HOUSE OF COMMONS

Foreign Affairs Committee

Oral evidence: The UK's role in strengthening multilateral organisations, HC 513

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Watch the meeting

Members present: Tom Tugendhat (Chair); Chris Bryant; Neil Coyle; Alicia Kearns; Stewart Malcolm McDonald; Bob Seely; Royston Smith; Graham Stringer; Claudia Webbe; Andrew Rosindell.

Questions 252-292

Witnesses

I: Angela Mudukuti, International Criminal Law and Human Rights Lawyer, and Anthony Dworkin, Senior Policy Fellow at the European Council on Foreign Relations.

II: Sir Howard Morrison, KCMG, CBE, QC, Appeals Judge at the International Criminal Court, and Peter Lewis, Registrar at the International Criminal Court

Examination of witnesses

Witnesses: Angela Mudukuti and Anthony Dworkin.

Chair: Welcome to this afternoon's sitting of the Foreign Affairs Committee. Thank you very much indeed for joining us. We have two witnesses on the first panel. For no very good reason but that this is how they appear on my screen, I will first ask Angela Mudukuti to introduce herself briefly, and then Anthony Dworkin.

Angela Mudukuti: Good afternoon, Chair. Thank you for having me. My name is Angela Mudukuti. I am a human rights lawyer specialising in international criminal justice. I am here in a personal capacity.

Anthony Dworkin: Thank you for the invitation. I am Anthony Dworkin. I am a senior policy fellow at the European Council on Foreign Relations think-tank based in London. I work on a range of subjects connected with human rights, democracy and international order. In particular, at the moment I am working on multilateralism, but I have also written on the ICC not too long ago.

Q252 **Chair:** Thank you very much. As you know, this is part of an inquiry we are doing into multilateralism, the UK's role in multilateral organisations and, indeed, the roles of many of those organisations in a rapidly changing global environment. Perhaps, Mr Dworkin, you will introduce us briefly to what you think are the successes of the International Criminal Court.

Anthony Dworkin: When thinking about the successes of the ICC, you have to look at two levels. One is what the ICC represents. The fact is that we now have a permanent international court with jurisdiction over the worst international crimes, it has a wide range of states that have joined as parties and it exists in a way at the apex of what I would see as a whole system of international justice, reaching down through other mechanisms, through states parties and so on. It is there as a kind of backstop and as a symbol that international justice and accountability are now a fixed element in the international system. That is very important.

When it comes to the specific actions and operations of the Court itself, obviously—this is no secret—the record of the Court is mixed, but one can point to some successes. The conviction of Bosco Ntaganda—a warlord from the Democratic Republic of the Congo, with a very bloody record, who was convicted on 18 counts, I think, of war crimes and crimes against humanity last year—is a symbol of what the Court can achieve at its best, bringing accountability for serious international crimes. One could point to other decisions and actions.

Beyond that, part of the success of the Court is in spurring attention to accountability within states parties. So, it is not only the cases that reach the Court, but the effect of getting parties to bring war crimes, crimes against humanity and genocide within their national jurisdictions, to add to

the knowledge of the Court being there as a backstop. All of that is as important as the specific case results that we have seen so far.

Q253 **Chair:** Do you think it has a dissuasive capacity, in the sense that people are now increasingly aware that this is a real possibility, that they might find themselves up before the ICC and therefore think differently about their actions?

Anthony Dworkin: I do, yes. There has been a certain amount of scholarly debate about exactly how much of a deterrent effect the Court has. Of course it is always somewhat difficult to prove a negative, but to my mind there are plenty of instances where you can see that countries are conscious either of the danger that their nationals will face prosecution if they commit such crimes, or perhaps, when they undertake investigations themselves, of doing so in a more scrupulous way, because they know that the Court will be there, watching them, and potentially able to step in. As part of that broader system that I discussed, one can see an impact in raising attention and the seriousness with which these kinds of crime are considered and addressed within many national jurisdictions.

Q254 **Chair:** Thank you. Ms Mudukuti, you expressed some concerns about this. Will you set out your views on bias that you have raised in the past?

