

TWENTY YEARS OF INTERNATIONAL CRIMINAL LAW: FROM THE ICTY TO THE ICC AND BEYOND

This panel was convened at 5:15 pm, Friday, April 5, by its moderator, Abi Williams, President of the Hague Institute for Global Justice, who introduced the panelists: Fatou Bensouda, Prosecutor of the International Criminal Court; and Theodor Meron, President of the International Criminal Tribunal for the former Yugoslavia, and President of the International Residual Mechanism for Criminal Tribunals.

THEODOR MERON

The creation of international criminal courts and tribunals has really been the creation of a new universe of international justice. It took a lot of time, but the achievements have been tremendous. The fact that at the ICTY we have, after some years, arrived at 100% law enforcement in the sense that all of our 161 indictees have been accounted for, is a feat that not all justice systems could have achieved. The fact that we have applied international customary law, not just in a few cases as in Nuremberg, but in case after case; that we have shown that even the most senior people, including heads of state, who have been accused of some of the gravest crimes known to humanity can be prosecuted; and that we managed throughout all of our cases to apply a panoply of norms of fairness and due process—I think these are tremendous achievements.

ABI WILLIAMS

Thank you. Prosecutor?

FATOU BENSOU DA

Good evening to you all. I am happy to be here and having this discussion. I also thank our host, the Netherlands, for giving us this opportunity, and, of course, the Society.

But to the question, I think the ICC has also accomplished a lot, and it is without doubt that now the Court has become a real player, an important player, in international relations, and this has been done in 10 years. Of course, we had a lot to learn from the ad hoc tribunals. They have set the jurisprudence, but when the Court started, we also had empty floors, empty corridors. We started from scratch. We have been able to develop policies of the office, we have been able to develop strategies, we have an operations manual, and in 2002 we did not have any case. Today we have at least eight situations which have generated over 10 cases before the Court, and this is something to be proud of. I think also the fact that the ratifications of the Statute are still ongoing. We are having cooperation from states who have signed and ratified, but also from non-state parties. And I will just give the example of what happened last week about the surrender of Bosco Ntaganda to the Court and the assistance of the United States and Rwanda, both non-state parties to the Court, assisting for Bosco Ntaganda to be transferred to the Court. We, of course, have still a lot to do. There are many cases that we still are looking at, but I think this idea that we had in Rome, this has been translated to an operational institute that has become very important in international relations.

ABI WILLIAMS

I want to follow up first on the point that Judge Meron mentioned, that one of the significant aspects of the ICTY was that it was the first international criminal tribunal since Nuremberg.

The International Military Tribunal at Nuremberg in a sense had the luxury of having police powers to arrest and seize evidence. How do you deal with the challenge of arrest without such powers, which the Nuremberg Military Tribunal had?

THEODOR MERON

It's a very serious challenge. In fact, during the first lean years of the ICTY, my colleagues—and I, when I arrived—were really worried that the day may come that we would not have defendants before us. We are totally dependent on cooperation of states, and initially—for quite a few years—that cooperation was very slow in coming. It was only when the United States and the European Union reached the conclusion that peace in Europe and access by the states of the Balkans to the European Union required that justice be done and that those states should cooperate by delivering up to The Hague the principal defendants indicted by the Tribunal that things started changing.

It's not just a question of fugitives, important as that is. You cannot have a criminal trial conducted according to all the due process standards if you do not have the evidence. The evidence has to be collected thousands of kilometers away. For that, you also need supportive governments, and fortunately over time, and thanks to the credibility that the Tribunal has established, things have started changing.

I would like to acknowledge not only the role of the EU at large and the role of the United States in pressing states to deliver people indicted of very serious crimes to The Hague; the Netherlands has also played a very special role. When some kind of tribunal fatigue started setting in more and more in the European Union, the Netherlands remained the “last man standing,” insisting that the rapprochement between Serbia and the European Union should depend upon the delivery of General Mladić. And General Mladić was found and delivered to The Hague, making him our 160th of 161 indictees accounted for, and for that we are eternally grateful to the Netherlands.

