

## Lincolns Inn

International Criminal Justice- Where does it go from here?

### Introduction

1. Fellow benchers, Fellow Judges, Distinguished guests, Ladies and Gentlemen, Thank you for attending. Particular thanks to those who have crossed the channel in the week of the EU elections to be here-) Professor Kevin Jon Heller ( from The University of Amsterdam ) and Dr. Viviane Dittrich ( The Deputy Director of the International Nuremberg Principles Academy .)
2. The oldies in the room might remember Haircut One Hundred , who were a British new wave band formed in 1980 in Beckenham by Nick Heyward. In 1982 the band released a single "Love Plus One" . It was the band's biggest hit. It reached No. 3 in the charts and it “went gold” after achieving sales in excess of 400,000 copies. It was a catchy number- in a sort of irritating way. In the

song Nick Heyward asks the question “ Where does it go from here ?”. Those of you expecting his reply to be profound and wise will, I am afraid, be disappointed. The answer he gave does not relate to the meaning of life. His answer to “ Where does it go from here?” was “ Is it down to the lake I fear, followed by, as I recall :” “ay, ay, ay ay ay-ay etc” .

3. But the question he asks is a good one for those interested in and involved in international criminal justice . Where does it go from here? About 5 weeks ago the PTC at the ICC unanimously denied the Office of the Prosecutor’s (OTP) request to initiate a formal investigation into the activities of Afghan Defence Forces, American Armed Forces, the CIA and The Taliban in the situation in Afghanistan under Article 15 of the Rome Statute. This was after the judges had deliberated for 1.5 years and after a preliminary examination lasting more than one decade involving 794 submissions from 6220 individuals, 1690 families and involving events in 26 locations. The PTC concluded that an investigation would not be in the interests of justice.
4. At the same time Sudanese President Al- Bashir found himself in a cell in Khartoum and charged in The Sudanese courts with

inciting violence, having been ousted from power and with no certain indications as to whether he would be surrendered to the ICC to face trial on charges , including 3 counts of genocide. And then the Appeal Chamber at the ICC decided on the lack of immunity accorded to former President Al-Bashir before any international court.

5. I could spend the entire talk interrogating the Afghanistan decision- one which commentators have variously called “Fundamentally flawed” ( Kevin Jon Heller), “this poorly reasoned and badly written decision “( Sergei Vasiliev), one which amounts to judicial suicide ( Gueneal Mettraux), and “self-inflicted delegitimization - a decision so structurally flawed, so politically susceptible, so morally malleable that it is only a matter of time before the ICC self-destructs” ( Michael Karnavas).
6. But in this talk I have sufficient time only to deal with 2 pressing topics in international criminal justice, namely (a) the current political landscape in which ICJ has to operate and (2) Reform within the ICC .

## The current political landscape

### General

7. At para. 94 of the ICC PTC Afghanistan decision:

***“ 94. subsequent changes within the relevant political landscape both in Afghanistan and in key States (both parties and non-parties to the Statute), coupled with the complexity and volatility of the political climate still surrounding the Afghan scenario, make it extremely difficult to gauge the prospects of securing meaningful cooperation from relevant authorities for the future”.***

8. It seems likely , therefore, that future decisions of the Prosecutor, the PTC and all Chambers of the Court may now be underpinned by more open (and perhaps honest) reference to the realities of the political landscape. In the wake of the Afghanistan decision, observers were asking (1) Will the OTP now adjust its mantra , which up to date has been “ the OTP does not make decisions based on political considerations” and (2) Is the reality now that powerful states and/or those that threaten or obstruct the work of

the ICC will never appear within the cross-hairs of an investigation, let alone a prosecution?

9. These questions were addressed ,in part, last Friday when the OTP at the ICC published its Draft Strategic Plan for 2019-2021. The document is heavy on pledges, but thinner on how exactly those pledges will be put into practice. The document does, though recognise just how important the political landscape is in placing limitations on the ability of the OTP to have real impact:

“Conflicting national interests, and political agendas of States and other international actors create shifting dynamics which may either create support or resistance towards the Office’s activities, depending on the situations under investigation. Economic realities, political alliances, diverging views on multilateralism and on how to tackle global problems are just some of the factors determining the position taken...the OTP’s operating environment is impacted by the surrounding political reality.”

10. What then is the current political landscape and the surrounding political reality? Well, the landscape has changed in

the past 20-odd years and it continues to change by the month, week and day. Shifts in the balance of power have been acute. Commitment to multi-lateralism has lessened and nationalism and authoritarian government ,entwined with populism, is on the increase. Many countries are re-asserting national sovereignty, often at the expense of evidencing commitment to the rule of law as an instrument of global governance.

