dass der Strafgerichtshof noch 1996 eine bloße Utopie war, eine Art Traum, wenn man bedenkt, was seither erreicht wurde, dann wird deutlich: Unsere Arbeit ist keineswegs aussichtslos.

Heute, im Jahr 2013, gibt es auch keine andere Alternative: Auch künftig muss alles getan werden, um schwerste internationale Verbrechen wie Völkermord, Verbrechen gegen die Menschlichkeit, massenhafte Kriegsverbrechen und das Verbrechen der Aggression möglichst wirksam zu verfolgen und zu bestrafen. Vorrangig und am besten geschieht dies durch nationale Strafrechtssysteme; wo diese versagen, hilfsweise durch den Internationalen Strafgerichtshof, der für diese so bedeutsame, schwierige Aufgabe weiter gestärkt werden muss.

Der Gerichtshof hat in seiner kurzen Existenz eine enorme Entwicklung vollzogen, nicht nur personell, sondern auch institutionell. Ich bin der festen Überzeugung, dass sich diese immer weiter konsolidieren wird, sie erscheint irreversibel. Der Gerichtshof wird mehr und mehr akzeptiert werden und weitere Staaten werden dem Römischen Statut beitreten.

Auch wird der Gerichtshof bald in ein neues Gebäude umziehen, das nicht nur die Effektivität des IStGH steigern wird, sondern auch für einen Zeitraum von 100 Jahren angelegt ist. Somit ist zu hoffen, dass der Gerichtshof nicht nur in 30 oder 50 Jahren, sondern auch in einem Jahrhundert noch darüber wachen können wird, dass Täter internationaler Kernverbrechen nicht straflos bleiben, sondern nach dem Römischen Statut verfolgt werden.

Aber auch dann wird weiterhin eine fundamentale Realität, ein Mechanismus, wirksam sein, den die Richter des IStGH seit 2003 immer wieder erfahren mussten: Das System internationaler Strafgerichtsbarkeit nach dem Römischen Statut kann und wird nur so stark, effektiv und glaubwürdig sein, wie es die Vertragsstaaten und die internationale Gemeinschaft selbst machen.

Legacies of the International Criminal Court under Construction

Viviane E. Dittrich*

Abstract: The notion of legacy has been absent in ICC discourse, while the theme of completion and legacy became increasingly topical against the backdrop of closure of the ad hoc tribunals. This article argues that a nuanced legacy concept enriches our understanding of the ICC, highlighting the interplay and institutional dynamics of its permanent nature and finite elements and proceedings. The focus is on the construction process of multiple legacies in which the Court, while gradually engaging in legacy planning, plays a central albeit limited role. By contributing an innovative analysis, embedded in a systematic conceptualisation of the legacy process, the article sheds light on the already ongoing formation of the Court's legacies and struggle over the power of interpretation.

Keywords: International Criminal Court, ad hoc international criminal tribunals, legacy, impact, completion
Internationaler Strafgerichtshof, ad hoc Strafgerichtshöfe, Vermächtnis, Wirkung, Abwicklung

1. Introduction

Against the backdrop of closure of the ad hoc international criminal tribunals, the theme of completion and legacy has become increasingly topical. Legacy has become a buzzword and the notion is omnipresent that international criminal tribunals should leave a lasting impact beyond prosecuting a select number of individuals. To date, however, there has been remarkably little discussion of legacy in relation to the International Criminal Court (ICC or 'Court' hereafter). After its tenth anniversary it is timely to engage in much needed critical analysis to theoretically accompany the burgeoning debate of the Court's impact and effects. The Court is hailed as milestone in the pursuit of international justice by some and criticised as failure in theory and practice by others. The topic of impact and legacy is significant as it touches upon constructions of purpose, raison d'être and legitimacy. The purposes of international criminal trials have been pointedly summarised as truth telling, punishment, healing, advancement of the rule of law, and reconciliation (Fletcher & Weinstein 2002) or retribution, deterrence and expressivism (Drumbl 2007). The ICC has faced the challenge of earning and maintaining legitimacy, carving out its own institutional space, assessing impact, and legacy building, whether explicitly acknowledged or not.