But this problem of a lack of police power continues to be a serious one. For example, when we, as judges, consider the question whether somebody should be given, as we call it, provisional release (or as we would say here, grant the person bail), we are deeply aware of the issue that if he fails to return, we would again be completely dependent on the state where he may be present to deliver him back to The Hague. And in terms of other questions, such as the protection of witnesses, we again continue to depend on the cooperation of states. And we remain dependent on the good will of the Security Council and the international community in making sure that that cooperation is forthcoming.

ABI WILLIAMS

Could I just follow up on that point about the relationship with the Security Council? Because the relationship between the international courts and tribunals and the Security Council is a delicate one. To what extent are you dependent on the Council? And how do you manage this delicate relationship with a body which is essentially a political body? And I would also like the Prosecutor to address that question as well.

FATOU BENSOUDA

With respect to your first question, on arrests. One of the biggest challenges that the ICC faces today is arrests—arresting those wanted by the Court and surrendering them or

transferring them to the Court. As you know, the Court can only be able to function effectively if we have these individuals arrested and brought to the Court. But the system that has been put in place by the Rome Statute—I call it a system and not a court in the sense that we are the judicial arm of that system, we investigate, we prosecute individuals—requires that the decisions that the Court takes are to be executed by the states themselves.

As you know, the ICC is a voluntary institution in which states ratify and become part of the Court. Today we have 122 states members of the ICC. But the powers of arrests and executing the decisions of the Court remains with the states, and this is why cooperation for us also is huge. If we do not have this cooperation, if we do not have these arrests taking place, the Court will not be effective as we wanted it to be. So that is the system that has been put in place by the Rome Statute. We are not meant to go out and arrest individuals, and of course this is a challenge for us, but as I said, that is the system that has been put in place. We continue to call on states, we continue to call on all partners to assist us in this regard. We have many outstanding arrest warrants in all the situations that we are dealing with, and we are not able to proceed with those cases because those individuals are not before the Court. And if you look at the situation of President Bashir, for instance, who has been wanted by the Court I think since 2005 or 2006, an arrest warrant has been issued against him, and this has been a big challenge for the states but also for the Court. The situation of Sudan was referred to the Court by the United Nations Security Council, and President Bashir is all the time pushing the envelope, going to states that are parties to the Rome Statute, who have obligations under the Rome Statute to arrest and surrender him, but for one reason or another, sometimes political reasons, he is not arrested. And in situations like that, as you know, there is only so much that the Court can do, apart from reporting back to the Chamber and to the UN Security Council that the arrest is not taking place.

Maybe this brings me to the relationship between your second question, the Security Council, and the ICC. In the first instance, the Security Council can refer cases to the ICC, which they have done in the Sudan as well as Libya. They can also request the ICC to stop investigations or to stop prosecutions, suspend for a year. They have the power of referral and deferral to the Court. The actions that the UN Security Council takes or the decisions that they make affects us as a judicial institution to the extent that the ICC is being accused of double standards. I always get the question, “Oh, you are in Libya. Why are you not taking Syria?” The speaker is always unaware that Libya was referred to us by the UN Security Council because it’s not a state party. So it is not the decisions of ICC that create that situation, but rather a political body. We have had all these discussions behind closed door, but for the first time we are making efforts to have open discussions, also to see the nature of the referrals that we receive from the UN Security Council, the fact that sometimes there is not always the support that we need, the follow-up that we need from the referrals we receive from the Security Council. All these discussions are taking place.

ABI WILLIAMS

Thank you. Judge Meron?

THEODOR MERON

Our relationship with the Security Council is perhaps even more complex because when the Tribunal was established by SC Resolution 827, it was established as ‘‘a subsidiary organ of the Security Council.’’ I’m sure you will all agree with me that we are a bit uneasy about

calling a court of law a subsidiary organ of the Security Council. Now, on the positive side, and giving the entire credit to the various Secretaries-General of the United Nations, I must say that from the beginning, the Secretaries-General made it very clear to the United Nations and to the Security Council that in the exercise of our judicial functions, we will not be dependent on the mandates of the Council: we will do our judicial work independently. Judges, although they are nominated by governments and short-listed by the Security Council, are then elected by the entire membership. In fact, to be elected, you require an absolute majority of the General Assembly of the United Nations.

At the Tribunal, we are dependent on the Security Council for amendments of the Statute; the Security Council is, in a way, our legislator, and somewhat parallels the role of the Assembly of States Parties for the ICC. During the last three years, and so as to avoid destabilizing our work by elections, the Security Council has routinely extended the term of office of judges. And the Security Council has amended the Statute, for example, to allow the election of *ad litem* judges and over time has enlarged their competencies.

