

Introductory talk at the KAS International Criminal Court
workshop on 12 March 2010

1. Origins of international criminal law

The Germans have a special relationship to the International Criminal Court, for it was in Germany, after the end of National Socialist reign of terror, that the Nuremberg War Crimes Trials were held, and they were the first international criminal court. Between 20 November 1945 and 14 April 1949, a total of 185 members of the Nazi regime were prosecuted and held to account in Nuremberg.

The Nuremberg Trials confirmed the principle that there are a number of serious crimes for which no impunity can be granted. This was the first time that the representatives of a state that had been sovereign at the time of the crimes were held to account for their actions. It was at Nuremberg that what are known as the Nuremberg Principles of international criminal law were developed:

1. Any person who commits an act which constitutes a crime under international law is responsible for it and liable to punishment.

2. Even if national law does not impose a penalty for an act which constitutes a crime under international law, the person who commits the act is not relieved from responsibility under international law.

3. If a person who commits an act which constitutes a crime under international law acts as Head of State or responsible Government official, he or she is not relieved from responsibility under international law.

4. If a person acts on the order of his or her Government or of a superior, he or she is not relieved from responsibility under international law, provided a moral choice was in fact possible to him or her.

5. Any person charged with a crime under international law has the right to a fair trial on the facts and law.

Against this background, the following criminal offences are now recognised in international criminal law:

1. War crimes
2. Crimes against humanity
3. Complicity in the commission of the above crimes
4. Crimes against peace: a war of aggression

The Nuremberg Trials were therefore the beginning of and at the same time the precursor of the Tokyo War Crimes Trials, which immediately followed them, and later of the UN International Criminal Tribunals for the Former Yugoslavia, of Ruanda, and – due to a treaty – of Sierra Leone, and finally also of the Rome Statute of the International Criminal Court. So this was how everything began,

with the catastrophe of the Second World War, instigated by Germany and driven by Germany.

2. The role of Germany in the founding of the ICC

The Nuremberg Trials were held by the four victorious powers, the United States of America, the United Kingdom, the Soviet Union and the French Republic. In this way, Germany was consistently confronted with its own guilt and the crimes committed in the past. The Nuremberg Trials played an important role in helping Germany come to terms with its history, and today the country is a stable democracy and a reliable partner for the former victorious powers, which are now its partners. Without the pressure of the United States, the UK, the Soviet Union and the French Republic, this would never have happened.

This particular history gives Germany a particular responsibility. This view is shared by all German political parties who have governed to date. For this reason, Germany today is especially committed to making sure that injustice of this kind can never be repeated.

The Federal Government has always strongly supported the Rome Statute, which was adopted by the signatories on 17 July 1998. Together with our European partners, we campaigned throughout the world for an International Criminal Court to be created, and we ratified the Statute very early, on 11 December 2000. On 11 April 2002, the required number of sixty ratifications was reached and it

was possible for the permanent International Criminal Court to be founded.

Today, a total of 110 states (out of 192 UN states) have ratified the Rome Statute, and a further forty have signed the Statute. None of the states of Europe have forgotten the horrors of the Second World War, and they are all members of the International Criminal Court. In addition, nearly all the states on the American continent – with the exception of the United States – have ratified the Statute; just as have many states in Asia and Oceania and in particular states of the troubled continent of Africa.

3. The character of the ICC

The Rome Statute reaffirms the principle of individual criminal liability as the guiding principle of a world order which is based on peace and justice and in which serious breaches of international law may be punished by an independent international institution. It is the aim of international law to strengthen the rule of law in international relations.

The ICC is therefore the expression of a system of justice exercised in the name of the community of states and is an important complement to the rule of law system of the United Nations. It deliberately focuses on the individual, in order to show the heads of state of this world clearly that they can be personally called to account.

4. Initial successes of the ICC

The first court proceedings show that the possibility of a criminal prosecution is one to be reckoned with and the International Criminal Court is not a toothless tiger.

On 10 February 2006, the ICC issued an arrest warrant for Thomas Lubanga, the Congolese militia leader, on suspicion of the war crimes of conscripting and enlisting children under the age of fifteen years for military purposes and for using children to participate actively in hostilities. Investigations are ongoing as to further crimes that may have been committed, and it is possible that the indictment will be extended if evidence of them is found. On 17 March 2006, the Congolese authorities handed Lubanga over to the International Criminal Court; he was transferred to the United Nations Detention Unit at Scheveningen, and on 28 August 2006 he was indicted before the court. This makes him the first suspect who was transferred to the ICC on the basis of an ICC arrest warrant, and also the first defendant in the history of the court.