Angela Mudukuti: Absolutely, but before I do that, I would like to add to the successes, because that is important to the whole context. Specifically, for example, I would look at the Trust Fund for Victims—I believe that the United Kingdom has a representative on the trust fund's board and has donated, I think, over €4 million since its inception. That body has two mandates: reparations and the assistance programme.

The assistance programme is what I will focus on, because that is particularly interesting. It has managed to reach, in Uganda and the DRC alone, over 400,000 individuals. It assists with everything from prosthetic limbs to trauma-based counselling, educational support, income-generating activities and so on, obviously done in consultation with parties on the ground. The fact that this is something that does not require a conviction means that it can act quickly to assist affected communities as quickly as possible. Although it is not perfect, it is worth promoting because, without the Rome statute, there would be no Trust Fund for Victims.

I would also say that the victim-participation models are particularly important. Victims may participate actively in the trials, not just as witnesses for the defence or for the prosecution, but as participants themselves. Again, that is important from a victim-centred perspective.

Lastly, I would say that the Court has also managed to make the world a smaller place for people who are wanted for egregious crimes. In 2015, I tried to have the former President of Sudan, Omar al-Bashir, arrested while he was in South Africa. He arrived on a red carpet and had to scurry away like a thief in the night, which was quite an indignity for a Head of State. Even though we did not succeed in our objective, which was to have

him arrested and put on trial at the ICC, it was still important from the victim perspective: it provides some element of hope.

Q255 **Chair:** Thank you very much. That is important context, and I am grateful to you for bringing it up. Could you please touch on some of the accusations of bias that you have made towards the Court? I would be very interested to hear your perspective on that.

Angela Mudukuti: Absolutely. First of all, I have never accused the Court of bias.

Chair: Forgive me. You have made allegations of bias around the Court, rather than to the Court.

Angela Mudukuti: Yes. I think that there are people who have made accusations of bias against the Court; I am not of the mind that the Court is biased. In particular, people raise this with regard to the number of African situations that have come before the Court. The reason that people say this is because there are 12 countries currently under investigation at the ICC, and only three of them are not African: Georgia, Afghanistan and the Bangladesh-Myanmar situation. The rest are African cases, and the ones that are at trial phase are also African. But what we have here is two issues—perception versus reality. The perception in some corners is that the ICC is targeting Africa; the reality is somewhat different. I am not of the mind that the ICC is biased or targeting Africa, and I will explain why.

As you probably know, there are three ways in which a matter comes before the ICC: the first is that the prosecutor can of his or her own volition initiate a process, the second is the United Nations Security Council referral and the third is state referral. You will see that two of the referrals are from the United Nations Security Council: Darfur and Libya, which are African situations. I will come back to the Security Council and the complexities there, because it plays into the bias discussion. In two other situations, Kenya and Côte d'Ivoire, the prosecutor acted of his or her own volition. Four situations are self-referrals, with autonomous independent African Governments referring themselves to the ICC and seeking the ICC's intervention. The majority are self-referrals, so I think the question of bias falls away when you look at the statistics.

Still talking about numbers, 33 African states have signed and ratified the Rome statute and subjected themselves to the jurisdiction of the Court. It is no surprise that there are a number of African situations, because Africans have decided to be part of the Rome statute system. This is the biggest regional bloc of signatories; there is no other region that has such high numbers of signatories to the Rome statute.

Q256 **Chair:** Why is it that so many African nations have done this? Why have so many decided that this Court is appropriate for their needs?

Angela Mudukuti: I think that that is a question that you cannot answer in a general sense. You would have to look at each country specifically, which I do not think we have time to do today. For some countries, for example South Africa emerging out of apartheid, it was important to join

international organisations and show that they were serious about justice, accountability and moving forward in a way that shows a complete rejection of impunity. Every nation had different reasons, and being part of the new world order was quite a compelling one for many nations.

Q257 **Chair:** Thank you very much indeed. Mr Dworkin, do you think that there is much chance that some African nations will be leaving the ICC, given what Ms Mudukuti outlined?

