

## Report on the Conference on the Commemoration of the 20th Anniversary of the Statute of the International Criminal Court

On 18 July 2018, Parliamentarians for Global Action (PGA), the International Association of Penal Law (AIDP – Italian chapter), and No Peace Without Justice, co-organized a *Conference on the 20th Anniversary of the Rome Statute of the International Criminal Court* (ICC), which was held in the *Sala della Protomoteca* of the City Hall of Rome, Italy. The event was an initiative of the Vice-President of the European Parliament Fabio Massimo Castaldo, MEP, and was hosted by the Mayor of Rome Virginia Raggi. The Conference gathered together nearly eighty attendees, including distinguished high-level representatives of the three branches of power of the Italian State, ICC judges, PGA members, legal experts, representatives from non-governmental organizations, members of the press, academics and students.

### Historical Background, Aim of the Conference, and Main Points under Discussion

Contrary to the popular belief, the Rome Statute was *effectively* opened to the signatures by States on 18 July 1998, when the Final Act of the Rome Diplomatic Conference was signed. Indeed, at the end of the Rome Diplomatic Conference on 17 July held at the Food and Agriculture Organization of the United Nations (FAO), the UN-clock was stopped at 11:59 PM in order to allow Delegations to participate in the last plenary session. The Conference of Plenipotentiaries ended up voting on the adoption of the Statute of the ICC in the following two hours, responding to a request of the United States of America's delegation. The following morning, Delegations convened at a dedicated Ceremony held in the Sala della Protomoteca of the City Hall of Rome at *Campidoglio* to sign the Final Act of the Conference in the presence of the Secretary-General of the UN, who did not attend the vote.

Twenty years later, in the same monumental room designed by Michelangelo Buonarroti, the Conference reunited high-level experts and professionals who thoroughly reflected on the Statute of the ICC and its underlying system, inspired by a shared desire to “relaunch it”. While emphasizing the vital importance of the ICC and State action against impunity for crimes under international law, the participants analyzed the main issues directly and indirectly hindering the universality and effectiveness of the Rome Statute system, and proposed ways to overcome them. Various challenges were identified within the ICC, at the level of the States, and at the United Nations Security Council (UNSC).

Particularly, the discussions dwelled on:

- The fight against impunity for the commission of international crimes, including the need for universal ratification/accession and domestic implementation of the Rome Statute, as well as reinforcement of the cooperation of States with the ICC
- The activation of the ICC jurisdiction over the crime of aggression on 17 July 2018
- Finding concrete ways to strengthen the ICC, including the revision of:
  - I. The mechanism of nomination and election of the judges
  - II. The composition and structure of the Office of the Prosecutor (OTP) and the Registry

III. The procedure of cooperation of States with the ICC

IV. The functioning of the Assembly of States Parties (ASP) as the “executive” branch of the Rome Statute system

### Moments and Interventions

**Fabio Massimo Castaldo**, MEP, Vice-President of the European Parliament and PGA member, opened the solemn session with a meaningful synopsis of the legal and historical events that preceded the creation of the first permanent and independent International Criminal Court. Castaldo announced that on 17 July 2018, his colleagues and members the Five Stars Movement (currently the largest group in the Italian Parliament) had just re-deposited a Legislative Bill to authorize the prompt ratification of the Kampala Amendments.

**Sen. Emma Bonino**, Founder of No Peace Without Justice and former Head of the EU Delegation at the Rome Diplomatic Conference on the ICC, critically reflected on the main international developments over the last twenty years. Particularly, the phenomenon of social disgregation, the resurgence of nationalism, and the reemergence of a sense of mistrust on multilateralism and international cooperation. Sen. Bonino then explained the need for the ICC to increase its outreach capacity, and for the international community to reaffirm its commitment to cooperate with the Court.

**Dr. Ricardo Fuzio**, General Attorney of the Republic before the Supreme Court of Cassation, laid emphasis on the importance of the Preamble of the Rome Statute, which states that “all peoples are united by common bonds”. Dr. Fuzio argued that the cornerstone of that common cultural heritage is the protection of human rights, a vital element the ICC intends to protect.

