Statute are not necessarily beyond the Court's jurisdiction. In an international situation, for example when one state intervenes in the territory of another and crimes are committed by nationals of the first state, the Court has jurisdiction even if the first state is not a party but the second is.

But it is obvious that universality, or in any case near universality, is a basic aim of the Court for at least two reasons, one of principle and the other practical. The reason of principle is that it is the only international tribunal ever created by treaty and it must therefore democratically strive to reflect the universality of the international community. As for the more practical reasons, the Statute imposes constraints relating to the consent of certain states except in cases where a situation is referred by the Security Council. In order for the Court to exercise its jurisdiction, it must have either the consent of the state of which the accused is a national or the consent of the state in the territory of which the crime was committed. This leaves a certain number of situations outside the jurisdiction of the Court if there are not a sufficient number of ratifications.

An encouraging trend that I have observed in this context is the sharp increase in knowledge and understanding of the Court just about everywhere, even in states that are not party to the Statute. I have been pleasantly surprised during my recent travels: each time, I notice that the Court is increasingly better known and that it is, therefore, attracting greater appreciation and interest. One of the worst enemies of the Court is ignorance. As long as the Court is perceived in an abstract way, as a vague threat, as an institution that could engage in activities that are not very well understood, it is going to provoke a great deal of reluctance. Once this stage is past, appreciation and interest increase, not only the appreciation and interest of whole populations, but also the interest that certain states might have in being part of the system. It's a matter of time: the Court must be given the time to make itself known, to conduct its first proceedings and to see where that leads.

Once again, let us not forget that the Court is an extremely young institution. If we consider the Law of the Sea Convention, which clearly affected the internal interests of states to a much lesser degree, twelve years were needed before it entered into force. But the Statute of the Court took only four years to enter into force after its adoption at the 1998 Rome Conference. Relatively speaking, that is quite a success, and I think that having 100 ratifications after two and a half years of existence is not bad either.

The session of the Assembly of States Parties held in November 2005 raised the issue of the Court's general strategy.

We are still living with the inheritance of the special tribunals which developed in reaction to events. States parties have no desire for the Court to develop in an accidental way, under pressure of events. We are therefore working on a strategic plan for the years ahead, in which we attempt to set out the Court's mission, objectives and key activities.

How many cases will the Court be able to handle?

This will depend on resources, which in turn will depend mainly on the Office of the Prosecutor and on the Assembly of States Parties; on what the Prosecutor presents and on what the Assembly of States Parties accepts. But certain scenarios are nevertheless being examined. With given resources we are going to be able to meet certain challenges, with more resources we will be able to do more, with fewer resources we will be able to do less. We are also examining the organization and improvement of internal structures. Two and a half years ago we had fifty staff, while we now have approximately 600 employees of all kinds. Naturally enough, this dynamic and extremely rapid evolution has caused some clashes of culture, not only between the organs of the Court but also within some of them. Obviously, someone from the UN will not behave in the same way as someone from the private sector or from treaty diplomacy. All of that had to evolve over time. I think we have made a great deal of progress. We want structures that clearly lead us to success.

External relations are extremely important in several ways. In our relations with states parties, we need to have them understand what we are doing so that they will give us what we need. Concerning relations in the field, the Court needs to be understood and conditions need to be created in which victims, witnesses and whole populations are as willing as possible to co-operate with the Court. In our external relations in general, the focus is in fact on making the Court understood. Our policy is to do no promotion ourselves, since promoting the Court has to be the responsibility of states and of non-governmental organizations. But we consider it our responsibility to explain the Court when we are asked to do so.

The international tribunals are often criticized as being slow. Will the permanent criminal Court be able to operate effectively?

We are developing a judicial strategy for the Court in which we are trying to set up judicial procedures that are as effective as possible and to estimate the time that might be required for a trial, a preliminary phase and an appeals phase. We are also seeking to make efficient use of resources, both as regards the internal organization of the Court and the management of its external relations. For all of that, a strategy is being prepared for the Court.

As for the Court's effectiveness, we have taken the experience of the ad hoc tribunals into account. The Regulations we have adopted for the Court represent an attempt to draw the necessary conclusions. In the Statute itself we

already see that certain lessons have been learnt. The most obvious is the creation of the Pre-trial Chamber, which aims to relieve the trial itself of all matters that ought to be treated beforehand, such as issues of jurisdiction, issuing of arrest warrants, confirmation of charges, and certain matters relating to witnesses and victims. In all cases, the lessons learnt from ad hoc tribunals will lead to a situation where the trial itself will be much more streamlined and much less encumbered.