### Former U.N. High Commissioner for Human Rights,

11. According to former U.N. High Commissioner for Human Rights, Zeid Ra'ad Al Hussein writing earlier this month in The New York Times : “ most of our political leaders are morally weak, short-sighted and mediocre. It used to be that abuses were called out and many were stopped. Human rights violators had something to fear. But today the silence of those public officials is astounding. Their hypocrisy is sickening. I fear they are no longer able or willing to defend the human rights of all people and as a result the worst human rights offenders are able to act with complete immunity”.

## The loss of US hegemony

12. We also need to examine events since the end of the Cold war

.As Mark Kersten has observed: “ The end of the Cold War, characterized as it was by realpolitik and stagnation on many human rights questions, provided the elbow room necessary for liberal cosmopolitan projects (previously deemed idealistic or utopian) to institutionalize... guilt stemming from the inaction by the international community in the face of the Rwandan Genocide and the Srebrenica massacre fuelled the liberal cosmopolitan cause. “ It was within this spirit that the ICC was created.

13. But the “world order” has changed dramatically. The world no

longer turns on an axis of American hegemony . At the end of The Cold War the United States of America became the unipolarity in international relations and began to pursue interventionist regime change strategies – what has been described as policy based on “fantasies of liberalism marching inexorably forward to certain global triumph.”

14. Concurrent with the loss of hegemony the USA found that its

alliances with Saudi Arabia, UAE and Israel contributed to a

growing opposition to the US in The MENA region by Iran, Libya, Hezbollah and Iraq. The Soviet Union could no longer provide the patronage enjoyed by certain countries. Then ill-judged and damaging invasions of Iraq and Afghanistan led to the strengthening and proliferation of terrorist groups, the destabilisation of other countries in the region and then the crisis in Syria leading to the proliferation of non-state actors and the emergence and then decline of ISIS. At times many terrorist groups were given a comfortable space in which to operate and some even began to control territory, run local administrations and control economic output. We are told that ISIS is defeated (in Baghouz) but I suspect few of us believe that it will not re-emerge , especially after the explosions in Sri Lanka for which ISIS claimed responsibility. Al Qaeda and its affiliate groups are still active and in 2018 carried out over 300 attacks world-wide, and it is believed that Hamza bin Laden may be a future leader.

15. But ,US policy has changed. Soon after his appointment President Trump declared his intention to end “this destructive cycle of intervention and chaos “. According to Daniel Drezner writing in the April 2019 edition of The Foreign Affairs Magazine

**“The time has come to face facts. American hegemony is not coming back, at least not in a form recognizable to those who knew it .U.S. hard power is in relative decline, U.S. soft power has taken a huge hit.”**

## Iran

16. Iran has flexed its muscles in an effort to build a crescent of influence from Iran stretching westwards toward Hezbollah in Lebanon. The Trump administration is seeking to marginalise Iran. In 2018 Mike Pompeo issued a list of 12 demands Iran must meet to ease American pressure. Power politics are at play. In April 2019 President Trump announced plans to classify the Iranian Revolutionary Guard as a terrorist organisation.

17. Earlier this month the US Administration revoked waivers to Iran’s remaining oil export markets and unveiled more sanctions in addition to those it imposed last year after quitting the Iran nuclear deal. Mr Trump has said he will impose secondary sanctions on China if it continues to import Iranian oil. Oil is the economic lifeline of the Iranian economy.

18. Following the US administration's threat to deploy carriers to the Persian Gulf, this has now happened and Iran is threatening that, unless the impact of sanctions is lessened, it will withdraw from the nuclear deal . On Monday it was reported that Iran's nuclear agency had quadrupled its production of low-enriched uranium.
19. What may be the underlying politics here? Well- John Bolton has a goal of regime change in Iran, believing the country to be the world's largest financier of international terrorism and a malign influence in the region, fomenting unrest and financing militant groups in Syria and Yemen.
20. And what of sanctions? Many doubt that sanctions will force Iran to "buckle"- the country is resilient and has survived through many years of sanctions.
21. With multi-lateralism in mind should the USA have made implied threats to impose sanctions on UK, France and Germany ( who have pledged to stay in the nuclear deal with Iran)? This set in the broader context that Angela Merkel wants Europe to forge a united front capable of standing up to the US, China and Russia.

22. A President Trump tweet on the Iran issue on Monday was characteristically firm : “If Iran wants to fight, that will be the official end of Iran. Never threaten the United States again!”
23. On March 11, President Hassan Rouhani of Iran arrived in Iraq for his first visit. Iran and Iraq are Shiite-majority countries that share centuries-deep cultural and religious ties — and a 900-mile border. Iran is seeking to expand trade with Iraq to help offset these reimposed U.S. sanctions. It might be sensible to predict that Iran and Iraq will develop closer alliances in the forthcoming years.