This article argues that conceptualising a nuanced legacy lens enriches our understanding of the ICC. It highlights the interplay of its permanent nature and institutional dynamics of finite elements and proceedings which have been widely neglected. The notion of legacy is introduced as relevant for a holistic analysis of the ICC in relation to the ad hoc tribunals rather than in artificial divorce and for avoiding a black-boxing of the Court. The focus here is on scrutinising Court developments in light of an

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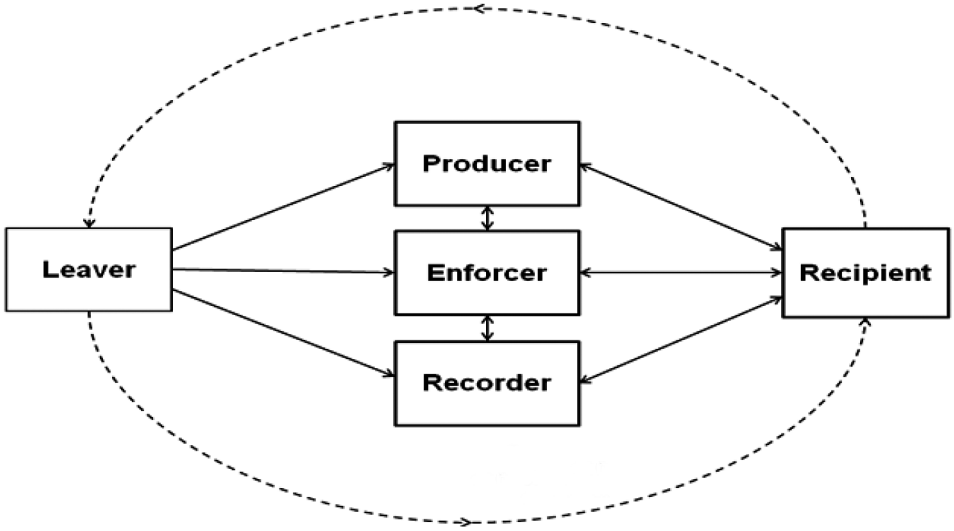
adequate legacy concept relevant to a permanent institution in lieu of attempting another empirical assessment of the effectiveness of the ICC per se. The Court, wheather or not engaged in extensive legacy planning, plays a central albeit limited role in the construction process of multiple legacies. By exploring the already ongoing formation of the Court's legacies and struggle over the power of interpretation this article contributes an innovative analysis, embedded in a systematic conceptualisation of the legacy process which could take more centre stage in the case of the ICC.

Figure 1: Legacy actor model with ideal-typical interaction



2. Legacy construction

Talk about legacy often arises in a valedictory or commemorative setting when reflecting upon accomplishments and the meaning of being. We have witnessed what might be called the 'legacy turn' (see Dittrich 2013). Indeed, legacy building has become an institutionalised endeavour at the tribunals and legacy assessments abound. It could be argued that the consequences and impact of international criminal trials are increasingly questioned. This does not seem coincidental, as the International Criminal Tribunals for the former Yugoslavia and for Rwanda (ICTY and ICTR) and the Special Court for Sierra Leone (SCSL) are in the throes of their respective completion strategies, transitioning to what has become known as 'residual mechanisms' – the successor institutions that continue the ongoing obligations or residual functions. The Independent Expert Report on the Special Court for Sierra Leone by Antonio Cassese (2006) noted: "This is the question of a tribunal's legacy: tribunals must leave something useful behind." But what this "something useful" is remains disputed, given different expectations of legacy. A broad concept, which may include contributions to law, justice, peace and reconciliation, stands in contrast to a more conservative notion covering the legal and judicial arena solely. Legacy has broadly been defined as "that which the Tribunal will hand down to successors and others"[1] and more narrowly as a court's "lasting impact on bolstering the rule of law… by conducting effective trials to contribute to ending impunity, while also strengthening domestic judicial capacity" (OHCHR 2006: 4-5). Here, questions of purpose and interpretation of the legal, political, social, economic or cultural components of international tribunals take centre stage.

The concept of legacy seems to be engulfed in a paradoxical situation: it is understudied, yet rhetorically overused. The common concept is too simplistic, static and one-dimensional. Two brief observations are in order: First, the term is often used in the singular, which seems problematic and misleading. A plural conceptualisation of legacy is advocated here in order to pinpoint to the unfolding of multiple legacies instead of a single objective legacy. Second, most often only marginal attention is paid to the social process behind legacies. This oversight is problematic for two reasons. It turns a blind eye to their construction and the interplay of intentionality and non-intentionality. Moreover, such oversight ignores actor diversity. The dyad between leaver and recipient frames the legacy process. In the case of the ICC, a multiplicity of legators is to be recognised: the Court e.g. in a given situation, different Court organs or individuals such as the Prosecutor or President. The manifold legatees range from victims, witnesses, defendants, court staff and organs, various professionals, civil society, to local and international courts, governments, the United Nations and international community. Five main ideal types of actors, indicative and reflective of the actor diversity, have been distinguished (Dittrich 2013): legacy leavers, producers, enforcers, recorders, and recipients (see Figure 1).