Anthony Dworkin: Obviously there is one country in Africa that has left, and there is one other, the Philippines. Ms Mudukuti would probably be following this more closely than me, but I believe that the issue is still at least live in South Africa—there is some possibility. But in general one can see that there was a sort of groundswell of concern and possible movement around the AU—the African Union—against the Court, and my sense is that that has somewhat subsided. This notion that the Court was biased against Africa is perhaps less widely a live issue and concern than it was a few years ago, partly because, as Ms Mudukuti mentioned, there are now three investigations taking place outside Africa.

I think that in a way some of the discussion and concern around the Court has moved on to other issues. It may always be that a country here or there will withdraw, but I think that the danger of the Court's legitimacy being undermined by large-scale withdrawals has receded. I do not see that as such an issue at the moment.

Q258 **Chair:** Ms Mudukuti, do you see anybody following Burundi's example?

Angela Mudukuti: No, I think at the moment that the momentum to withdraw has subsided. It is true that in South Africa it is potentially still on the table, but other issues to tackle have meant that it has temporarily fallen off the radar. It remains to be seen, but I do not think we will see a mass withdrawal, which of course two or three years ago was a serious concern.

Q259 **Chris Bryant:** Thanks very much for joining us this afternoon. What do you think African countries hope to achieve by the ratification of the Rome statute?

Angela Mudukuti: Again, I will begin by saying that it is difficult to generalise—we are talking about a continent—but I will point you to a few examples. For example, in South Africa there is a desire to be part of the new world order and a recognition of the fact that you need to have justice on a domestic level, and hopefully some day on a regional level, and also at the international level. You will find that there is no regional African court with criminal jurisdiction. Quite frankly, it does not exist, so if you do not have justice on the domestic level, you need a last resort, which is exactly what the International Criminal Court was designed to be.

There is also a sense of ownership, in the sense that the Rome statute needed signatories, and without the African signatories, we would not be talking about an established institution today, so it is also quite important

to acknowledge the active participation of African states in ensuring that there is a court of last resort for their own people.

Q260 **Chair:** Can I just jump in on that—forgive me, Chris—before you go on to Mr Dworkin? It is a very interesting point that this is one of the essential building blocks of the post-90s international order, but it has effectively been buttressed and reinforced—created, in many ways—by African nations. I am going to come back to this, but is there an effect on the Court? Has that affected the culture of the Court, not just the jurisdiction?

Angela Mudukuti: Chair, could you be more specific about what you mean by affecting the culture of the Court?

Q261 **Chair:** Any organisation clearly focuses on the areas in which its members or those who are particularly sensitive to it see interest. The World Health Organisation has recently had a rather greater focus on certain areas of illness than others, and we have noticed that very specifically, because that is where its funders and members have been interested. Is there an African element, then, to the ICC that has seen justice being done in different ways and a level of interest in different things? As you rightly say, it is one of the pillars of the international community that is, in many ways, much more African than many others.

Angela Mudukuti: I would not say so, because the institution is a legal institution and it is guided by the confines of the Rome statute. The decisions that are made are made within compliance of the law, so they follow the evidence, they follow where they legally have jurisdiction. I would not say that there is some sort of, as you describe it, African element that is influencing the institution.

Chair: Okay. Sorry, Chris, forgive me.

Q262 **Chris Bryant:** Could I put the same question to Mr Dworkin?

Anthony Dworkin: I certainly would not point to any particular element of the Court. Of course, I share the notion that any idea of a bias against Africa is much too simplistic, but there have been some ways in which the operations of the Court have been in tension with some of the views that a number of African countries have espoused. In that sense, I guess that there are a couple of things that one can point to.

First, it is in the nature of the Court statute that there is enormous discretion granted to the prosecutor about the cases and the situations to take up, and the speed at which the prosecutor moves through the different stages, from preliminary examination to investigation. Some of the preliminary examinations have taken an extremely long time.