### Broader Sunni/Shia contest

24. The broader Sunni/Shia contest primarily between Sunni Saudi Arabia and Shia Iran will not abate and we see its impact, aside from the situation in Iran, most graphically in Yemen, where it is alleged that the UK and France continue to supply arms to Saudi Arabia in circumstances where it is widely reported that such arms have been used in a proxy war causing thousands of civilian casualties from bombardment . And even though the House of Representatives and The Senate agree that

the USA should stop supporting Saudi Arabia in Yemen , in late April 2019 Pres. Trump exercised his veto for only the second time in his Presidency to veto Congress's calls for the US to put an end to its support for the Saudi-led war in Yemen .

## Egypt

25. President Sisi of Egypt has met with President Trump and there are suggestions that the US administration may declare the Muslim Brotherhood a terrorist organisation. Congress intends to make \$260 million of annual military aid to Egypt conditional on progress in human rights and democracy. (Egypt receives \$1.3 billion in annual US military aid.)

## China

26. We see the growth of China- politically, militarily and economically and, in particular, its growing influence on the economies of certain countries in Africa. Just to take one example, China has a monopoly over oil reserves in Sudan and South Sudan having invested in infrastructure projects,

undeterred by corruption and civil conflict . Its economic influence is also increasing in Europe.

27. China is predicted to pass the US to become the world's largest economy by 2030, with India overtaking Japan, Germany, the UK and France to become number three.

28. A deeper relationship is emerging between China and Russia. Economically the two countries are working together in investment projects and transportation through links between China's Belt and Road initiative and the Eurasian Economic Union.

## Russia

29. Russia has become emboldened by its involvement in Syria. It has expanded its military bases in Tartus and Latakia in Syria and is acting as a power-broker in The Middle East and a major force in global affairs . Syria has worked out better for Russia than its interventions in Georgia and Ukraine.

30. In the past 12 months a series of talks have taken place on the future of Syria , attended by Bashar al Assad and Vladimir Putin

and President Erdogan of Turkey. The USA and the EU are not at the table. Russia is seen by Saudi Arabia and Israel as a force in the region and maintains relationships with Iran, Qatar and the Kurds.

## Turkey

31. Turkey is also making its mark. . It has its own geo-political interests to pursue. It has sent troops into Syria and runs local administrations in sectors in the North. [ Last month Erdogan's party lost control of power in Ankara and Istanbul and so his political supremacy may be on the wane.] It is a member of NATO, yet recently undertook joint military drills with Azerbaijan, Uzbekistan and Pakistan, to strengthen military cooperation between those countries and has discussed a possible deal to increase military and security co-operation with Iraq. Last Saturday President Erdogan announced the purchase from Russia of an air defence system and an agreement with Russia to jointly produce another air defence system.

32. Adding to the complexities of the Syrian situation, Iraqi officials have now started to attend meetings in Damascus (in March 2019).

## Libya

33. In Libya General Haftar and his Libyan National Army ( receiving military support from the UAE and President Sisi in Egypt and now endorsed by President Trump and having approval of France, Saudi Arabia and Russia ) is moving his troops westwards in an attack on Tripoli in an attempt to defeat troops loyal to The Government of National Accord,” which has UN support. Is there the prospect of further authoritarian rule in Libya? Amnesty International reports the commission of war crimes on both sides.

## Sudan

34. In post- Al-Bashir Sudan one group of activists ( perceived as being the stronger ) is reported to have close links with Saudi Arabia and the UAE and is supported by Egypt , whilst another is supported by Qatar and Turkey.

## Authoritarian regimes

35. The sense of instability is not restricted to MENA region . Authoritarian regimes which fundamentally undermine the rule of law cause damage wherever they emerge. This is not restricted to states that may once have been classified as classic rogue states. Viktor Orban in Hungary has neutralised the judiciary, attacked media freedoms, pressurised civil society, and pushed a nationalist agenda. Hungary is perceived as far closer to Russia than the EU and China has invested heavily in the country.
36. The Polish government has drawn criticism in the EU and beyond for its treatment of its judiciary. Nationalist parties are growing in stature and increasing their populist voting bases in Germany, France, Italy, The Netherlands and Austria. Nationalist parties from those countries, together with parties from Slovakia and Bulgaria attended a joint rally on Saturday in Milan, in advance of the European Parliament elections.
37. Multi-lateralism that has existed generally in terms of EU policy and delivery is now struggling to assert itself. Is autocracy beginning to nudge democracy aside ?

## USA reduced appetite

38. All this needs to be viewed against a reduced appetite in the Trump administration for engagement in Iraq and Afghanistan and engagement in world affairs more generally. “Making America Great Again” may be a message which resonates with many voters domestically, but crucially it has co-incided with a lack of interest on the part of the US administration in supporting international organisations and strengthening global governance.
39. The recent PTC decision at the ICC regarding Afghanistan was reported by the Trump administration as “ a major international victory ”. Many commentators observe that it is difficult to see the decision as anything other than a capitulation to pressure from the USA which had been building up for months. In 2018 President Trump referred to the ICC as “an unelected, unaccountable global bureaucracy”. In September 2018 John Bolton, The National Security Advisor to President Trump set out the USA policy towards the ICC in these terms - “We will not cooperate with the ICC. We will provide no assistance to the ICC.