Did the Statute of the permanent Court make international justice more efficient?

Yes, the Statute brought certain improvements, including one improvement which has to do not with efficiency but with the attention granted to victims. In the other international tribunals, victims mainly served as witnesses, but in the International Criminal Court they have their own status as victims. The Court is doing what it can to bring about improvements in efficiency and effectiveness. But whatever it might do, whatever it might undertake, the fact is that for anything beyond legal and administrative matters it is essential for the Court to obtain the co-operation of states foreseen in the Statute and the co-operation of international organizations.

There are currently four situations (Central African Republic, Democratic Republic of the Congo, Sudan and Uganda) in respect of which the Court is taking action.

There are four situations, but three investigations. The Office of the Prosecutor has not yet taken a decision on the fourth: the Central African Republic.

All four situations concern Africa. In the case of Sudan – which is exceptional in that it was referred to the Court by the Security Council – it has been said that the Court was an instrument of colonization or neo-colonization. How do you deal with the perception that the continent that is already poorest has been targeted while other countries and situations cannot be touched?

There are three points. First of all, I would like to mention Africa's support for the Court. I used to be a diplomat, and I served as chairman of the Committee of the Whole of the Rome Conference. The most meaningful declarations that were made about the Court came from Africa, because Africa said, "You Europeans, you have humanitarian values, you want to promote humanitarian values, you want to bring about positive change to people's lives, and you also want this Court to make a contribution in terms of keeping the peace and achieving stability in regional peace. But we know the consequences of these crimes committed in our own territory and we want to use the Court as a preventive means of protection against crimes that other states, whether our neighbours or others, might commit in our territory." I was always convinced and I remain convinced now that without Africa's support, the Rome Statute would never have been adopted. So Africa is not a reluctant partner, but a partner that in a certain way has perhaps the greatest interest, or in any case a very great interest, in the Court.

Secondly, contrary to widespread opinion, the regional group most represented among the states parties is not western Europe but Africa.

Finally, and this is my third point, three requests come from the African states themselves. The Court has not sought the requests; it is the African states that have brought situations to the Court. Even in the case of Darfur, the charge of neo-colonialism is beyond me. It was the Security Council, facing a plainly tragic situation in which numerous serious crimes seemed to have been committed, that decided to refer this situation to the Court. And the Security Council is not made up of Western countries only.

It should also be pointed out that although four situations have been referred to us, the Prosecutor can also refer a matter to the Court on his own initiative. He can launch an investigation provided that the Pre-trial Chamber authorizes him to do so. He has not yet done so, but he has received over 1,600 communications from various sources, mainly non-governmental organizations, since July 2002. I think that almost 80 per cent of these communications, or possibly more, are not admissible, either because they concern crimes that are not covered by the Statute of the Court or because they concern events that took place before July 2002 –when the Court’s jurisdiction began – or else because the crimes involve situations where no state is party to the Statute. The Prosecutor has declared, however, that he is monitoring five other situations. I do not know which ones they are, that is the exclusive province of the Office of the Prosecutor, but I believe that they have to do with more than one continent.

Africa is thus not the only continent providing the Court with significant support. The Court has won broad backing in most parts of the world. Only in Asia and the Middle East have any reservations been expressed about it. In any case, this is not a Court that concerns itself primarily with Africa.

If there is a problem at present, it has to do with how things are presented; it is not a real problem. Of course, if the situation were to remain the same fifteen years from now, then probably there would be a real problem; but it should be pointed out once again that the Court is still very young.

Despite the Court’s independence from the UN, the Court counts on that organization’s co-operation. However, the UN and its specialized agencies often have completely different mandates. Some have mandates advocating justice and human rights, others are more concerned with humanitarian issues, while still others are more active politically. Does the Court co-operate in different ways with different parts of the UN?

Yes, of course. I have already emphasized how essential it is to have the co-operation of states, but the co-operation of international organizations, the United Nations in particular, is just as important. It is necessary for us to have the support of an organization such as the UN, which already has established operations in the field. We invited a certain number of international organizations to the Court mainly to determine how comfortable they are about co-operating with the Court, to what extent there might be problems and, if there are problems, to think about how they might be solved.