It has sometimes been said that the first prosecutor, Luis Moreno Ocampo, was in some senses treading rather cautiously around the political sensibilities of some of the larger and more powerful great powers in the world, such as the United States and Russia. Situations in which they had an interest, whether it was Afghanistan, Colombia or Georgia, moved rather slowly, and some of the African situations seemed to move much

more quickly. In that sense, there was perhaps some sense that the Court was still finding its feet as an international judicial organisation situated in a world of power politics. Of course, there are considerations about what makes an effective investigation that would lead to successful prosecutions, taking account of certain realities. That has been rather a consistent tension in how the Court operates. In that respect, rather than reflecting African sensitivities, there was perhaps a degree to which the Court seemed to have some element of greater deference towards other countries outside Africa.

A second issue—this is something of a technicality—is that there is a provision in the Rome statute that allows investigations to be deferred for a year if the Security Council requests it. There is an assumption that if an investigation is getting in the way of peace and security, the Security Council might want to defer it for a year. There have been a number of cases where some African organisations and states have thought it would be appropriate to have a deferral, because it might interfere with a possible peace process—this came up in the cases of Sudan and Libya, I believe. The Security Council has really not entertained that idea in those cases. Again, one can see that rather than reflecting what one might describe as African sensibilities, it is issues such as this that gave rise to some of the tensions. As we can agree, most of these issues have somewhat receded now, but there have still been questions about the arrest of indicted Heads of State and so on.

Q263 **Bob Seely:** I thank our guests for being here today. I agree about all the good that has been done by the ICC. I will ask a question that is slightly critical, but it is not going to be critical of the overall approach, which is clearly a major step forward for humanity. It seems to me, however, that if you are a "great state", you are judged by different rules. If you are the client of a "great state"—in inverted commas—or a P5 member, you are judged by different rules. Some of the most appalling abuses of human rights, and indeed some war crimes, have included the deliberate targeting of hospitals in Syria by the Russian air force. There have been significant abuses of gay people in Chechnya, and we know of the systematic oppression that is taking place in Xinjiang province. All these do not make one cynical about the process, but I want to see the ICC really working on a global basis when it is doing stuff in Syria and when it has worked out a means of tackling superpowers such as China, or indeed former superpowers such as the Russian Federation. It would be great to get some comment on that from our two guests.

Anthony Dworkin: I'll jump in, and perhaps Ms Mudukuti will add to it. These are obviously serious gaps in the jurisdiction of the ICC. Syria probably stands out as the conflict in the world where the highest number of atrocities that fall within the subject matter and jurisdiction of the Court have been committed, yet the Court has not been able to get jurisdiction. That is because it is not a court that has universal jurisdiction. Broadly speaking, it is a membership-based institution. States become a party to the statute, and that gives the Court the jurisdiction to intervene. To my mind, it is really important to understand that the ICC is a breakthrough in

many respects, but it is also a body that does not represent the dawning of the age of impunity. The Court was born at a time when there were great hopes, in the period following the end of the cold war, that the world was moving towards a kind of single order, which would be an age of one set of values across the world and a gradual convergence around broadly liberal democratic states. Clearly, that hasn't happened. That is the background and context to a lot of the discussions you are having, I am sure, about the challenges of multilateralism today.

It might have been hoped, at one point, that the ICC would move towards being a court to which all states adhered and which had jurisdiction universally, but to expect it to do that is to place unrealistic expectations on the Court, which don't belong to the Court itself. The Court's role is to hold accountable individuals responsible for crimes, either the nationals of countries that have signed up to the Court, or those who commit those crimes on the territory of countries that have signed up to the Court.

Q264 **Bob Seely:** One can agree that a critical flaw in an otherwise decent process is that the more powerful the country that is doing the abuses, or the worse the abuses are in any particular country, the less likely people in that state are to get justice. Is that fair?

Anthony Dworkin: There is perhaps a correlation, but there are different ways in which the influence of power on the operation of the Court operates. No. 1 is that many powerful states, among them China, Russia and the United States, have not joined the Court. Therefore, they can only be investigated when nationals of those countries are alleged to have committed crimes on the territory of member states, as we are seeing potentially in the Georgia investigation and with respect to the United States in Afghanistan.

A second element is that sometimes these states can withhold their co-operation and even mobilise diplomatically, as the United States has done, to try and frustrate these investigations.