On 14 July 2008, Luis Moreno Ocampo, the Prosecutor of the ICC, applied for an arrest warrant for Omar Hasan Ahmad al-Bashir, the President of Sudan, for genocide, crimes against humanity and war crimes in the Darfur conflict. This application was granted on 4 March 2009, but the charge of genocide was excluded for lack of evidence. Since then, the President of Sudan has scarcely been able to leave his country.

In addition, at the end of 2009, the main proceedings in the trials on Germain Katanga and Mathieu Ngudjolo Chui were also opened. These two Congolese former militia generals are accused of seven cases of war crimes and three cases of crimes against humanity. *Simba*, as Katanga was called by his soldiers, allegedly shared responsibility for the death of 8,000 people. The trial began on 24 November 2009.

These cases are a clear warning to the tyrants and warmongers of this world, and they show that they can no longer hide behind state immunity or a lack of comparable cases.

Moreover, many states have now transposed the criminal offences of international law into national law. In Germany, for example, a Code of Crimes Against International Law entered into force on 30 June 2002. When this was drafted, one of the problems was the question of how to define crimes such as genocide, crimes against humanity and war crimes. There has also been a discussion in recent years about the term "aggression" as the fourth element of crime, and this shows how difficult the subject is. For this reason, Germany also supports the ICC's Legal Tools Project. This project is intended to help make criminal offences internationally comparable and to create an international-law database.

5. Involvement of the USA

If we are to find a universally valid definition, all the important states of this world must be involved. We are therefore more than happy that since 18 November 2009, the United States has been involved again as an observer at ICC conferences. Even though Stephen Rapp, the head of the observer delegation, pointed out that the United States does not intend to ratify the Rome Statute, this is still a step in the right direction.

Personally, I can understand the scepticism of our American partners. They are involved in regions all over the world, taking responsibility for Europeans as well. Hence their fear of themselves being prosecuted before the ICC is understandable. It is therefore essential to guarantee that the court cannot be instrumentalised and used against the United States.

However, even our transatlantic partners must not be allowed simply to evade justice. Although the United States will of course prosecute the crimes of US citizens within the meaning of international law, it is still necessary for us to jointly demonstrate that crimes in states that do not prosecute such offences will be prosecuted by the ICC.

It is therefore very important to me that our partners are again sharing in the discussion as to how we intend to jointly further develop international criminal law, and it sends a good message to the victims and a warning to the perpetrators all over the world.

6. Further development and outlook

This spring in Kampala, with the USA taking part, we will be taking stock and discussing amendments to the Rome Statute.

To date, the ICC can prosecute the following crimes:

1. Under Article 6, genocide
2. Under Article 7, crimes against humanity
3. and under Article 8, genocide

As I have already mentioned, the definition of the fourth offence in the Rome Statute, the crime of aggression, as in a war of aggression, is still disputed and has therefore not been prosecuted.

Since 2002, a special working group has been studying the definition of this offence, and on 13 February last year, a draft definition was finally passed under the chairmanship of Christian Wenaweser from Liechtenstein. According to this draft, an act of aggression is "a military action, for which a leader is responsible, by one state against another state".

This includes in particular an invasion, an attack by another state, military occupation of another state, bombardment, blockades, the sending of armed bands to carry out acts of armed force against other states and ultimately also actions that make it possible for another state to commit acts of aggression against a third state. On the other hand, terrorism is not deemed to be aggression as long as it is carried out by non-government agents.

This agreement could be a further milestone in the success story of the ICC. It would change international criminal law from a *jus in bello*, that is a system of criminal law for war crimes, to a *jus ad bellum* – a system of criminal law that makes decisions on war guilt.

7. Conclusion

I believe that we have enough material for discussion in this new draft definition, the future development of international criminal law and the coming review conference in Kampala. I therefore look forward to an interesting conference with stimulating discussions, and I hope that my introduction of the German perspective at the beginning of my remarks will enable us to keep our shared goal in focus: the goal that sixty years after Nuremberg and Tokyo the world will become safer and more peaceful.