The construction of legacies is an inherently social process. The ICC's significance in international relations will depend as much on its successful performance as on the perception and construction of its success, in other words, how the institution's impact and effect is framed. High and conflicting expectations exist regarding what the legacies are and should be in the areas of law, justice, peace and reconciliation, given different legacy concepts. There are no universally agreed desired legacies since the vantage point of legacy actors is paramount. Put simply, legacy means different things to different actors at different times. International criminal tribunals do not operate in a political vacuum; struggles over the power of interpretation and editorial control are inevitable. Legacies can acquire significance and meaning beyond the original intent and emphasis of a legator ('emergent' legacies). It is the action inside and outside of the courtroom in its wider context that shapes legacies. The remainder of this article will briefly sketch three moments of ongoing legacy constructions

1 http://www.icty.org/sid/10293 (last visited 30 June 2013).

driven by the Court and other legacy actors such as states, NGOs and individuals: the ICC's creation ("coming into being"), first ten years of existence ("coming into motion") and the gradual realisation of institutional finiteness despite institutional permanence ("coming to an end").

3. Coming into being: 'All roads lead to Rome'

The work and impact of a tribunal starts before the first day of trial. Similarly, legacies do not simply emerge after closure. The timing, mode and momentum of the Court's creation as a permanent institution alongside its subsequent judicial work and other activities shape its perception, image, impact, and legacies. Often, however, stakeholders neglected to recognise that serious attention to a tribunal's legacy should begin before its very creation, not just once it closes. This was recognised by former UN Secretary-General Annan: "And it is essential that, from the moment any future international or hybrid tribunal is established, consideration be given, as a priority, to the ultimate exit strategy and intended legacy in the country concerned" (UN S/2004/616: 16). It seems the topic of legacy was relegated to the ad hoc tribunals introducing a strange conceptual divorce between the discourse and the thinking surrounding legacy for the ad hoc tribunals and the ICC. Yet the mainstream depiction inserts the establishment of the ICC in a narrative of international law's linear progress: from Nuremburg to The Hague – such is the dominant refrain in academic research, political discourse and media reporting (see overview in Koller 2012: 99). But such a narrow linear portrayal obscures certain influences, contestations, fissures and delays in the history of international criminal prosecutions. A critical analysis of this "exercise in metaphorical cartography" exposes the weaknesses of the unifying narrative of linearity by emphasising that "the path which led to the creation of the ICC was not one but multiple: all roads led to Rome" (Koller 2012: 111). It is argued here that legacy constructions can be traced to the Court's establishment, conceptually in Rome and physically in The Hague.

The ICC was discursively constructed as triumph with positive legacy constructions beginning in Rome and even before. In light of its symbolic power at the interface of international politics and international law, former UN Secretary General Annan referred to it as "the most significant recent development in the international community's long struggle to advance the cause of justice and rule of law" (UN S/2004/616: 49). The ICC has been hailed as "the most significant development in international criminal law since the existence of the discipline" (Schabas 2004: 25), a "significant building block in the construction of a truly international legal community" (Cassese 1999: 145), "the brightest star in the cosmopolitan firmament" (Simpson 2007: 39) and a "global civil society achievement" (Glasius 2007: i). For Mégret (2001) the year 1998 represents nothing less than a pivotal moment in international politics like 1648. The ICC's pursuit of justice alongside peace processes has been characterised as "ambitious vision for international justice" (Waddell & Clark 2008: 8). With his seminal essay "Perpetual Peace" (1795) Kant already shaped cosmopolitan aspirations to peace and justice, sketching out the scenario of an annihilating war leading to a perpetual peace in the vast grave of mankind. For proponents, the ICC was not merely a question of desirability, but of necessity (e.g. Kirsch 2005) vis-à-vis the existence of and failure of politics since "compromise is the art of politics, not of justice" (Bassiouni 1997: x). The dedication to legalistic politics (Shklar 1964) was seen as cemented with the historic milestone of the adoption of the Rome Statute on 17 July 1998. The date of 17 July was officially chosen by the Assembly of States Parties (ASP) during the Kampala Review Conference in 2010 as Day of International Criminal Justice to celebrate the anniversary of the Rome Statute and landmark achievements with formal events and a flag-raising ceremony.[2]