The third element is the role of the Security Council, which is clearly the most great-power-influenced part of the international system. It is a distinctive feature of the Rome statute system that it allows the Security Council to refer situations to the Court even when those countries are not parties to the Court, as it did in the case of Darfur and Libya.

There are arguments both for and against these referrals. On the one hand, they allow situations that would otherwise escape the Court—very serious crimes appear to have been committed in Darfur—to be brought within its jurisdiction, but they introduce a strong element of selectivity. Clearly, China, Russia and the United States have a veto in the Security Council, so therefore no referral will take place when it contravenes their interests.

There is also an argument to be made that referrals are not a tool that helps the credibility of the Court, because they are so determined by great power politics.

Q265 **Alicia Kearns:** Thank you to both of you for appearing today. I agree that generally it is desirable to prosecute cases in the countries where they occurred, but that can be very challenging in the absence of robust legal systems and particularly in matters of genocide. What is your view specifically on creating a new specialist court for matters relating to the persecution of the Yazidis, particularly since the ICC seems to be repeatedly blocked from doing so?

Angela Mudukuti: Specialist courts had great momentum about 10 years ago, when there was a specialist created for almost every single situation. There have been questions about whether they have been cost effective enough or effective enough. In many minds, having an International Criminal Court that was a permanent institution was to alleviate the burden of having to create a special court. I am not well versed enough on the situation with the Yazidis to comment, but I think it is definitely one of the avenues that should be considered to make sure that something is done, and sooner rather than later.

Anthony Dworkin: If I can add to that, I agree that there are advantages to having a sitting permanent court rather than creating an institution each time. There have also been successful models for so-called hybrid tribunals—international institutions that are based in the country with a mixture of international and domestic elements. The Sierra Leone special court is often held up as a successful example of that. In the case of the Yazidis, it is not clear if that would be viable. There are a number of problems. I think it is really important and desirable to achieve accountability for the crimes against the Yazidis, but there are issues that come up, one of which of course is that that is far from the only crime that took place within that context. Would it be a tribunal that sat in justice only for crimes against the Yazidis? What about other state crimes that took place in the same area? There are a lot of complications, but I think that for crimes that are serious enough it would be worth pursuing some form of accountability.

Q266 **Claudia Webbe:** I thank our contributors for coming today to speak to us. To touch further on this issue of bias, I hear what is being said about the concept of perception, but there is also a reality. What do our panellists make of the comments by Chief Charles Taku from the International Justice Monitor when he speaks very clearly about selective views, or accusing the ICC of being selective, or the issue of political interference, or that in some of the cases, the issues of conflict are often fuelled by other state operators? For example, the UK is not innocent in its supply of arms to African nations in periods of conflict. What do you think about those views as outlined by Chief Charles Taku of the International Justice Monitor?

Angela Mudukuti: I am not familiar with those exact comments, but generally speaking I think, on this question of political bias, as I said earlier, the numbers and the reality is that that is not the case. The ICC is not targeting a specific region or group of people. I think everyone can agree that it is very important for any international institution to have a diverse geographical docket. There is no doubt about that, but nobody can

dispute that in the cases that the ICC has been involved in, crimes were committed, and crimes that fell within the jurisdiction of the Court were committed. It is very easy to make a convenient argument and accuse the institution of these things, because then you draw into question its impartiality and thereby its credibility, which many people who have accused it of bias are seeking to do. We see it a lot with political leaders who accuse the International Criminal Court of bias—African leaders, leaders from other states as well—and that is because there is ultimately a political agenda. When you speak to the victims of these crimes, it is a completely different story. They had no justice domestically, no justice regionally, and the ICC was the only option for them. So I think it is a question of who you are listening to and what their motives might be.

Q267 **Claudia Webbe:** I am talking about the International Justice Monitor and what they have to say and the fact that, for example, of 37 cases where there were charges, all 37 involved African countries. What you heard earlier is that there are clearly crimes committed in other parts of the world, and those are not among the 37 or others being charged. I am talking about what other international institutions are also saying, not just what African politicians are saying. What do you make of the International Justice Monitor?