**Prof. Paola Severino**, President of the AIDP Italian Group and former member of the Italian Delegation at the Rome Diplomatic Conference on the ICC as well as former Minister of Justice, emphatically recalled the night in which the Rome Statute was adopted. Prof. Severino mentioned the hardships and intense negotiations required to reach such a historic agreement, which achieved nothing less than bringing together different legal systems.

**Counselor Francesco Cananzi**, Member of the Supreme Judicial Council (CSM), praised Italy’s leading role in the adoption of the Rome Statute. He characterized such remarkable moment as the “triumph of the Italian constitutionalism”, in light of the Art. 11 of the Italian Constitution, which “allows, on an equal footing with other States, the limitations of sovereignty necessary for an order that ensures peace and justice among the nations”.

**Mr. Enzo Moavero Milanesi**, Italian Minister of Foreign Affairs, participated through a video conference, and reaffirmed the Italian government’s commitment to the international obligations stemming from the Rome Statute system.

**Judge Rosario Aitala**, International Criminal Court (2018-2027), highlighted some of the internal and external challenges faced by the ICC. Firstly, achieving the ratification or accession of the Rome Statute by other States, including the great powers. Secondly, extending the ICC’s

jurisdiction *ratione materiae* over mass atrocities committed in the context of violent extremism not fully encompassed by the definitions of the core four international crimes. Thirdly, reinforcing the level of cooperation of the States with the ICC. Fourth, establishing clear, feasible, and consistent practices concerning the victims' participation before the Court.

**Judge Cuno Tarfusser**, International Criminal Court (2009-2018), took the floor and identified three types of difficulties in the Rome Statute system. Structural challenges, including the need to nominate and elect high-quality judges vis-a-vis the requirement to maintain a balanced representation in terms of gender, geographical regions, and legal traditions. Normative challenges, including the impossibility to deal with every *legal lacunae* through jurisprudence, requiring instead a more active legislative role from States Parties. And governance challenges, including the imperative necessity to toughen the pre-requisites and standards for a high-level meritocratic system of staff recruitment. In effect, Judge Tarfusser argued, some ICC judges do not have the required judicial experience, while others have limited knowledge of international law and international criminal law.

**Sen. Julio Cesar Valentín** (Dominican Republic), Vice-Chair of the Commission of Justice and Human Rights and longstanding PGA member, stressed the vital role of parliamentarians in the ratification and domestic implementation of the Rome Statute. The Dominican Senator also shared with the audience that on 11 July 2018, he had tabled an innovative resolution prepared by PGA's legal team, in which the Dominican Parliament expresses its consent to the ratification by the Executive of all amendments to the Rome Statute. That is, the amendment defining the crime of aggression and the one expanding the protections afforded to victims of aggressive wars and non-international armed conflicts. This resolution offers the Executive an expedited way and a simplified "package" upon which to act, without the burdensome procedure of having to send the texts of the amendments to Parliament.

In a written statement, **Mr. Alfonso Bonafede, MP**, Minister of Justice of Italy, MP, highlighted the role of international criminal law as a mechanism for social stability, and reaffirmed the Italian government's adherence to the fight against impunity for the commission of international crimes, the protection of human rights, and international peace and security.

**Ms. Virginia Raggi**, 65th and current Mayor of Rome, gave welcoming remarks and called on the international community to strengthen its commitment to ending impunity for the commission of the most serious crimes.

**Dr. David Donat Cattin**, Secretary-General of PGA, commended the legal initiatives of the colleagues of Vice-President Castaldo in the Italian Parliament and of Sen. Valentín, both regarding the Kampala Amendments to the Rome Statute. Dr. Donat Cattin then argued that "*Brexit*" had opened the door to other similar initiatives, including withdrawals from the Rome Statute. He also informed the audience that on 24 July, the Supreme Court of the Philippines will be holding a hearing on the petition of the unconstitutionality of the withdrawal from the ICC, signed by several parliamentarians, including PGA member Antonio Trillanes IV.