In a different light, the Court was constructed as a cautionary tale with sceptic legacy constructions in light of Realpolitik. Realist critics view any triumphalism as myopic, arguing that the ICC "suppresses considerations of power; it lacks democratic accountability; and it cannot reliably balance legal benefits against possible political costs" (Goldsmith & Krasner 2003: 53). Rieff characterises the ICC as a 'Court of Dreams', an institutional body for a non-existent international political structure: "Its real rationale derives from the hope that, somehow, law can deliver us from situations which politics and state craft have failed to deliver us" (Rieff 1998: x). In a similar vein, Wippman (2004) cautions that decisions on justice can hardly be left solely to the discretion of a legal institution such as the ICC. Hailing the Court as a triumph of law over politics seemingly glosses over the dilemma of substituting law for politics. The ICC rather "has become a symbol of both the promise of international law and its stunning shortcomings" (Rubin 2006).

The Court seemed caught between opposing views: for some it is not political enough, for others it is too political. The actor landscape has been diverse from the beginning. The idea of pursuing the promise of universal justice lay dormant for nearly fifty years falling hostage to power politics during the Cold War. On 17 July 1998 the Rome Statute was adopted, with 120 states voting in favour, 8 voting against and 21 abstaining. All states, whether negotiating the Rome Statute or not, whether supporter or critic, whether State Party or non-State Party, are legacy actors. Other prominent actors are NGOs, lawyers, court officials, academics and media representatives. Different actors have been instrumental in constructing different types of legacies, from the ICC's journey before Rome, at Rome and after Rome. In the first ten years of its existence the Court itself took on the role of legacy actors.

4. Coming into motion: 'International justice is in motion'

Since the Court's coming into being, legacy building has continued inside and outside of the Court. The ICC has made

2 http://internationalcriminaljusticeday.icc-cpi.info/en.pdf?view=article&catid=3%3Apress-and-media&id=11%3Aicc-launches-celebrations-for-17-july-international-criminal-justice-day (last visited 30 June 2013).

a name for itself within politics, media and academia, or more precisely, as argued here, has made multiple names given the multiplicity of actors partaking in legacy constructions. On 24 May 2008 the first ICC Chief Prosecutor Luis Moreno-Ocampo triumphantly declared that "[i]nternational justice is in motion."[3] Whether international justice is in fast or slow motion though lies in the eye of the beholder. In the following, three factors shaping existing views will be identified: the ICC's output record, its self-understanding and presentation and its relationship with states.

The caseload of the Court has consistently grown, but the efficiency and effectiveness of the Court is in dispute. In the inaugural years the first order of business was finding business. Looking for business or staying in business remains a preoccupation today (Seils 2011). As of June 2013, 18 cases in 8 situations have been brought before the ICC. The Court has opened situations in the Democratic Republic of Congo, Central African Republic, Uganda, Sudan, Kenya, Libya, Côte d'Ivoire and Mali. The Office of the Prosecutor is currently conducting preliminary examinations, including in Afghanistan, Georgia, Guinea, Colombia, Honduras, Korea and Nigeria. However, a simple case count might be a poor measure of success by the ICC in light of the principle of complementarity. As Moreno-Ocampo (2008: 55) declared: "On the contrary, the absence of trials before this Court, as a consequence of the regular functioning of national institutions would be a major success" and "[g]enuine investigations and prosecutions of serious crimes at the domestic level may illustrate the successful functioning of the Rome system" (ICC-OTP 2010: 18). However, execution of arrest warrants, state cooperation and eventual closure of situations are determinants in the construction of legacies. The ICC's output record, which is the object of much scrutiny, includes hundreds of decisions and only two judgements, the conviction of Thomas Lubanga Dyilo on 14 March 2012 resulting in a 14 year sentence and the acquittal of Mathieu Ngudjolo Chui on 18 December 2012.

After the first decade the ICC continues to face challenges and critiques. The first critique focuses on how justice has been pursued, i.e. the sequencing and timing of investigations, indictments and trials. The second, sharper critique scrutinises international criminal justice linked to the 'liberal peace' paradigm per se, which hardly seems to critically engage with its contested underpinnings and policy ramifications. In practice, critique of its punctuated progress, bureaucratic and technical procedures and widespread uncertainty about the effectiveness and impact is ever growing. The spectrum of critical voices was visible for instance at the UN General Assembly thematic debate on "The Role of International Criminal Justice in Reconciliation" on 10 April 2013 or the Security Council debate on Conflict in Africa on 15 April 2013. Adopting a legacy perspective enables a holistic view with contestation as essential moment of legacy construction. Legacy recorders have identified certain key issues for the Court. Debates in particular are concerned with the future of complementarity (e.g. Stahn 2012), the crime of aggression

3 http://www.icc-cpi.int/otp/otp_bio.html (last visited 30 June 2013).