We will not join the ICC. We will let the ICC die on its own. After all, for all intents and purposes, the ICC is already dead to us”.

40. In Dec 2018 Secretary of State Mike Pompeo declared that the ICC is “rogue” (on account of its attempts potentially to investigate US soldiers for alleged crimes committed in Afghanistan) .

41. Then in March 2019 Mr Pompeo, announced diplomatic sanctions against the staff at the ICC who were investigating war crimes committed during the Afghanistan war, by denying such persons entry into the USA and soon thereafter the ICC Prosecutor reported that she had been denied an entry visa.

## The UK perspective

42. When looking at the political landscape from the perspective of the UK, Brexit is likely to have an impact on the standing of UK in international affairs generally, and in the field of international criminal justice. In a post-Brexit world will the “soft” diplomatic power of the UK decrease significantly? Will it be perceived as continuing to “deserve” its seat as a P5 UNSC member? In Christopher Hill’s book “ The Future of British Foreign Policy –

Security and Diplomacy in a World after Brexit”” (published earlier this year ) he paints a glum picture of a country which, despite its nostalgia for a global power role, will discover that its “position in the world” will steadily decline. The UK, he argues ,will find it hard to frame its foreign policy in conjunction with the Commonwealth and , given the loss of EU multilateralism , will have to work hard to influence agendas in Europe on matters of significance, such as diplomacy, security and defence. What will happen in future Eurovision song contests is perhaps easier to predict!

### Why all the talk of politics?

43. There is little doubt that these trends in global politics have the potential seriously to undermine ICJ . Autocracy is on the rise. Many strong politicians are not advocates of enhancing an international rules -based order. True those states signed up to the ICC are numerous, but if the centre of gravity is moving towards China, Russia, USA, Iran , Saudi Arabia, Qatar, Turkey and Egypt then is there not a real risk that ICJ and the ICC become matters of marginal relevance ?

## Syria

44. The impact of this new emerging World Order has perhaps had its most profound effect in Syria. To remind you all it was in May 2014 that the UNSC voted on referring the situation in Syria to the ICC. Russia and China blocked such referral. There is no realistic prospect of the permanent P5 members of the UNSC ever referring the Syria situation to International Criminal Court (ICC). Indeed , in March 2019, at the UNSC Arria Formula meeting on “Human Rights, Accountability and Justice;” Russia criticised international criminal tribunals and vowed to block the UNSC from creating any new criminal tribunals or referring situations to the ICC. Furthermore on 19 March 2019 Russia ( and other countries) blocked the UN High Commissioner for Human Rights from providing the UNSC with a briefing on the human rights situation in Syria, claiming that discussions on human rights are not pertinent to the Security Council’s agenda.
45. Russia, Turkey and Iran (and other countries) have strategic geopolitical goals in Syria. The recent diplomatic discourse appears to relate more to the reconstruction of the physical

infrastructure of the country, rather than the creation of any court.

46. Reacting to the this , the UN set up its Commission of Inquiry and now the 34 worded body - UN International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in The Syrian Arab Republic since March 2011( thankfully known by its abbreviation the IIIM ) .Whoever dreamt up such a long name for such an important body should be referred to the Plain English Campaign's web-site !

47. The IIIM is undertaking some tremendous work in difficult and trying conditions. Information collected has been shared with investigators and prosecutors in domestic jurisdictions allowing significant progress to be made in the field of prosecutions in individual nation states, by applying their own domestic legislation on war crimes, through the use of universal jurisdiction,

## The ICC

### General Questions

48. The ICC has taken much incoming fire from critics in recent years. After 17 years and 1.5 billion Euros spent the ICC has clocked up only 3 core crime convictions ( with sentences of imprisonment) and one of those followed on from a guilty plea ! Even accepting the observation that a court cannot be judged on its conviction rate alone and that acquittals are a good sign that a court is functioning fairly ,this is a poor “institutional” record.
49. A fellow judge of mine at the KSC has argued that the moment has come for the ICC to “ re-calibrate and to do a reality-check”. That is right and the time has come for a third R- namely reform.
50. In March, April and May 2019 most eloquent and detailed observations on this question have been made by Douglas Guilfoyle, Kevin Jon Heller , Mark Kersten , William Schabas, Dov Jacobs, Sergei Vasiliev , Michael Karnavas - and others. I believe that they are all making a vibrant and necessary contribution to the debate and should be encouraged to continue

to do so. The ICC must engage with its critics, not seek to circumscribe their activities.