**Mr. Benjamin Ferencz** (USA), shared some of his experience as a *Chief Prosecutor for the United States Army at the Einsatzgruppen Trial*. Mr. Ferencz repeated the words he pronounced during the Rome Conference of 1998: “Never give up hope, never stop trying to make this a more humane world (...). The time is now, and the place is here”.

**Prof. Flavia Lattanzi**, former judge ad litem at the UN International Criminal Tribunals for Rwanda and former Yugoslavia, regarded the activation of the ICC’s jurisdiction over the crime of aggression as a historical as well as a symbolic achievement. Prof. Lattanzi argued that the opposition by certain States, especially France, to the crime of aggression regime results irrational, almost senseless. Reason being, the extremely restrictive definition of the crime of aggression based on the cumulative criteria of scale, gravity, and manifest violation of the UN Charter on the legality of the use of force. Prof. Lattanzi concluded that only three relatively recent “cases” could have fallen under the definition of the crime of aggression in the sense of Art. 8bis, para. 1: the USSR invasion of Afghanistan in 1979, the Iraq invasion of Kuwait in 1990, and the US-UK invasion of Iraq of 2003. All other situations of illegality or contested legality of the use of force could have fallen under the definition of an act of aggression, but not of the crime of aggression in the sense of Art. 8bis, para. 1.

**Dr. Alice Riccardi**, from the Faculty of Law at Roma Tre University, analyzed the crime of aggression and the principle of complementarity, the crime of aggression as a leadership crime, and the relationship between the crime of aggression and the general principles of law described in Part III of the Rome Statute. Dr. Riccardi stressed the need to treat international criminal law as a unified *corpus juris*, thus refraining from interpreting the crime of aggression as a “particular” or “exceptional” international crime. Inter alia, she noted how all the other crimes under international law may involve the utilization of the State apparatus for their perpetration.

**Dr. David Cattin** reminded the audience of the rather restrictive interpretation of the jurisdictional reach of the Kampala Amendments adopted by the ASP of the ICC with Resolution 10. This interpretation, argued Dr. Cattin, reinforces the need for promotion of the universal ratification of the Kampala amendments.

**Mr. Maurizio Block**, Military General Attorney of the Republic before the Court of Cassation, offered an elaborated historical review of the investigation and prosecution of the commission of war crimes in the aftermaths of the II World War by the Military Italian Tribunals, highlighting procedural as well as substantive aspects. Mr. Block recommended the adoption of a code of law regulating military operations abroad, up-to-date with current times.

**Julie Ward**, MEP (United Kingdom), European Parliament’s Committee on Culture and Education and committed PGA member, celebrated the activation of the crime of aggression as an opportunity allowing the ICC to increase its political outreach and visibility. Ms. Ward also announced that, along with fellow PGA members Ana Gomes and Barbara Lochbihler, she had written a letter to the High Representative of the European Union, Federica Mogherini, calling for the establishment of an EU Special Representative on International Humanitarian Law and International Justice. She was pleased to inform the audience that the European Council had



taken their words seriously, as the High Commissioner had been asked to present proposals to strengthen the EU's capacity in the area of international criminal justice. The European parliamentarian finished by calling for a democratizing reform of the UNSC, in face of a potential reluctance from powerful permanent members to refer situations to the ICC.

**Judge Domenico Carcano**, Adjunct President of the Supreme Court of Cassation, mentioned the need to adjust the substantive criminal order, ensuring the effective prosecution of alleged perpetrators of international crimes.

**Mr. Fabio Maria Galiani**, complemented the reflection of Judge Carcano reminding the audience that the Italian domestic legal order still lacks an implementing provision of crimes against humanity.

**Judge Elisabetta Rosi**, Vice-President of the AIDP Italian Group, reflected on the jurisdiction of the ICC *ratione materiae* regarding the link between international crimes and transnational organized crimes. Particularly, she pondered to which extent the trafficking in human beings can be investigated and prosecuted as a crime against humanity under Art. 7 of the Rome Statute. In this sense, Judge Rosi mentioned a certain difficulty to transpose the contextual element and the “static nature” of the definition of the crimes against humanity to the complex and dynamic nature of the trafficking in human beings.

