

Living up to the Legacy of Nuremberg

Interview with International Criminal Court (ICC) President Philippe Kirsch,

By [Siddharth Varadarajan](#)

Theme: [Crimes against Humanity](#)

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With 100 states on board, the International Criminal Court is slowly negotiating the hurdle of universality. But with major countries like the United States (and India) outside its purview, how effective will it be in dealing with war crimes, crimes against humanity, aggression and torture?

In an exclusive and far-ranging interview with me in New Delhi last week, **ICC President Philippe Kirsch**, who is normally very hesitant to get into what he calls “specific situations”, discussed the court’s limitations, the jurisdiction issue in recent allegations of torture by the German national, Khaled el-Masri, the issue of Afghanistan and other topics.

An interview of International Criminal Court President Philippe Kirsch by Siddharth Varadarajan

Siddharth Varadarajan: In a recent speech on the 60th anniversary of the Nuremberg trials, you said the International Criminal Court was the true inheritor of that tradition. Is that an accurate description?

Philippe Kirsch: The Nuremberg trials were a response to crimes committed on a massive scale which had tremendous consequences not only on individuals but on international peace and stability. It became clear you need to have a mechanism when national institutions were unable to act, that would try the most serious perpetrators of crimes, and would isolate the guilt to those individuals — as opposed, for example, to a whole population. That idea led to the thought that if further crimes were to be committed, it would be good to have a permanent institution. Efforts began to be made in that direction but soon collapsed.

Once the Cold War ended, you had renewed efforts to create a permanent international court, as well as the tragedies in Rwanda and former Yugoslavia. Massive crimes were committed. The Rwanda and Yugoslavia tribunals showed international criminal justice could work but they had inherent limitations. They were created for a particular situation as a political decision, they were retroactive. In any event, those tribunals could not achieve what is one of the aims of international justice, the creation of a culture of deterrence. Eventually, that led to the creation of the ICC. It was created by treaty and there was no question of it being imposed, it is prospective and not retroactive, it is not specifically directed to any particular situation, and it is open, it is available, it does not depend on any political decision of a few states at the time.

Varadarajan: In their reflections, Justice Robert Jackson, Telford Taylor and others

associated with Nuremberg as prosecutors have argued that the tribunal's main achievement was establishing the crime of aggression as the supreme international crime, because aggression contains within it the "accumulated evil" of all other crimes. Isn't the absence of aggression from the mandate of the ICC - at least till 2009, if not later - a fatal flaw?

Kirsch: Aggression, as you know, is listed among the crimes, but is not yet operational because it has not yet been defined... There will be a review conference in 2009 and we will see. One of the certainties is that this issue will be revisited again. Its absence today is a lack, but I don't think the jurisdiction of the ICC is fatally flawed for that reason. First, aggression implies an international act, an attack by one state on another. When you see the situation of Rwanda, or Cambodia, or the situation within former Yugoslavia, in many cases there was no international element. Yet, massive crimes were committed and national systems did not function at all. So you have a whole range of situations that, even if aggression is included in the statute, it would not be relevant to those. The second point is that if an attack is committed by a state against another, and even if the attack is not covered, all the crimes that may come with an attack - war crimes, almost always, crimes against humanity, increasingly - are covered under the statute.

Varadarajan: So an attack of the kind that took place on Iraq, say, would be covered by the kind of situation you are talking about?

Kirsch: As a judge of the ICC, I cannot comment on specific situations. I am bound to deal in concepts.

Varadarajan: You have described the ICC as an improvement over the ad-hoc tribunals for the former Yugoslavia (ICTY) and Rwanda. One of the criticisms of the ICTY is the seemingly political manner of the conduct of its prosecutorial system. I have in mind, for example, its refusal to take up the case of the killing of Yugoslav journalists by NATO when it deliberately bombed Belgrade's TV station in 1999. What is different about the ICC's system of taking up cases that could protect against this perception of political bias?

Kirsch: I will not comment on the way another tribunal conducts itself. But on the question of possible politicisation, put yourself in the position of the states which created the ICC in 1998. What they did was to create a court whose jurisdiction was completely unpredictable. The court could do anything anywhere, it all depended on what states became parties what situations came up, where crimes were committed. The last thing the states wanted in doing that was a court that had any remote possibility of conducting politically-motivated prosecutions or behaving politically. There are procedural principles within the statute which are extremely tight and detailed. For example, the prosecutor in undertaking an investigation on his own accord has to have the authorization of a pre-trial chamber. At that time, the accused, or the state of the nationality of the accused, will come and tell the ICC, 'our national system is operating properly, you have no business there'. And then the pre-trial chamber's decision can be taken to an appeal chamber of five judges. So the system is extremely tight, and the rights of the states and the accused are defined in great detail.