Nevertheless, when it comes to the performance of our judicial duties, we are not guided by the Security Council; we are guided by our obligations as judges, including our obligations to apply the full panoply of due process rights. For example, when I report every six months to the Security Council about the progress that we have made, are making, or will make with regard to the so-called completion strategy, I tell the Council very openly and transparently that we will do our best to go fast—we know that the Tribunal is a very costly proposition—but never, ever at the cost of or by cutting corners on due process. And this is something that, I must say, the Security Council has accepted. We have never encountered a situation where we had a conflict between our dependence on the Council in any respect and pressure for us to abandon our basic obligations as judges who must act independently.

ABI WILLIAMS

Thank you. Prosecutor, you mentioned that the ICC is often accused of double standards, and the issue is sometimes raised why you are in Country X and not in Country Y, and this issue, of course, usually is raised in the context of Africa, and the criticism that the ICC focuses only on Africa has been a constant for years. Is it a fair criticism? And what are you doing to answer it?

FATOU BENSOUDA

This is a question I get all the time, but I do not get tired of answering this question because I think it is a criticism that is unfair to the Court and also unfair to the victims of these crimes. If you look at protecting the perpetrators of these crimes, if that is the only thing you are looking at, obviously you will make the criticism that we are targeting only Africans. But if you look at the millions of victims of these crimes—millions, in all the situations across Africa that we are dealing with, there are millions of victims of rape, of pillaging, of all sorts of atrocities—then you will know that someone, some institution, has to be there to protect them. And again I always refer back to the role that Africa has played in establishing this Court. Those who were part of the negotiating teams know the big push that Africa, as a continent, made for the establishment of the Court because it was needed in Africa. If you look at the ratification process of the ICC by the African states, Senegal was the first state to ratify the Rome Statute that established the Court.

Today, if you look at the largest number of countries in any region that has signed and ratified the Rome Statute, it's in Africa. I think 33 countries now have signed and have ratified the Rome Statute and are part of the Court. The first referrals to the Court were from Africa—Uganda, the Central African Republic, and the Democratic Republic of Congo. Just last year, one month after I took office, another African state referred a case to the ICC asking for intervention. And I applaud that because it shows that Africa is also very much interested now in accountability and the rule of law.

That is the best option that we have in our hands—that the law must rule. Not violence, but the law must rule. Africa is taking leadership in that, and the continent should be commended for that, not criticized for doing that. I always say that it is not really that the ICC that is even going to Africa. With all the referrals that are coming requesting the ICC's intervention, I am saying that it is Africa that is coming towards the ICC, that is requesting ICC's intervention. And the investigations that we are doing in Africa are because crimes are also taking place there. They are these very serious crimes that are taking place. The victims have this opportunity to let the world hear their voices, for victims to have access to justice; otherwise, they would not.

So I take this criticism very, very seriously. I think it is unfair. And I also say that if you don't want to be targeted—I always say that—if you don't want to be targeted, don't commit these crimes.

THEODOR MERON

I completely agree with the Prosecutor on that. I think the ICC has been unjustly criticized. You have to start somewhere. If you make everything conditional on having an even playing field and eliminating selectivity everywhere at the same time, you will get nowhere.

ABI WILLIAMS

Prosecutor, you mentioned in your last response that Africa is demonstrating that it has an interest in accountability, and so I want to turn on to the broad issue of the purpose and nature of accountability. Recently, the ICC has acquitted one accused. The ICTR has acquitted two. And the ICTY has acquitted three. So are such acquittals compatible with the purpose of accountability?

FATOU BENSOUDA

The ICC is a court, and its responsibility is to deliver justice. Justice does not only mean convictions; it can also lead to acquittals. Of course, it is not a good thing for the Office of the Prosecutor to have acquittals, but I think, as a court, this has lent more credibility to the fact that we will do justice—the judges, the defense, the prosecutions will do justice—and if at the end of a case it leads to acquittal but justice was done, I think it is fair.

ABI WILLIAMS

Judge Meron?

THEODOR MERON

I am glad that you asked this question because my friends in the public at large are sometimes surprised, sometimes even astonished, by acquittals, but it should not be so. We

are a court of law. We do not determine that crimes have not been committed. We do not give certificates of innocence.