**Judge Roberto Bellelli**, President of the Military Surveillance Court of Rome, analyzed three aspects of the ICC. Firstly, although there is a legal obligation for States to cooperate with the Court under Art. 86 of the Rome Statute, he noted that it is still a highly “political” decision to do so in good faith. He therefore proposed the creation of a “network for direct cooperation in the fight against impunity”, similar to that of the EU, although bearing in mind the lower political and cultural cohesion among member States of the ICC. Secondly, he argued that the policy of the OTP to investigate and prosecute Heads of State or Government from autocratic countries presents a self-evident and inherent practical difficulty. Thirdly, he recognized a certain lack of experience and knowledge of critical areas of substantive and procedural law within the judiciary, the OTP, and the Registry. In this regard, he argued, it is more difficult for small States to nominate suitable candidates given the comparatively lower availability of knowledgeable professionals. Fourth, Judge Bellelli informed the audience of the concept note he authored and sent to the ICC in 2014, which includes guidelines for a new “arrest strategy” of suspects at large. This note has not been thoroughly addressed yet by the competent organs of the ASP, as no action has been taken on it as of now.

**Judge Daniela Cardamone**, Italian magistrate assigned to the European Court of Human Rights, made four specific proposals to improve the ICC system of nomination and election of the judges, based on the reforms undergone in ECHR, bearing in mind the structural and dimensional differences between the ICC and the ECHR. First, during the interviews, the ICC should include a direct inquiry about whether the candidate has ever been elected or appointed to a political position in the State submitting the nomination. Second, the internal procedure of triple nomination conducted by the States Parties should be public, transparent, merit-based

and, when possible, gender-balanced. The list of nominees should present the names in alphabetical order, avoiding any indication of preference. Third, States Parties that wish to make nominations for the highest individual organs of the Court (the Judges and the Prosecutor) shall make a compulsory public announcement of the positions that are available, so to facilitate a public process of nominations by the most competent jurists and practitioners who would fulfill the criteria for the election. Four, the Advisory Committee on Nomination of the Judges of the ICC should issue its opinion *before* States officially present the nominations. This would create a “filter” instead of a system of disqualification, through which non-qualified individuals simply cannot be nominated. The combined adoption of all these measures by the ASP would substantially depoliticize the election process.

**Mr. Cesare Placanica**, Attorney-at-law, President of Camera Penale di Roma, discussed the role of the judges not only as impartial but independent from the political power behind their nomination. He then mentioned the challenges of the defense of an accused with particularly grave charges vis-a-vis the principle of equality of arms.

**Dr. Niccolò Figà-Talamanca**, Secretary-General of No Peace without Justice and former member of the Rome Conference, recalled the expectations of those participating at Conference of Plenipotentiaries in 1998 in contrast with the current situation of the Rome Statute system. In the context of the post-Cold War, Dr. Figà-Talamanca argued, the international arena opened up to the participation of small and medium States, and the ICC embodied an idea of anti-colonialism. The Secretary-General considered the unsatisfactory quality of the ICC judges more a political than a procedural problem, given that States Parties do not seem to believe that the Court would merit a nomination of the most excellent practitioners or jurists. Jointly with the lack of sufficient investigative capacity, and the weaknesses of the institutional culture and leadership, these realities pose severe restrictions to the effectiveness of the ICC.

**Min. Plen. Francesca Tardioli**, Deputy Director General/Central Director for United Nations and Human Rights, Ministry of Foreign Affairs of Italy, affirmed the role of Italy in support of a rules-based international order as the main foundation for the bond between peace and justice, in face of the sentiment of return to unilateralism. As a result, Min. Tardioli made a very strong and precise commitment to the imminent ratification of the Kampala Amendments.

**Mr. Gianfranco Dell’Alba**, President of No Peace Without Justice, gave closing remarks acknowledging the attendees for their valuable contribution and called the audience to renew the trust and commitment to the fight against impunity for the commission of international crimes.