Figure 2: ICC's 10-year anniversary logo[7]

(e.g. Trotter 2012) and victim participation. Moreover, the Court is at the heart of what is commonly known as the 'peace versus justice' debate. While critics argue vociferously that aspirations towards justice in fact impede the realisation of sustainable peace, there is no unequivocal evidence to suggest that the ICC has definitely undermined or frustrated peace efforts and has had a deterrent effect. In light of legacy building, the resultant ambiguity is difficult to navigate for the Court.

The tenth anniversary of entry into force of the Rome Statute in 2012 was a welcome moment seized by the Court. At the 2010 ICC Review Conference Ban Ki Moon had ceremonially declared "The era of impunity is dead. We have entered a new age of accountability."[4] At its tenth session in December 2011 the ASP invited "…all parties to commemorate the contribution of the International Criminal Court to guarantee lasting respect for and the enforcement of international justice".[5] Such symbolic celebration of an anniversary was a first in the realm of the international tribunals. The ICC launched a 10-year anniversary website, developed a logo (see Figure 2) and encouraged commemorative events in 2012.[6][7]

The logo may be seen as visible example of institutional branding and thus highly relevant to legacy building. The slogan of the logo, '10 Years Fighting Impunity', demonstrates the Court's own sense of purpose and achievement. In recent years the ICC started several initiatives geared towards the media and the public, such as International Justice Day celebrated on 17 July and a public survey about the ICC website launched in summer 2013.[8] In the context of the festivities some critical aspects remain to be recognised. A reason for this seems that a prominent dimension of the Court's self-understanding is its permanent character. The physical architecture of an institution is a key component in legacy planning. Buildings represent a projection of self, and appearances shape how an entity is viewed. Being housed in temporary and not purpose-specific facilities may not convey permanence, commitment and gravitas. In December

4 http://www.un.org/apps/news/story.asp?NewsID=34866#.UdC-sjtmiSo (last visited 30 June 2013); http://www.unelections.org/?q=node/2386 (last visited 30 June 2013).
5 Resolution ICC-ASP/10/Res.5, §5.
6 http://www.10a.icc-cpi.info (last visited 30 June 2013).
7 http://www.10a.icc-cpi.info/index.php/en/logos-and-banners (last visited 30 June 2013).
8 http://www.icc-cpi.int/en_menus/icc/press%20and%20media/Pages/icc-website-survey.aspx (last visited 30 June 2013).

2007 the ASP decided that the ICC should be relocated in newly built permanent premises. The Chair of the Oversight Committee Roberto Bellelli stated that "this is a point of no return on the path of international criminal justice […] the transition […] to a permanent architecture in international relations [whose] roots […] are being excavated in a visible and permanent structure in the ground of The Hague" and ICC President Song echoed this by stating "An institution of global significance deserves a world class premises."[9] However, more *in situ* ICC proceedings may become a reality in the future. From a critical perspective, the current focus on a representative building with full institutional capacity in The Hague symbolically might be ambivalent for the principle of complementarity.

The state support enjoyed by the Court at its inception after swiftly meeting the threshold of 60 States Parties is yet to be matched by political and financial stamina for the Court's everyday work. As of 1 June 2013, 122 countries are States Parties to the Rome Statute, so more States Parties than 120 countries adopted the Rome Statute on 17 July 1998. Some significant countries, for instance China, India, Russia and the United States, remain outside the Rome framework, something that is critically viewed as hampering its universalist aspirations. There have also been significant delays with States Parties adopting national legislation. Antonio Cassese's (1998: 13) description of the ICTY also fits the ICC as "armless and legless giant which needs artificial limbs to act and move. These limbs are the state authorities". States have a considerable role in legacy building as the nature and level of state cooperation is crucial. Prolonged episodes, for example the non-arrest of Sudanese President al-Bashir or the non-transferal of Saif al-Islam Senussi from Libya, are often lamented as ridiculing and undermining the institution. Two relationships are especially critical for legacy building: relations with Africa and with the United States. First, given the persistent perception of an African focus the Court's critical relationship to Africa and African Union has taken centre stage (e.g. Keppler 2011). Africa has been considered as a laboratory for experimentation and development of international criminal law (Marikandiza 2009). Recently, the May 2013 African Union declaration and the motion in the Kenyan parliament to withdraw from the ICC on 5 September 2013 have demonstrated conflicting legacy constructions. However, important nuances are ignored when the reality of African agency within the ICC framework with 34 African State Parties and their self-referrals are overlooked. A strengthening of the Court's outreach activities may assist the ICC in counterbalancing what it perceives as bias. Second, the relationship with the United States has developed from hostile and ambivalent engagement with the dramatic withdrawal of its signature to the Rome Statute in June 2002, the 'American Service-Members Protection Act' by Congress in 2002 and the negotiation of Bilateral Immunity Agreements with some hundred states to a more constructive 'relationship of engagement' (Rapp 2010). The extension of the Rewards for Justice programme to the ICC in early 2013 illustrates this. While international justice is in motion, legacy constructions will rely on if, when and how these various challenges and dilemmas are addressed. Central to this is a recognition that despite being created as permanent body the Court is faced with finite elements and proceedings and how certain moments of completion are addressed and framed.