All that was done in 1998, and then a preparatory commission developed the elements of crimes, which is a further definition of the crimes in the statute, and the rules of procedure and evidence which for every other tribunal had been left to judges. So the system was designed to be extremely tight, where the ICC would have no margin of manouvre to stray

even slightly outside its mandate, and that's the way it should be.

Varadarajan: In a sense, what I'm trying to get at is that the rules are so tightly construed to protect states against what they feel might be political motivation that this itself can lead to politicisation of another kind. For example, Khaled el-Masri, a German citizen, says he was kidnapped in Macedonia by U.S. forces, taken to Afghanistan and tortured, and then dumped in Albania. Germany, Macedonia, Afghanistan are all states parties to the ICC. If he were interested in approaching the ICC, would he be able to?

Kirsch: The ICC prosecutor has received more than 1600 communications from a variety of sources, quite apart from the four referrals that were made formally to the ICC, containing allegations of crimes that had been committed under the statute. More than 80 per cent of those communications were dismissed by the prosecutor on the grounds that the crimes were not right, or the timeframe was not right, or that the situation invoked involved no state party. So there is already a clear decision to stick to the statute. Now the case - hypothetical case - you are raising...

Varadarajan: It is a real case. The only thing hypothetical is his decision to move the ICC.

Kirsch: Right, the kind of case you are raising involves a situation where all states are parties where, technically, the court has jurisdiction. But then comes the element of gravity. Take crimes against humanity, you have a list of crimes, starting with murder. Now, any murder is not a crime against humanity. For a murder to be a crime against humanity, it has to be committed in the context of a systematic, widespread attack against a civilian population, and that attack has to be in application of a policy of a state or organization, and the perpetrator has to know that. This is an extremely high threshold. The business of the ICC is not to take up isolated issues like this. One of the aims of the ICC is to prevent genocide, war crimes, crimes against humanity - they all reflect crimes of a widespread nature. If the ICC began to deal with isolated incidents, it would not only be a mistake, it would be against its mandate, its mandate being the high-level commission of crimes.

And even within situations, suppose there have been massive crimes committed somewhere, the ICC - that is the policy of the prosecutor and he has said it many times, this is the philosophy underlying the court - the ICC will only try the highest perpetrators, because you do not create a deterrent by going after individuals who have killed someone, you create deterrence by going after the high-level people who have done this. The ICC is not a court of appeal. If a national system functions, and someone is acquitted, or is not prosecuted, the ICC is not going to challenge that if the system works properly. The ICC's goals are very, very narrow, and the ICC's capacity is always going to be limited to four or five situations at the same time...

Varadarajan: But who decides if a national system works properly? If a Sudanese court were to find someone guilty and sentence them to six months or two years - as American civil courts and courts martial have done to Lyndie England and some of the other U.S. soldiers found guilty of torturing Iraqis - how would you decide which domestic legal process is legitimate and valid and which is not? I understand Iraq and the U.S. are not signatories but egregious leniency in sentencing is not the preserve of just a few 'undemocratic' states.

Kirsch: Ultimately, the process will be left to jurisprudence. There will have to be a judicial determination made, first by the pre-trial chamber, then by the chamber of appeal. But the criteria that are in the statute – let's consider a state which is unwilling to act. What this means is that you have proceedings aimed not at administering justice but shielding a perpetrator. So the state undertakes proceedings essentially to cover itself. That's really the basic criteria. This could take various forms. Indefinite delays, where proceedings never end, or the proceedings are weird, in a manner that is not normal. Ultimately, there will have to be a judicial decision on a case by case basis depending on the circumstances. I cannot give a general answer at this stage. If the court's jurisdiction is challenged by a state a national of which comes up before the court, then we will have a concrete example.

Varadarajan: Do you think the fact that major countries like the US, India, China are not signatories affects the credibility of the court?