51. Douglas Guilfoyle asked in a recent contribution “Is the Court’s job one which can successfully be done at all under present conditions” He said this before the recent PTC Afghanistan decision.

52. Most of you will be familiar with “The Emperor’s New Clothes”- a short tale written by Danish author Hans Christian Andersen. It is about two weavers who promise an emperor a marvellous new wardrobe of clothes . The weavers announce that the new clothes will be invisible to those who are ignorant, stupid, or incompetent. Thereafter the reality was that the 2 weavers did not make any new clothes for the Emperor, but pretended to dress the emperor in his new clothes. The emperor then walked out in public, naked, to engage with his subjects. No adult wanted to tell the emperor that he was naked, for fear of being exposed as stupid or incompetent. So, all the subjects of the emperor told him how fine he looked in his wonderful new clothes. Finally a child cried out, "But he isn't wearing anything at all!"

53. The recent Afghanistan PTC decision is equivalent to the child's unmasking of the reality of The Emperor's New clothes . No more pretence that the law is supreme. An acknowledgement or perhaps a surrender to the reality that power politics will inevitably influence decisions and that powerful States are unlikely to be held to account.

54. What does this signal for the future? Can the court recover from this “ acceptance” that it is operating on an unfair playing field? As Mark Kersten stated yesterday :

“Only the most insincere advocate of international criminal justice would say that the selection of situations and cases before the ICC is justifiable or “fair”. It is not, and it has never been. Whether it be the overwhelming focus on African situations and cases, the asymmetrical selection of cases *within* those situations, or the reluctance to investigate and prosecute powerful global actors, selectivity....has been the Achilles heel of ICC legitimacy.”

55. To expand the Emperor's clothes metaphor, It is going to be difficult for the court to conceptualise, design, cut, create, modify , produce , brand and market a real set of clothes embroidered

with a clear message of legitimacy , for Emperors to wear – especially if weavers believe that they are now participating in a “rigged” market.

56. For victims the news is depressing. The Aghanistan decision indicates that their expectations amount to no more than aspirations. That the institution in which they had placed enormous trust may actually be incapable of recognising their suffering because judges have determined that investigations might not be feasible, might inevitably be doomed to failure or where the prospects for successful and meaningful investigations are unlikely, for instance because of the limited prospects of meaningful cooperation from relevant authorities.

57. So, has as the time now come for practitioners , members of staff at the ICC , judges, observers , academics, diplomats and all others who have an interest in the survival of the court, to encourage immediate, tough institutional reform and the emergence of a more positive culture.

58. The recent PTC Afghanistan decision should be viewed as the catalyst for immediate change. The PTC judges appear impliedly to recognise this ( para. 90) – **“the Statute reiterates the\_idea**

**that the Court is not meant - or equipped - to address any and all scenarios where the most serious international crimes might have been committed; therefore, focussing on those scenarios where the prospects for successful and meaningful investigations are serious and substantive is key to its ultimate success.**

59. True this can only be done through The Assembly of States Parties. But it is argued that the ASP must act now, otherwise the future of the court is at risk.

60. On a positive note , on 24 April 2019, 4 former presidents of the ASP together recommended that a group of experts undertake an independent assessment of the court's functioning in advance of Dec 2020 meeting. They stated ; “ We are disappointed by the quality of some of its judicial proceedings, frustrated by some of its results and exasperated by the management deficiencies that prevent the court from living up to its full potential. We see too little genuine political engagement, way too much micromanagement and distrust” and spoke of a new deal between the ICC and its states parties so that the court is enabled to “

clarify the legal standards it applies to its criminal proceedings, work on the basis of clear prosecutorial strategies and policies, end its endless internal squabbles and address its management issues head-on”.

61. This is a move in the right direction. But is appointing a team of experts to produce a UN style report really enough ?. In times of crisis the unimaginable become the imaginable . We are dealing here with the failure of a business model and there is a pressing need for fundamental restructuring. So appointing a traditional UN panel of experts may not be the best option available . Has the time come for the court to look to experts in business restructuring to assist ? Should a Chief Executive Officer of a multi-national corporation be recruited to investigate and re-shape ? The key is implementation of sensible, even if radical, proposals.

62. Douglas Guilfoyle’s view is that we should be “ slow to ask for the Court to be reshaped to reflect present realities as such a court would likely to be a hollowed-out pointless shell”. Perhaps now, though, after the Afghanistan decision, there is a catalyst for

meaningful reform- in order for the ICC to become more focused, for procedures of little value to be re-shaped, for personnel truly of the highest calibre to be employed and for a more positive , united culture to emerge – and thereby to develop a greater opportunity for the ICC to operate more effectively and not to become “pointless”.

63. The Twittersphere has become clogged with articles addressing the ills of the court and experienced commentators have provided many very sensible suggestions for reform .