The international criminal courts, like domestic courts, adjudicate guilt; they do not adjudicate innocence. We go by the case before us. We look at the evidence. We look at the arguments of the parties. We look at the governing law. And we cannot ever be guided by a political agenda. We cannot be guided by a broader agenda. The day that we judges will decide cases depending on the consequences, that would be the end of international criminal justice—not only for the ICTY but for our colleagues at the ICC as well. We are always dealing with individual criminality: whether the person who is in front of us can be found guilty beyond reasonable doubt. And if he or she can't, we may be very sad about it, but we have a clear judicial duty to acquit him or her. I realize that those acquittals from time to time cause great pain to the victims, but acquittals in controversial domestic cases also cause great pain to the victims. Let's not forget we are a court of law and that we are bound to follow our obligations as a court of law.

But I would like to come back for a second to your question about accountability, if I may. First let me say what I think accountability does not mean. Accountability—and I completely agree with the Prosecutor of the ICC on that—accountability does not mean that every trial should end in a conviction. If every trial, including every international trial, were to end in a conviction, what would be the purpose of this exercise? We would be living in a world in which a person who was charged with an offense would almost necessarily and automatically be found guilty, and this, I would suggest, would be anathema to what we mean by justice, to what we mean by rule of law, and what we mean by the presumption of innocence.

So what do we mean then? If this is not accountability, what do we mean by accountability? Now, for me, accountability means that crimes will be investigated—that when there is sufficient evidence to suggest that a person may be responsible for a crime, that person will be tried and that person will be tried in accordance with the entire panoply of due process protections. In other words, what we mean by ensuring accountability is observing the rule of law. I believe that acquittals, just as convictions, show the health of the system. Would a single one of us want to live in a society where there would be a perfect record—a 100 percent record—of convictions? I'm sure none of us would.

ABI WILLIAMS

From accountability, let's turn now to universality. Prosecutor, how important is universality to the ICC's success? Absent universality or in the face of gaps in the ICC's substantive or temporal jurisdiction, will there be a continuing need for ad hoc or hybrid tribunals?

FATOU BENSOUDA

I think the Court was established at a time when there was really momentum for international criminal justice, for establishing a permanent independent international court. As I said earlier, it's a treaty-based institution that states voluntarily ratify the Statute and become part of the ICC. Of course, we are looking always towards more and more ratification of the Statute, and today we are 122, which I think is over half already of the United Nations membership, but it can be more, and we hope that it will be more. I think any country that is concerned about international criminal justice should really look towards ratifying the Rome Statute and becoming part of the ICC family. And I know that this is a decision that

states make by themselves. It is not the ICC that would invite them to come; it's based on the policies of states as they wish and as they want to join the ICC. But I always say that states should be reminded that it is an institution that is quite relevant and quite important in the fight against international crimes, and it does complement the national systems in that regard.

I am not sitting here to explain why states are not becoming part of the ICC, but the Court would function even better with more states on board. For the past ten years, the ICC has done a lot to work towards universality, and having states become part of it also will reduce to a great extent the gap where impunity can be.

THEODOR MERON

This is, of course, an extremely important question. And while progress on ratification of the ICC Statute is continuing—which is a very, very good thing—we probably cannot expect that everybody will ratify the Statute soon. Therefore, the power of the Security Council to refer cases on an ad hoc basis to the ICC is an extremely important one, and I am very grateful that my own country, the United States, has been changing its attitude towards it. I am glad that the previous administration was willing to abstain on the referral of the question of Darfur, enabling the referral to take place, and I am happy that the present administration has made it possible to send—with the United States' actual affirmative vote—the case of Libya to the ICC. These are very, very good things.

The question which is really so difficult to answer is, how do we deal with the future? It may very well be that the last 10, 15 years have been exceptionally successful in terms of international criminal justice, but this is changing somewhat. It is changing because the ICTY and the ICTR will, in a few years, be out of commission. Fortunately, the United Nations, instead of deciding to go back to the route of impunity, has decided to establish a new tribunal with a terrible name—"Mechanism"—to take over and continue the jurisdiction of the ICTY and the ICTR. Let me assure you that this is a tribunal which is a totally legal tribunal, it is a tribunal, it is a court of law despite its terrible name. That's one of the answers.