One of the situations in which the Court has jurisdiction is when a state is not able to prosecute war criminals. At present, as can be seen in eastern Democratic Republic of the Congo and in northern Uganda, state structures are often lacking. In some places there are practically no local police to cooperate with the Court. The Court's Prosecutor has to build his case and gather evidence where he can. He therefore contacts everyone possible in these contexts, including humanitarian organizations. This poses problems for the ICRC, but potentially also for other humanitarian bodies and even for the United Nations. Is it possible to provide aid and at the same time to collect information that may be used in criminal proceedings? Do the interests of justice have priority over the immediate needs of the victims or is it the other way around?

It is extremely difficult to answer. The question involves the Prosecutor and the organizations concerned, and also perhaps the Registrar. In addition, it is clear that interests of justice play a major role and will have to be defined. It's one of the great issues: what are we going to do with interests of justice? I find it very difficult to speculate about questions of this kind, not only as President of the Court but also as a judge in the Appeals Chamber. One day, I may have to contribute to a ruling on the matter. But it is clear that there is a problem, since in order for the Court to operate, it is absolutely necessary that it be able to count on those who are in the field.

There can also be a certain tension between the interests of justice and political interests. Criminal prosecutions can prevent or delay a ceasefire or a peaceful solution to a conflict. Some people believe that it is hardly possible for reconciliation to be achieved while criminal prosecutions are taking place. The charges brought in Uganda are said to have provoked attacks against possible witnesses and to have led to renewed fighting. Is there a way to know how the Court will react in such situations?

There are two provisions in the Statute that are directly or indirectly relevant. The first is that the Security Council is entitled not only to refer a situation to the Court but also to defer an investigation or prosecution for twelve months. Nothing in the Statute says that this deferral cannot be renewed by the Security Council, inasmuch as the Council takes this decision under Chapter VII of the United Nations Charter relating to international peace and security. The other provision concerns the interests of justice. The Prosecutor may decide not to initiate an investigation if he believes that a prosecution would not serve the interests of justice. It is very difficult to predict how this provision will be applied. Clearly, and here I am almost going back to square one in my chain of reasoning, if it is accepted that the Court is part of a global system of international justice, that system is not a legal system exclusively. It is a system that includes such mechanisms as truth and reconciliation commissions. I think it is entirely possible that all these mechanisms can coexist inasmuch as the Court was not created to supplant national mechanisms. The Court merely fills in for national mechanisms

when states are unwilling or unable to try those who have committed any of the crimes mentioned in the Statute.

But no one should be able to evade justice from the outset?

I think it is widely presumed that the Court was created to prosecute any persons responsible for crimes over which it has jurisdiction. The Court thus also has a preventive function. Its jurisdiction can be exercised only inasmuch as it aims at and lays the blame on the highest-placed people, those who order the crimes. The fact that the Court will never have the capacity to handle more than a few situations at a time and therefore, according to what I just said, a few people at a time, is related to this. That leaves many guilty people who will not be brought before the Court, whether for practical reasons or for reasons of principle. And yet these people will nevertheless have to be brought to trial, and that brings us to the national systems, which can in part apply the national legal mechanisms and in part apply the non-legal mechanisms.

Isn't there a risk that the non-legal mechanisms – accompanied by amnesties – will nullify the obligation to prosecute war criminals?

What is entailed by a situation is the basic criterion for the International Criminal Court. Does action taken by a state, or the use of a certain mechanism, involve as a consequence, deliberate or not, that national jurisdictions are unable or unwilling genuinely to carry out the necessary investigations or prosecutions? Legally, I think that is the way the Court will have to handle these situations, because the system will clearly have to work in its entirety and with ample flexibility.

Despite the Court being so young, the expectation of success weighs upon it. Do you feel this pressure?

Yes. For the time being, with the four situations that have been referred to us, we have an enormous amount of work. The Court clearly recognizes that it bears responsibility for establishing its own credibility. In legal matters, first of all, and I am not concerned about that. We are going to have to learn, of course, but it is evident that everyone at the Court has only one single aim: the proper administration of justice. There is no agenda. In time, I think it will inevitably be concluded that the Court is in fact what it ought to be, and what it claims to be, that is, a purely legal institution exercising a purely legal function without conducting politically motivated prosecutions. We waited fifty years for this Court and now it has to work, because there will be no second chance. This is very important, because success could eventually weaken the culture of impunity that has always prevailed and lead us to a system that guarantees a better application of the principle of individual responsibility.