5. Coming to an end: 'All's well that ends well'

For any new institution the focus is on beginnings and not on endings, yet anticipating and framing the 'end', however big or small, is paramount not only for the ad hoc tribunals but also for a permanent court. The notions of 'completion', 'residual functions' and 'legacy' have gradually become part and parcel of tribunal parlance and activities. However, for the ICC such discourse has been absent, arguably regarded as blue-skies thinking by many who question why and how a permanent institution might consider closure and legacy. The term legacy has been seemingly eschewed inside and outside the Court. Here it is argued that the term deserves to be explicitly introduced as a concept the ICC is grappling with. While the ICC itself may be a permanent body, there are elements that are ephemeral and finite: staff appointments expire, decisions or cases are completed, field presence is reduced, milestones are achieved, review conferences are held and anniversaries are celebrated.

To date, the topic of completion has been subordinate or eschewed by the ICC. Until 2010 any discourse on completion or exit was non-existent. In light of sustainability of the Court qua institution and its presence and engagement in given countries, the imperative of contemplating completion has become palpable. By design and by necessity the ICC cannot remain engaged forever in all proceedings ever opened. The scenario of unlimited ICC operations in time and space would defy the purpose of the Court and present a road towards failure – failure of legal proceedings, resource management, political responsibility and diplomatic relations. The timing and modalities of ICC engagement and, ultimately, disengagement remain under-examined. In light of the Court's geographical reach and complexity and of the distinctiveness of each situation, it seems critical to develop and implement situation-specific exit strategies. Various dimensions play a role, involvement of local actors, assistance in terms of transfer of knowledge, reparations, witness protection and outreach. It was once reported that the ICC is "therefore closely following the discussions about completion strategies, residual functions and legacy in the other tribunals and courts, with a view to building on their experience and knowledge."[10] In December 2011, the ASP Committee on Budget and Finance duly noted "that consideration should be given to formulating exit-strategies for situations where the Court has completed its judicial activities" (ICC-ASP/10/20: II, 2, §19). The newest development has been the creation of a Field Coordination Working group in the Registry to prepare strategies and provide policy orientation for a Court-wide policy on

9 http://www.icc-cpi.int/en_menus/icc/about%20the%20court/permanent%20premises/latestnewsandcalendar/Pages/-ICC-holds-groundbreaking-ceremony-for-Permanent-Premises-construction.aspx (last visited 30 June 2013).

10 http://www.icc-cpi.int/NR/rdonlyres/3358BCD6-6DC3-42D6-91F8-ABC5FFED3CA6/0/ICCASP912ENG.pdf, § 23 (last visited 30 June 2013).

residual functions and legacy.[11] Decisions on guidelines or criteria implicitly will likely be based on conceptions of purpose, necessity and desirability and be accompanied by management of expectations. On 17 November 2012, in the margins of the ASP, the NGO No Peace Without Justice organised a side-event on the development of a comprehensive ICC completion strategy. Does an exit strategy or transition strategy, completion strategy or continuation strategy fit best conceptually? Beyond any semantic exercise, the choice of terms suggests different connotations. A strategy can be framed as a reaction to possible funding constraints, capacity limits or institutional overstretch given the expanding caseload. Alternatively, it can be framed as a proactive forward-looking embrace of opportunity. Hopes are high that it might for instance allow a "second bite at the cherry" of complementarity (Hamilton 2012), so close scrutiny needs to be paid to the Court's stimulation of domestic proceedings.