64. Perhaps they can be summarised as proposals for reform in structures, procedures , priorities, resource allocation and reform of philosophy/ outlook and also including an entreaty for all personnel and organs within the ICC to develop a more heightened sense of honesty , modesty and reality.

## Personnel reform – prosecutors, investigators and judges

### The OTP

65. I would like to start with personnel- prosecutors, investigators and judges .

66. If an enhanced awareness of Realpolitik is now the name of the game , should the OTP “come clean” and ditch other investigations, which have no realistic prospect of success- in other words to be honest with everyone ( and particularly victims) and say “ this situation is not going to end up with accused being indicted and trials taking place “?
67. The OTP is spread too thinly. It cannot deliver quality investigations across so many fronts , given its budgetary restrictions. Should the OTP now prioritise and concentrate on, say 10 matters only ? If this was done there would no doubt be severe criticism, especially from victims. But what is the alternative ? Potentially allowing weak matters to trundle on for years , using up resources that can more effectively be deployed elsewhere. It is such a depressing prospect I accept, but the court cannot properly perform an “Everyman” function.
68. Does the OTP need to put concrete action before expressivism ? The Emperors New Clothes have been revealed. Now politics trumps expressivism. Authors, have written about the strong expressivist message delivered when the Prosecutor at the ICC announces a decision to commence a preliminary examination

and thereby “casts its shadow” over the leaders of the country concerned , thus creating a deterrent or a vehicle for reform <sup>1</sup> . Guilfoyle has pointed out that the shadow theory amounts to little in the current climate. <sup>2</sup> And he said this before the PTC Afghanistan decision, which now suggests that ,far from casting its shadow , the court has, in effect, encouraged powerful States to act with impunity and disregard international law ( Dov Jacobs) and to send the message that bullying wins and non-cooperation is rewarded.

69. Would the OTP ( and indeed the Presidency and all representatives of the court) be well-advised to stop relentlessly beating the drum of “ending impunity” and “delivering justice” ? I see in a document published last Friday on the ICC web-site more measured language is being used, with the phrase “ a call to unite humanity against crimes” being repeated.

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<sup>1</sup> Carsten Stahn – need reference.

<sup>2</sup> Guilfoyle Part 1

70. Does the OTP need to explain “ this is what we cannot achieve and this is what we can achieve” – rather than continuing to pursue preliminary examinations and investigations , where the predominant motive is expressivism . Victims want to see results and if the reality is that the prospect of delivering results through quality investigations followed by criminal trials is now lessened, then do the expectations of victims need to be addressed in other concrete and meaningful ways through other mechanisms and processes? Look at Colombia and The Gambia and the use of other imaginative mechanisms.

71. The OTP could also recruit more prosecutors from domestic jurisdictions who have extensive quality experience in supervising teams of prosecutors and who have advocacy experience and who know how to manage and, most critically of all, assess evidence.

72. We all know that cases have proceeded to trial supported by inadequate evidence. Making predictions/ judgement calls about whether evidence will be sufficient to persuade judges to convict is a most difficult task. But it is what has to be done. This is a skill which cannot exclusively be “ learned on the job”.

73. Is the OTP being sufficiently self-critical when it says in the new draft Strategic Plan at para.10 that “The unsatisfactory results in court, in particular, resulted from a mixture of causes, including the residual effects of a previous strategy, a need to further strengthen the present strategy, cooperation and security challenges, and a lack of judicial clarity.” Not perhaps sufficiently honest in terms of “mea culpa”.

## Investigators

74. As far as investigators are concerned Phil Clark has suggested that the OTP needs to divert more resources to seeking to employ local investigators with local knowledge of local situations, instead of relying on generalist international investigators being sent from The Hague to investigate alleged crimes. The idea being to develop a footprint in the heart of the country and foster and nurture relationships by way of a more settled presence, but the OTP would need to manage this and not to have “investigation by intermediary” as its default position. This would chime with the change in OTP policy from short “bug-in /bug-out” investigations to longer more intensive investigations .

75. As far as the Jurisdiction, Complementarity and Cooperation Division (JCCD) is concerned Phil Clark asks does it have sufficient political expertise to navigate state power? It needs to negotiate, but also needs to maintain independence from States and build contextual knowledge of the political situations affecting local investigations.

## The judges

76. Current issues relate to (a) selection (b) collegiality and (c) awareness.

77. As to selection -Judges are elected from two lists of candidates. List A comprises candidates who have "established competence in criminal law and procedure, and the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings". List B, on the other hand, comprises candidates who have "established competence in relevant areas of international law such as international humanitarian law and the law of human rights, and extensive

experience in a professional legal capacity which is of relevance to the judicial work of the Court". Elections are organised so that there are always at least nine serving judges from List A and at least five from List B.