But what do we do when there is a situation where, either for legal or political reasons, the Security Council does not wish to refer a question to the ICC, or the ICC cannot accept it? Can we accept that impunity will be the result? Can we accept that people who are committing terrible crimes will not face justice? I personally would not exclude the possibility that, should there be a need one day—and I don't think that this would be in any way critical of the ICC or detrimental to its interests—maybe the Security Council, the international community, or a regional organization will have to resort to some kind of a hybrid or ad hoc institution simply to make sure that atrocities are not left without accountability. I would like to leave the door open to that possibility and not closed.

ABI WILLIAMS

Judge Meron, you mentioned the Residual Mechanism. I was wondering: What challenges have you faced in establishing it? And what challenges do you foresee in pursuing its mandate effectively? Could you say something about that?

THEODOR MERON

It's a very interesting experiment. In contrast to the ICTY and the ICTR, the international community with the establishment of the Mechanism (we call it the MICT, or the Mechanism for International Criminal Tribunals) has established a new model of international justice, a model which will operate in a much more economical way from a manager's perspective.

I was appointed by the UN Secretary-General as President of the MICT. It will be very difficult to operate, but the idea is that there is a roster of 25 judges elected, including myself, by the UN General Assembly, and those judges will merely be on the roster until the President invites them to sit on a case, either a trial case (because we still have nine fugitives from the ICTR, three of whom are high-level and should be tried by an international court and not just referred to Rwanda or elsewhere for trial), an appeal case, or some other matter. So we have the roster approach, which is very interesting, because judges will not be paid an annual salary or a retainer. This sounds great on paper, and it's potentially an efficiency measure and a very economy-promoting measure. But it is not certain that when the day comes—not if, but when the day comes—and I have to phone Judges X, Y, and Z, they will not tell me, “Ted, it's very nice of you to think of us, but we have a family to support, and we have jobs.” Because in contrast to the other tribunals, the statute of the Mechanism allows judges to have other occupations, which is quite clear, because they must support themselves and their families.

One of the interesting legal problems we had is how to establish normative continuity between the ICTY and the ICTR on the one hand and the Mechanism on the other. (The Mechanism will be a sole institution which will take over both from the ICTY and the ICTR.) So we had to make sure that the crimes to be applied would be the same. But it's not a question of crimes alone. We had to work out draft rules of procedure which would be a continuation of the rules of procedure of both the ICTY and the ICTR. And then when there are differences in practice, we had the conceptual question, do we follow the rules of the ICTY, do we follow the rules of the ICTR, or do we go by the principle that the result more advantageous to the person—to the convicted person, to the accused—will be followed? And this is the choice that we have made.

For example, in the ICTY, we have the practice of considering a person eligible for early release after the person has served two-thirds of his sentence. In the ICTR, it's three-fourths, and there was a question of which of those principles we should follow. This was now my responsibility, solely my responsibility, as President, according to the statute established by the United Nations. I decided that I will follow the human rights norm of preferring a solution which is more advantageous to the person, to the convicted person.

In the MICT there has been a range of very interesting situations which we have resolved. We have commenced the operations of the Arusha Branch. We have been in operation since July 1, 2012, and on July 1, 2013, The Hague Branch of the Mechanism will also become operational.

ABI WILLIAMS

Before I open it up to questions from the audience, let me just pose one final question. Let's assume that there is some benevolent entity that can grant you one wish, give you one thing, or make one change that would vastly improve the way that your tribunal works, either the ICC or the ICTY, what would you ask for?

FATOU BENSOUDA

Arrests. It's an important aspect of the work of the ICC. Having investigated and identified individuals who we take to be the persons bearing the greatest responsibility, I think it would be good if we could have those individuals before the Court to continue with the process of bringing justice to the victims.

ABI WILLIAMS

Thank you. Judge Meron?

THEODOR MERON

I agree. I think also perhaps, put more broadly, I would ask for the cooperation of states. Please remember that international criminal courts operate in an environment which is so different from that in which domestic criminal courts operate. A court of law in the United States has contacts with and can count on the support of the Department of Justice, on the Department of the Treasury, and so on. In international criminal courts we are completely alone, and we have to create for ourselves all those structures regarding, for example, funding for defense. In order to accomplish our tasks, we really need the support of the international community for fugitives, first of all, but more broadly for everything that we are trying to do.