Kirsch: I have always been convinced that the aim of the ICC has to be to reach universality. It is matter of principle and a practical matter, because you have constraints over its jurisdiction that eliminate certain situations if states are not a party. The ICC does not have universal jurisdiction. It has jurisdiction, except in the case of a Security Council referral, only where it has the consent of the state of the nationality of the accused or the state of the territory where the crime is committed, which is very restrictive. Therefore, to fulfill its role as was anticipated at its creation, the ICC will have to have more ratifications, to get as close as possible to universality.

There is also another reason. The statute has been designed by all. There has been controversy about the jurisdiction of the ICC but not really about the way its judicial system was constructed. Even now, there would be details but the fact that it is a system which reconciles and combines very different systems has been accepted. But, within the court, certain legal systems are not well represented yet, and so those systems have to be in the court too. A state can only have a judge selected if that state is party to the statute. So from that respect too, universality it is necessary.

If you compare the ICC's development with the development of other major international treaties which have far less impact on domestic legislation, say the Law of the Sea, it took 12 years for UNCLOS to come into force but only four years for the ICC statute to come into force. I think this reflects the very, very strong momentum at the time that the ICC should be created and begin to act.

Now, there are a number of states that have not been as convinced as the 100 ratifiers that the legal foundation of the system is impeccable. I think if states want to wait, it is their national decision, but then the answer to this has to be the way the ICC behaves. If the ICC behaves in an absolutely and exclusively judicial way, without any trace of politicisation, if its proceedings are effective, if it is seen eventually as help to the international community and not as a threat to sovereignty, then it stands to reason that the broader objectives of the ICC — which is the reduction of the commission of massive crimes, the reduction of phenomena that come with it like the flow of refugees — will begin to dominate the scene and not vague apprehensions about what the ICC could do. I think at that point, support for the ICC by states which are hesitant is bound to increase.

Varadarajan: The US is one of those countries which feels the process could be political, it is signing agreements with states parties to ensure its citizens are never brought before the court. What specific arguments have you made to

convince the US that the ICC is a judicial and not a political body.

Kirsch: The ICC is not a diplomatic body. We are not in contact with governments to negotiate the application of the statute. But I have been invited several times to the US for tours, conferences and have met individuals who are interested. It is clear to me that the level of understanding has increased a lot in the US about what the ICC really is and, therefore, the level of apprehension has decreased. It is a fair statement to say that the referral by the UN Security Council of Darfur to the ICC would not have been possible a year ago. The recognition that the ICC is not a threat, that it is useful in situations of massive crimes, has been acknowledged, these are facts. And it is a fact that in the two-and-a-half years of existence of the ICC, there has not been a shred of evidence of any politicisation.

Varadarajan: Is there a danger that in your concern to demonstrate the ICC will not “politically” target the U.S., the court and its system will soft pedal cases which may fall under its mandate but where the US would take an adverse view, such as the case which I mentioned of Mr el-Masri? This is not an isolated case as you seem to suggest, but part of a host of evidence in the last two-three years of the customary norm against torture being violated by the U.S. You have official memos which advocate a certain interrogation system. So these are not individual or isolated instances.

Kirsch: We are not trying so hard to convince the Americans we are not political. We are not political. The court behaves in a judicial way because that's its job. To be political would be against its mandate. It is not a matter of diplomacy but of judicial administration. As for the broader point you are raising, as I see it, first, the ICC cannot intervene in situations which concern non-state parties. But, second, the ultimate criterion for anything the ICC does now is gravity.

Varadarajan: But if I may interject, the allegations on torture involve flights to — and torture in — countries which are signatories, which would suggest geographical jurisdiction would not be so much of a problem. And the fact that it is not just one incident but many would suggest these are not isolated instances.

Kirsch: I cannot substitute myself for what the prosecutor is doing. The prosecutor has received four situations formally and has his hands full. As a result of these 1600 communications, he is also monitoring eight other situations that are not public, that are not known to me. There is a separation of powers. But certainly I can see that there is a great deal of consistency in the prosecutor's policy so far, which is, that he focuses his efforts on the gravest situations. Now, how that will be applied to specific situations I cannot say.

Varadarajan: On jurisdiction, Afghanistan is a signatory. If Afghan citizens make allegations against soldiers from coalition countries which are not signatories, there would be no problem of physical jurisdiction, right?

Kirsch: Yes.

Varadarajan: And notwithstanding any immunity agreement the Afghan government may sign with those coalition countries?

Kirsch: I can't talk about that. That's the kind of question that may come before the court for judicial determination. I cannot give an opinion on that now.

Varadarajan: So it is an open question?

Kirsch: Yes.