The notion of legacy has been remarkably absent in ICC discourse. The SCSL, established the same year as the Court, already "consider[s] the important issue of the legacy the Court will leave behind" in its First Annual Report (SCSL 2003: 4). While at the ad hoc tribunals legacy has become a leitmotif as mentioned above, the issue of legacy is viewed as remote consideration rather than current preoccupation for the ICC: "In the future, […] consideration could be given to addressing, in a timely manner, relevant legacy issues" (ICC-ASP/11/24, § 20). The ICC appears to reluctantly embrace its role in legacy leaving as this self-understanding at first glance seems to be in opposition to its self-understanding as permanent court. Resorting to a nuanced legacy concept emphasizes the multidimensionality and multiplicity of legacies with different legacy leavers and recipients, producers, enforcers and recorders involved (see Figure 1). A focus on relationship of legacy actors within the Court deserves particular attention as the social lives of the tribunals have been sidelined in international legal scholarship (Meierhenrich 2008). Several levels and layers of legacies can be identified and will be briefly sketched. At a macro level, legacies of the institution include its contribution to international criminal law through decisions on procedural and substantive law, for instance regarding the right to a fair trial, lowering of crime thresholds or the ICC as a trigger to a definition of the crime of aggression. At a meso level, legacies of specific situations and cases pertain to the interplay of inter alia the principle of complementarity, prosecutorial policy and state cooperation. At a micro level, legacies of individual actors, e.g. ICC President, Registrar, Prosecutor or judges, are shaped by multiple factors such as leadership style, institutional priorities, political climate and timing. For instance, the legacy of Moreno-Ocampo will arguably be coloured by his ability to open investigations, and the legacy of the current Prosecutor Fatou Bensouda is likely to be assessed in terms of completion of investigations (see Hamilton 2012). The 2012 documentary "The Court" directed by Marcus Vetter and Michele Gentile is a recent example of a legacy recording of the Office of the Prosecutor and Moreno-Ocampo. Multiple legacies are constructed and shaped daily, by numerous factors such as the Court's judicial work, decisions, public relations work and individual staff action. The politics of legacy building in the wider actor landscape thus deserve greater attention.

11 Ibid, § 24.

6. Conclusion

Ultimately, constructions of legacies are both a reflection and a sideshow of broader debates about the Court's raison d'être, international involvement in conflict and post-conflict settings and the meanings of justice. It has been argued that the 'legacy turn' in the realm of the tribunals is of great relevance for the ICC. At the ad hoc tribunals, legacy has become a leitmotif in terms of discourse and specific projects, reporting and self-understanding. Adopting a legacy lens for the ICC sheds light on the interplay of permanent and finite institutional dynamics, long-term planning and 'ad-hocism'. Differences in institutional set-up, scope and time horizons between the tribunals and the Court should not be dwarfed. The use of the term legacy simultaneously needs to be considered and nuanced. It has been argued that the common concept of legacy in the singular is too simplistic, static and one-dimensional, as it neglects the dynamics of multiple legacies. A focus on legacy actors has been markedly absent to date. The presented legacy-actor model aims to correct this oversight by identifying five main actors: legacy leavers, producers, enforcers, recorders and recipients. Political and social dynamics involved in the creation, contestation and control of legacies needs to take centre stage. The ICC is a central, albeit only one actor, alongside states, organisations, NGOs and individuals. In light of the contours of the framework sketched above, legacy constructions have accompanied the ICC's coming into being, coming into motion and coming to an end, starting before the establishment of the Court and proceeding after any exit strategy is implemented in the future. Three different levels of legacies have been distinguished.

The legacies of the ICC are under construction in light of ongoing debates on the impact and the measurement of success and effectiveness of tribunals. The topic of completion and legacy still remains remarkably absent in official discourse and assessments. Conceptualising and implementing situation-specific exit strategies is gradually gaining greater attention. Indeed, despite its permanent nature the Court needs to carefully consider the issue of exit and completion not in terms of overall institutional demise but in terms of various finite elements, for instance meaningfully terminating court operations in specific situations. In this context, the ICC will need to further grapple with issues such as complementarity, field presence, outreach and management of expectations. It is paramount to further scrutinise the dynamics between exit strategies and legacy constructions. Institutional dialogue with the ad hoc tribunals could be intensified in this regard given their first-hand experience in legacy planning. However, notwithstanding even meticulous planning, the legacies will remain sites of construction and struggles over the Court's meaning for the institution itself, a given situation and society and international criminal justice.

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Völkermord abschaffen: Ein Gedankenexperiment

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Abstract: The 1948 Genocide Convention is rightly considered a milestone in the development of international criminal law. Due to an imperfect definition, overblown expectations by lawyers, politicians and the general public, and enormous difficulties in proving acts of genocide, the law of genocide might have turned into an obstacle and burden to the evolution of international law and the functioning of institutions like the International Criminal Court. It is argued that there is no need for the law of genocide in the 21st century, and that the goals of international (criminal) law can better be pursued by focusing on the broader and more practical definition of crimes against humanity.