ABI WILLIAMS

Thank you. Let us open it up to questions from the floor.

AUDIENCE MEMBER

My name is Jamie Rowen, and I'm with the American Bar Foundation. I have a question. Given that we're a room full of both academics and practitioners, I'm curious how you see the role of legal academics in your work. What kinds of work are beneficial for the courts? What kinds are detrimental? Both legal theory as well as empirical work on atrocities. Thank you.

ABI WILLIAMS

Let me take another.

AUDIENCE MEMBER

Simon Chesterman from National University of Singapore. I thought I would do the flipside of Abi's opening question and ask: If we were coming back 10 years from now, what do you hope you would be able to say the achievements are in international criminal law? And, Ted, if I may, do you think the Mechanism will still be in existence?

ABI WILLIAMS

And one more. I'll take it in threes.

AUDIENCE MEMBER

My name is Benjamin Ferencz. My question is whether it would be helpful for the ICC as well as for the transfer of cases, the ICTY and ICTR, to strengthen the complementarity provisions which are already in the Statute, and put greater emphasis on transferring cases to the domestic jurisdiction of as many states as you can possibly get to accept it? And if so, what do you recommend, and what do you think the public or we can do to accelerate that process?

ABI WILLIAMS

Prosecutor, do you want to start off on the role perhaps of legal academics?

FATOU BENSOUDA

We find legal academics to be very, very important to our work, especially in terms of the research that they are able to do in various aspects of what we do. And as you know, we also make requests of them, to which they give us answers on a voluntary basis. I have two special advisers who are present here from the academic world and who are helping my office in important issues like crimes affecting children in conflict and also in other aspects of the work. They also do criticize the Office. I always hope that those criticisms will continue to be constructive ones, taking into account the practicalities of what we deal with, because that is one problem that we have. My office is always ready to work with and to interact and exchange with academics, we are open to that, but we also hope that it continues to come in a constructive way that will move the issues forward and not just criticize because someone has the ability to do so. But academics are very important for our work, I need to emphasize that.

I will address the complementarity question. Ben, you, more than anybody, know that the Court complements national systems, and I think the idea that we had in establishing this Court is that national systems should take or would take up the responsibility of investigating and prosecuting because once they do that, the ICC will not intervene. But if you look at the capacity for national systems (at least of those that have referred cases to the ICC), the capacity for them to do so, or sometimes even their willingness because they are unable or unwilling to investigate and prosecute, that can be lacking. With regard to states that refer cases to us or where we have jurisdiction to go in and investigate and prosecute, the last thing that we want to do is to open investigations there. During the course of our preliminary examinations of these situations, one of the aspects that we look at is whether that state is in a position to investigate and prosecute or is actually doing it—because it is only then, when the state is not doing it, that we intervene.

A typical example is Guinea. Guinea has been under preliminary examination since 2009, and the office has been looking for ways in which Guinea can investigate and prosecute by itself. We have even gone to the extent of looking for third parties who can assist because of the country's lack of capacity. There may be a willingness or there may be even the expertise and the experience found on the ground, but the basic logistics of investigating and prosecuting are a problem. I have consistently been contacting the government. I have written letters. I have met with the president. I have also tried to encourage the president to give to this panel of judges that was established to investigate the crimes, the capacity to investigate the crimes. So it is not always a question of that the ICC does not want the state

concerned to investigate and prosecute, but it is also the lack of capacity, which brings me to where the international community comes in because we are not a development agency. I think there are other agencies and other countries and partners that can help these particular states to undertake investigations and prosecutions by providing them with the expertise or providing them with logistics or providing them with the technical assistance that they need to investigate and prosecute.

ABI WILLIAMS

Judge, did you want to touch on Simon Chesterman's question on 10 years from now?

THEODOR MERON

Sure. I would like also to say one word about the academic angle. For someone who has spent a quarter of a century teaching international law to say that academic work is of no relevance would be suicidal . . . and I would, of course, not do that. At the same time, let me make it very clear: judges are working exceedingly hard. They read briefs and other materials consisting of virtually hundreds of pages. Therefore, it's extremely important for the parties—which means for the prosecution and for the defense—that when there is an important point to be made, in drawing on legal, scientific, or academic writings, to make sure that they make the point in their briefs because there is a limit to what the judges can do in that respect.