Varadarajan: Are there safeguards to protect against potential conflicts of interest when it comes to decisions taken by the prosecutor or particular judges in cases concerning “their” countries? Eyebrows were raised when a Canadian lady, who was the ICTY’s prosecutor during the Nato bombing of Yugoslavia and refused to open an investigation against her own government (which was part of Nato) for the TV station bombing case, then went back home and was nominated by the same government as a Supreme Court chief justice. In the ICC, how can one guard against the appearance of conflict of interest? Is there a bar on future appointments, sinecures?

Kirsch: The fact that a person who has performed high services abroad is later on recognized as an eminent person in his or her own country is not surprising. I think that making a link between that recognition and partiality on the part of the prosecutor is a great leap. Speaking specifically, I think there is a general rule in the ICC that a judge cannot be involved in a situation where he or she has an interest.

Varadarajan: Earlier this year, the Iraqi government revoked its decision to join the ICC. What arguments would you like to make to tell the Iraqis they should be part of the ICC.

Kirsch: I cannot comment on any specific situation on any specific state. I think...

Varadarajan: But you said you would like the US or India, for example, to be parties. So what about Iraq?

Kirsch: That is a general proposition. My general proposition remains, that the ICC statute is a very strong legal foundation, it has been designed to deal with serious crimes when national systems are unable to deal with them. Ratification itself is a matter of national sovereignty. The legal foundation is strong, the ICC will show it responds to the objectives set, obviously it is up so states to join. But the ICC, even if it is not suffering now from the lack of wide ratification, ultimately, [universality] will be important for the ICC in terms of effectiveness, but it will be more important for the international community for which it was created.

Let us take an abstract example, an international situation. There is a widespread misconception that for the ICC to be able to intervene, you need the consent of the nationality of the accused, his or her state in all cases. That is a widespread misconception, and it is leading to national positions that are, that may influence some positions on the basis of an inaccurate assumption. In reality, let’s get back to the aggression point. Say State A attacks State B. State A is not a ratifier, but State B is. The attack itself is not covered at this point, but if crimes are then committed by nationals of State A on the territory of State B, the ICC does have jurisdiction even though State A has not ratified. This is to me a very important point. If your own premise, that aggression is the cause of other crimes, is correct, then that is a very powerful argument for states to ratify.

Varadarajan: What are the Iraqi objections?

Kirsch: I have not heard anything. All I heard was that they were going to ratify, and one

week later they said they were not going to.

Varadarajan: What do you think happened in that week?

Kirsch: I don't know. Ask the Iraqis. (laughs)

Varadarajan: One of the arguments you made was about the ICC as a deterrent. Are you concerned that there has been a general slippage in well-recognised international humanitarian law (IHL) norms against perpetual confinement, torture, does it worry you that even as you have an ICC which has been ratified by 100 countries and which reflects growing adherence to IHL, you have this other trend?

Kirsch: I think it is not in dispute that a large problem in armed conflicts is that the norms are not applied properly. I myself believe that if the existing norms were to be applied properly, far fewer crimes would be committed. The ICC is not instant coffee. One gets questions about the ICC which has existed for two and a half years, as if it has had 30 years to perform and improve itself. It is the beginning of a process. You need to have some time to see how the process evolves, that the ICC does its job, and that it has the deterrence which is hoped for.

Varadarajan: Based on the cases taken up so far - Uganda, Congo, Central African Republic and now Darfur — is there a danger that you will be seen as a court which only goes after little brown and black men, that those responsible for other, bigger crimes internationally will never be brought before you. If this trend continues, and the prosecutor doesn't pick up other cases, wouldn't there be a feeling that the ICC is a political court?

Kirsch: If this is the situation 15 years ahead, then I think there might be a problem. But if you look at the situation now, the ICC has not taken up any case on its own. Cases have been referred to us. The ICC statute would not have been adopted if Africa had not supported it strongly. For them, it is a practical issue. They are worried about what might happen on their territory. The Europeans, Canadians and others had two interests - humanitarian concerns, and international peace and security, stability. But the African states were concerned about the direct effects of these crimes and saw the court as protection. Africa is, in terms of numbers, the highest represented group among regions. It has 27 signatories. And the three states which have referred situations to us have referred situations on their own territory, not against their neighbours. As for Darfur, it has been referred by the SC.

So the ICC has not been after Africa, Africa has been after the ICC. In 15 years, it may be another matter, but for now, there is no ICC going after little people.

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