78. Judges should be appointed who are the best for the job. Selection must be on merit alone. Past elections have been marred by the “trading of votes” or block voting and the advancement of political agendas. This led to judges being appointed who are not the best for the job. For instance, should diplomats ever have been appointed as judges?
79. The ASP and the Advisory Committee on Nominations on the selection of judges must begin to show the political will to drive reform of the procedure for the election of judges and take steps to prioritise the appointment at the ICC of criminal law judges from international and national systems . There are, after all, plenty to choose from ! It is not a difficult task.

80. Dov Jacob's has suggested that the B List candidate system ( whereby a country can put forward for nomination as a judge at the ICC a candidate who is not a judge, has never been a judge, is not a criminal law advocate, has never stepped foot inside a courtroom , has never practised as a lawyer and who does not hold a law degree) needs to be scrapped. On the face of it that seems a sensible suggestion for the sake of building the future integrity of the court . Should the focus now be on real experience of criminal law ? Does it assist to have judges who are not experts in criminal law ? I add the observation from my time as The Vice President of the Kosovo Specialist Chambers that there is a place for a sensible mixture of international criminal law judges, domestic criminal law judges, international criminal law academics, and practitioners and selected UN Senior Legal Officers experienced in international criminal law. However, when the chips are down, the ICC needs to be able to call upon a core of judges, who have significant real experience of criminal law- as judges. They should be experts and be at ease in the often hectic atmosphere of a criminal court. They must inspire the confidence of Counsel and those observing proceedings.

## Collegiality

81. It has been reported that there appears to be a lack of collegiality amongst judges at the ICC, with observers pointing to, (i) for instance difficulties encountered in the appointment of Appeal Chamber judges to hear the Appeal in the Gbagbo case ;(ii) recent events at the ICC over the Ntaganda case – where judges initially voted and agreed to allow a fellow judge from a diplomatic background to take up a post as Ambassador to Estonia whilst still sitting part-time as an Appeal judge at the ICC on that case . Pausing there. I suspect that even the most junior barristers in the Hall tonight would see an obvious problem there. How can a person be acting in a judicial and executive role at the same time ?! But this was initially agreed upon, before common sense prevailed and the judge relinquished the diplomatic role . (iii) that certain judges are petitioning for an increase in their salaries.

82. As to awareness, Kevin John Heller has also recently publicised a transcript of comments made by an ICC judge on a visit to China in 2017, including a reference to a decision made in a case by him and other trial judges to ignore the provisions of the

Rome statute and to restrict interlocutory appeals and also making negative comments regarding suspects from Africa.

83. These instances give the impression that certain judges do not appear to understand the precise effect their decisions and utterances have on the reputation of the court amongst observers. Ill- advised acts and omissions can result in immediate and obvious reputational damage.

84. Observers also argue that the quality of its jurisprudence is in decline, particularly with regard to the requirement for strict interpretation of The Rome Statute. Whether there is a need to encourage consistency in jurisprudence is a subject worth of another entire lecture !

## Outlook and Philosophy - Victims

85. Being honest with victims. We now live in an age where the commission of mass atrocity crime can be subject to contemporaneous media coverage. Victims can find themselves giving accounts to many different reporters or investigators within weeks of relevant events and, quite understandably, they have a valid expectation that they may be testifying in a court

within a few years of crimes having been committed and that their testimony will lead to convictions of accused persons. But victims are not assisted if they are given false hope- if their expectations of a conviction are not tempered by reference to the need for quality evidence, the imperative of upholding defence fair trial rights and frank explanations about the role of judges and the standard of proof.

86. The OTP must choose its words carefully when speaking with victims. For example, it is reported that, in March 2019, a senior official at the ICC told victims in Bangladesh that the ICC will bring justice to Rohingya victims from Myanmar. This sort of language is unhelpful. It is not measured or nuanced. It does not admit of limitations or conditions. In short it is likely to build expectations. Victims need to be given realistic advice, not “feel-good” advice which might be misleading.

87. Arguments continue over the extent to which victims should participate in proceedings through Counsel and through giving evidence as witnesses. Judge Christine van den Wyngaert, who is one of the most experienced judges in the field of international criminal justice ,has written and lectured extensively on this

point and criticises procedures in cases in which she was involved. According to Douglas Guilfoyle : “ To put an unpopular view , allowing victim participation at each stage of the proceedings as a represented party was likely a mistake”. There are, of course, those who advocate full participation at all stages of proceedings.

88. Crises causes the unimaginable to become the imaginable. So, should applications for victim status, assistance to victims and reparations for victims be kept entirely separate from the criminal proceedings ? Why should dealing with such matters be the function of a criminal court, when the primary function is to hear evidence and decide on innocence or guilt ?

## Structural /Procedural Reform

### General complaints

89. Complaints are made that (i) ICC needs to deliver value for money (2) it is becoming too unwieldy and that there is a focus within on managerialism , excessive bureaucracy, performance monitoring and assessment , rather than producing real results. If you like the tick-box approach to measuring performance.