Going back to the question that you have asked me about the Mechanism 10 years from now, yes, the Mechanism will still be in existence because of the way the Security Council has articulated its various mandates. It is quite clear that some of the most high-profile potential appeal cases—the appeal of Mr. Karadžić, the appeal of General Mladić, and the appeal of Mr. Hadžić—will in fact be adjudicated, not by the ICTY but by the Mechanism. While those appeal cases should be done by then, we will have continuing competence over requests for review, continuing competence over questions of pardon and early release, and therefore I expect that the Mechanism will still be existing 10 years from now.

My own ambition for the Mechanism is to try and counter the criticism (which has been made against all international criminal courts) that we are slow. People forget what kind of cases we deal with: mega cases covering large territorial space, large temporal space, and often large in terms of the number of victims involved. Every single word has to be translated, and we always—including for people who choose to represent themselves—have to apply the entire panoply of due process protections, making sure that the timetable we establish is one with which they can cope. So there are many problems here, but still I would like, if I could, to make the Mechanism a successful experiment and to show the international community that you can have both justice and efficiency. I don't know whether it will be possible. I will at least try.

ABI WILLIAMS

We'll take another round of three questions.

AUDIENCE MEMBER

Rebecca Hamilton, soon to be an Associate at Columbia Law. During the time of the first prosecutor, the emphasis was on getting cases to the ICC. We weren't sure whether the ICC

would get any cases at all, but that hurdle has obviously been cleared, and now you have essentially a zero-growth budget, the Security Council handing you cases. At some point the question is going to come: When do you exit a situation? I was wondering if you could talk to us about thinking inside the Court on what the guidelines would be for that and perhaps particularly how it might relate to this question of capacity at the national level. Are the ability and willingness of national jurisdictions to take on and finish justice going to be part of your thinking on that?

AUDIENCE MEMBER

My name is Ademola Abass, United Nations University. Just two short questions to Madam Prosecutor. I am one of those people who has been asking you these unfair questions about whether the ICC has been fair to Africa. If you remember, at Albany Law School last April, I asked the question why the ICC has a very low appetite for non-African cases, and your response, if I remember, is pretty much what you said tonight—that in terms of jurisdiction, it is only when the Security Council refers non-member state situations on that to the ICC that you can act, which is true. But don't you think the question is: Can the ICC say no to the Security Council when the Security Council refers cases? Because I think if the ICC feels that it always has to investigate any time the Security Council refers a case, then the ICC is becoming a poor cousin of the Security Council. What is your response to that?

Regarding my second question, I was hoping that the moderator would talk about the relationship between the ICC and Africa now, because there is a new protocol, as you are aware, which has expanded the jurisdiction of the Court. We don't know whether that should be adopted or not, but I'm quite keen on hearing your view about what the potential relationship of the ICC and the African Court of Human and People's Rights will be, considering that from one point of view, the ICC can only adjudicate on war crimes against humanity and genocide. The new protocol of the African Union confers jurisdiction on the African Court to prosecute such crimes as changes of government like military coups and whatsoever, over which the ICC has no jurisdiction. My question for you is: What if the African states come to you and say, "Look, we have to prosecute these crimes because we have qualified them, as you know, in the African Charter on Democratic Governance 2012, and the ICC cannot prosecute them." What would be your response to that? Thank you.

AUDIENCE MEMBER

My name is Bruce Zagaris, a practitioner here in Washington. My question goes to the ability of the courts to ascertain the assets of the defendants in certain cases. A good example of this would be in the Charles Taylor case where it was said that Mr. Taylor had huge amounts of money but he still had a public defender, partly because the court or the registry was unable to show that he did have a lot of wealth. It also bears on the ability to trace, freeze, seize, and forfeit assets, and to use them to compensate the victims. You have this in virtually all of the cases. So my question is, do you think that the courts have the appropriate authorities and the resources to be able to accomplish these goals? If not, what would you suggest in terms of improving upon the authorities and the resources to accomplish these goals? Thank you.