Keywords: International Criminal Court, genocide, crimes against humanity
Internationaler Strafgerichtshof, Völkermord, Verbrechen gegen die Menschlichkeit

1. Ein Blick zurück

Rückblicke auf das Wirken einer Institution wie den Internationalen Strafgerichtshof (IStGH) sind kein leichtes Unterfangen. Persönliche Einstellungen zu Sinn und Zweck von Strafe, dem Verhältnis von Opferschutz und Beschuldigtenrechten sowie der Effektivität völkerrechtlicher Verhaltenssteuerung verstellen allzu leicht den Blick auf das zu begutachtende Objekt; die Erwartungshaltung des Rückblickenden prägt das gezeichnete Bild: Während ein optimistisch gesinnter Betrachter die Anzahl der eingeleiteten Verfahren, die gegen amtierende (*al-Bashir*) und ehemalige (*Gbagbo*) Staatschefs erlassenen Haftbefehle und die bereits gefällten Urteile (*Lubanga*, *Chui*) betonen und den IStGH als Symbol im Kampf gegen die Straflosigkeit preisen würde, dürfte ein pessimistischer Beobachter die ressourcenintensiven und wenig erfolgversprechenden Verfahren (*Kony*), die starke Fokussierung auf afrikanische Bürgerkriege fernab des Interesses der ständigen Sicherheitsratsmitglieder (*Zentralafrikanische Republik, Demokratische Republik Kongo*), Ermittlungen als Legitimationsquelle für militärische Intervention (*Libyen*), die selektive Auswahl der Täter (*Kenia, Uganda*) und Taten (*Lubanga*) sowie rechtsstaatlich zumindest fragwürdiges Verhalten der anklagenden Behörde (*Lubanga*) unter dem ersten Chefankläger *Luis Moreno-Ocampo* hervorheben. Erschwert wird der Rückblick durch den zu begutachtenden Wirkungszeitraum. So vermochte der IStGH in der vergangenen Dekade zwar zwei Verfahren durch erstinstanzliche Urteile abzuschließen. Eine gefestigte Rechtsprechung zu umstrittenen Rechtsfragen (z.B. zur Definition der Verbrechen gegen die Menschlichkeit) ist für den juristischen Beobachter indes nicht oder nur schwer auszumachen. Ebenso lässt sich kaum absehen, welche Effekte Verfahren und Urteile auf die betroffene Bevölkerung im Tatortstaat haben werden. Da ein abschließendes Urteil über das Wirken des IStGH in seinem ersten Jahrzehnt mithin verfrüht erscheint, soll dieser Rückblick zum Anlass genommen werden in die Zukunft zu blicken.

Anhand einer rechtspolitisch höchst interessanten Entscheidung der Anklagebehörde des IStGH im Darfur-Verfahren sollen Leitlinien der Entwicklung des Völkerstrafrechts sowie dessen Reformbedürftigkeit aufgezeigt werden. Die Rede ist vom Antrag der Anklage vom 14.7.2008 auf Erlass eines Haftbefehls gegen den amtierenden sudanesischen Präsidenten *Omar al-Bashir*. Dieser habe sich, so die Anklage, wegen Kriegsverbrechen, Verbrechen gegen die Menschlichkeit und, dies sei hier besonders betont, Völkermord strafbar gemacht. Die zuständige Vorverfahrenskammer I folgte dem Antrag, lehnte aber den Erlass eines Haftbefehls wegen des Verdachts des Völkermordes mangels ausreichender Beweise ab. Nachdem die Berufungskammer festgestellt hatte, dass die Vorverfahrenskammer von einem falschen Beweisstandard ausgegangen war, beantragte die Anklage die Erweiterung des Haftbefehls auf den Verdacht des Völkermordes; am 12.7.2010 erließ die Kammer den erweiterten Haftbefehl.

Auffallend und angesichts der fehlenden Notwendigkeit einer Haftbefehlserweiterung verwunderlich ist, dass sowohl die Anklage als auch zahlreiche Kommentatoren dieser Erweiterung einen derart hohen Stellenwert beizumessen scheinen.[1] Die

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1 Zu Kooperationspflichten aufgrund der Völkermordkonvention siehe Gillett, Matthew, The Call of Justice: Obligations Under the Genocide Convention to Cooperate with the International Criminal Court, in: Criminal Law Forum 1/2012, S. 63-96; Sluiter, Göran, Using the Genocide Convention to Strengthen Cooperation with the ICC in the *Al Bashir* Case, in: Journal of International Criminal Justice 2/2010, S. 365-382.