## The Pre-Trial Chamber

90. The function of the Pre-Trial Chamber has come under scrutiny. To quote Kevin Jon Heller :“ the Afghanistan rejection is simply the next front in the ongoing war between the OTP and the judiciary over who has primary authority to decide which situations the ICC will investigate”. So, would the court suffer materially if the pre-trial chamber no longer existed ? Should its role be curtailed and should it be given a more limited mandate? Has the PTC, in the Afghanistan decision, overstepped the mark by usurping the OTP of its discretionary authority and undermining its independence ? Here in England and Wales judges do not usurp the authority of the CPS to decide to charge a defendant and pursue a case to trial, but many systems operating the civil law model will have an investigating judge who is supreme in directing the judicial police in exactly how an investigation should proceed. Have the civil law judges allowed domestic practices to operate at the ICC, contrary to the Statute?

91. The PTC has, at times, performed its functions as if conducting a mini-trial – not simply determining if there is a prima facie case. Is it the role of the PTC to give prosecutors second-chances to get their cases in good order? Should PTC judges suggest to the prosecution in which areas the cases presented are weak in terms of evidence? Are the judges to act as judges or are they second-string prosecutors?

92. Dov Jacobs argues that the PTC has filtered out weak cases and there does still need to be a filter of some sort.- a proper filter and not a “nodding cases through” approach. Could this be done predominantly by a single judge?. But is it too much responsibility to give a single judge, in the sense that such a judge would have to bear the brunt of negative criticism following an unpopular decision?

#### Core Functions

93. Does the ICC need to identify and concentrate on a revised core function? Should the provision of advice and support to

states by way of positive complementarity come from providers who are selected by but not connected with the court and who have, for instance , relevant recent expertise in court procedures and case management in domestic jurisdictions or , say, in the training of judges and the provision of advocacy training in the domestic context.

94. Should the ICC be co-ordinating its positive complementarity efforts more with other organs- The African Union, The UN, The EU and national aid agencies providing post-conflict judicial assistance .

## Africa

95. You will all be familiar with the oft-repeated criticism that the ICC is Euro- centric, neo-colonial court pursuing a European dominated agenda of making African countries subservient to its political will. But, comes the response, the first cases at the ICC were self-referrals by countries who were States parties , there were abuses in Africa and the prosecutor has done much to

introduce a more balanced prosecution policy and to shine its investigate torch on other crime scenes worldwide.

96. I have not seen, yet any formal indication of an African Union response to the Afghanistan decision. It may have the effect of strengthening political will in Africa for the African Court of Justice and Human and Peoples' Rights to become fully operational and to emerge as the principal judicial organ of the AU.

### Listen to the diplomats and do not hide from criticism

97. The challenge also for the ICC is to keep its donors "on-side" and to strive meaningfully to engage with the diplomatic community and start showing real progress, particularly in the speedy delivery of trials and the reallocation of resources .

98. Countries in The Assembly of States Parties are losing patience. At the ASP meeting in New York last December disappointment was expressed by 10 states- [Argentina, Belgium, Costa Rica, Finland, Liechtenstein, Luxembourg, The

Netherlands, Slovenia, Sweden and Switzerland at meeting of ASP.] The UK delegate, Andrew Murdoch, stated “ We cannot bury our heads in the sand and pretend everything is fine when it isn’t. The statistics are sobering. After 20 years and 1.5 billion Euros spent we have only 3 core crime convictions”

## Endpiece

99. Look, I will be honest. It is difficult to be positive in the current political climate, but politics changes peoples and countries – often in the space of 10 years. Where will Mr.Putin and Bashar al Assad be in 10 years time ? Who will then be President of the USA? Will the dynamics within the UNSC change ?

100. The avowed policy in the new OTP Strategic Plan “to give increased consideration to the possibility of bringing cases that are narrower in scope, focusing on particular incidents, areas, or time periods, or a single accused and, in particular, when appropriate, bringing cases against notorious or mid-level perpetrators who are directly involved in the commission of

crimes ( rather than the highest echelons of a military or political apparatus) may be beneficial in the long run.

101. The numbers of individuals committed to ICJ has grown in recent years. The number of students studying ICL has increased. We have excellent counsel ( both defence and prosecution) committed to the cause of ICJ. The ICL academic community is alive and kicks with every click of a tweet. We must not lose hope.

102. I started with Haircut One Hundred and I finish with Haircut One Hundred. One of the band's other popular singles from 1982 was called " Fantastic Day". We are undoubtedly many years away from a "Fantastic Day" in ICL ( far from it ) but if universal jurisdiction cases continue to grow and countries within the ASP insist on urgent and necessary reforms at the ICC and the OTP's new strategic plan leads to real tangible change then we , hopefully, can approach the prospect of a day " with sunny spells and outbreaks of rain". That for me is worth striving for.

103. Thank You.