FATOU BENSOUDA

I think the first question came from Rebecca about existing guidelines on the situations that we investigate and prosecute where we are. Like the ad hoc tribunals, there should come a time when the Court has to exit a particular situation—we cannot be there forever. If you look at what we did in the DRC, it was a situation where the conflict was moving in terms of gravity from one area to another and continues to do so. We have found the need to investigate and prosecute in DRC in phases, if I may put it that way, because at the time we started with Lubanga, the time when we started the investigations, it truly was the gravest, and that is where we thought we should focus our investigations and prosecutions. Recently, we started moving. We are looking into the Kivus. Exiting the country completely is a huge responsibility. Because what we were looking to do to be able to exit, and to exit with a clear conscience, is to make sure that the plans we had for working with the local judiciary to investigate themselves, to continue working on the cases themselves, were in place.

Unfortunately, it has not quite worked out that way. That is one way where we think if we go into a country, use positive complementarity, make sure that we at least get the country to be assisted by other partners to also investigate and prosecute, then it will be easier for the ICC to exit and for the local judiciary to take over. But in the example of the DRC, we have had huge problems. These are mainly problems of security—of protection of witnesses, ICC staff, and the judges themselves. So this has not been possible. But we are trying to look for ways in which the local judiciary can take over and the ICC can exit and look at other situations.

I had a long question from my friend about the low appetite for non-African state cases, and I think, as you have seen, that I responded to that earlier, and I think it's one of the main questions that you asked. But coming to the question of this protocol by the African Union establishing this court or division which will try ICC cases, I always say that we must continue to look for ways of addressing these crimes. We must make sure that there will be no impunity for the crimes. If it is the choice of the African Union to establish this division that will investigate and prosecute these crimes, I think it's a good thing. It is not that it is because the ICC will not work if this happens. And if you extend the issue of complementarity, we are looking towards national systems being able to investigate and prosecute these crimes. But if regional systems are also able to investigate and prosecute this, I do not think that that is something that the ICC would be against.

And there was a third question.

ABI WILLIAMS

The third question relates to the ability of the Court to ascertain the assets of defendants and how that could be strengthened.

FATOU BENSOUDA

Yes. In our investigations of these cases, that is one of the things that we do. We first try to ascertain the assets of the individuals, and for that again we come to the issue of cooperation with states. When we believe or suspect that an individual has assets in a particular state, we ask for assistance from that state. But I have to say that with respect to that, we have had our challenges. It has occasionally been difficult in getting states to assist us in tracing the assets of individuals and in requesting that the Court freeze them. We do have a mechanism

already in the Office to do that, and we have been trying for a long time to set up a unit that will only deal with financial investigations—not only for freezing or tracing of assets but also for looking at the proceeds of these crimes and at who is sponsoring these crimes. This is something that my office is looking at seriously, and of course we will seek help outside of the Office to do that, but it has been a challenge to get this. We have seen not only Charles Taylor, but also Laurent Gbagbo, who was president of Côte d'Ivoire, being provided a defender by the Court. You've seen Jean-Pierre Bemba, who is believed to be very rich, also being supported by the Court, and that is because we have had our challenges in knowing and tracing where exactly their assets are.

ABI WILLIAMS

Unfortunately, we have run out of time, but I will give just the last word to Judge Meron, if he wants to say something briefly in wrapping up.

THEODOR MERON

Just very briefly with regard to those situations in which the Security Council refers cases to the ICC: I do not think that the United Nations should get a free lunch. If the United Nations sends cases to the ICC, it is fair that the United Nations should budget for them. It is not fair that the members of the ICC should do it. Conceptually, it is, I think, a basic norm that the UN should accept the responsibility for funding those cases when the Security Council uses the ICC for those referrals. It is very much as if the Security Council were treating the ICC as an ad hoc tribunal, except that the tribunal is already standing, which produces a much greater economy and efficiency. But the United Nations should accept that it should pay for that exercise.

FATOU BENSOUDA

I think there was a question of whether we are bound to take all the cases that the UN Security Council refers to us. The answer is no. When we get these referrals, we still have to do our preliminary assessment of whether the crimes fall within the ICC's jurisdiction or whether they are ICC crimes. We make all these assessments, and if we do find that they are not, then we are not bound to take cases referred to us by the UN Security Council.

ABI WILLIAMS

This has been a fascinating and stimulating discussion. It only remains for me to thank Judge Meron and the ICC Prosecutor, and to thank you for attending this session.