Angela Mudukuti: Again, I have not specifically read the comments that you are referring to, so I would need to do that to give you a fuller answer. However, based on what you have said, what I can say is that there is a recognition of this perception, and if you look now at the International Criminal Court's preliminary examinations, there are nine countries under preliminary examination and only two of them—Nigeria and Guinea—are African. The rest are outside Africa, so again, I agree that there needs to be a geographically diverse docket, but the institution is guided by law, the confines of the Rome statute and where they have jurisdiction.

Chair: Bob, you wanted to come in on a right to protect question, which I think builds on a couple of earlier points. Can you come in now?

Q268 **Bob Seely:** Yes, thanks, Tom; I am hoping it does. Again, just to be slightly pejorative to get a reaction from both our witnesses, the right to protect is very important, but countries such as Russia have not liked it because it is seen to infringe on their sovereignty and maybe their spheres of influence. It also seems to have taken a real knock in recent years with the Syrian war. Is the policy of the right to protect internationally effectively dead? Can it be resuscitated, or am I exaggerating its demise?

Angela Mudukuti: You might perhaps be exaggerating its demise. It has definitely taken a significant knock over the past few years, but I do not think it is dead. This is what speaks to the importance of accountability mechanisms such as a permanent court that tackles international criminal justice.

Anthony Dworkin: Could I just add to that quickly? First, Russia's relationship to the responsibility to protect doctrine has been somewhat complex: when they intervened in Georgia a number of years ago, they tried to justify their action under the responsibility to protect, so it has been rather more opportunistic than simply opposing. However, I suppose those people who were responsible for developing and promoting this idea were keen to emphasise that it encompassed a range of measures, not only military intervention—prevention, drawing international attention, and so on—but there are always going to be cases where atrocities are taking place, and it is simply beyond the reach of the international community to do anything.

Probably many of us are a bit more chastened now than we were a few years ago about what it is possible to achieve through military intervention. If a state is strong enough, determined enough, and has international support, there may be limited options, so in that sense the goal of ending atrocities is an idealistic one that is out of step with the reality of the world today. However, there are still steps that can be taken in a number of instances, and it is important to keep international attention, as well as domestic attention, focused on doing what one can.

Q269 **Bob Seely:** So it is going through an ebb. It has not quite been written off yet, but clearly it is going through a situation different from maybe a decade ago, when there was more of an agenda to intervene. Is the right to protect therefore dependent on superpowers, great powers, powers with military force, or indeed the African Union and suchlike being willing to intervene? To what extent does there need to be political will, or is that a statement of the obvious?

Anthony Dworkin: The success of action to end atrocities is going to depend on mobilising a broad international coalition. That is not only a question of military intervention, which is very much a last resort and always entails complexities and unexpected results, but of mobilising international condemnation, support to try and persuade Governments, and potentially implementing sanctions. All of these are questions of both political will and how broad a coalition one can assemble, and it is now a more challenging international environment for these kinds of questions.

You can look at Xinjiang for a perfect example of that, but I still think it is important that we try to keep attention on those atrocities to highlight that they are international crimes, and to see what can be done in any situation to try to mitigate them.

Q270 **Royston Smith:** May I move on to last year's comprehensive review, which was advocated by the ICC president? What are the possible repercussions of the findings of the independent experts' review into the ICC?

Angela Mudukuti: The experts released their report this year. It is far reaching, with recommendations on every aspect of the Court, from governance to bullying and harassment and gender balance. There are some very useful recommendations. The idea is for the Court to assess the

recommendations and to see which ones are fit for implementation, how and by whom. The Assembly of States Parties is now involved in a process to develop a resolution for the implementation, or at least for the meaningful engagement and consideration, of the recommendations produced by the experts.

The expert report touched on some very important issues that are crippling the institution at the moment—one of them is gender imbalance. As of September last year, only 26% of women held any position above P-5—the rest were held by men—so you can see the gender imbalance, which then of course affects issues of sexual harassment and how bullying is tackled in the institution. The experts had some recommendations that will hopefully be taken into consideration by the respective organs of the Court as well as by the Assembly of States Parties.

Anthony Dworkin: I agree. It is a very comprehensive and far-reaching report. Even the priority recommendations contain 76 points, so there is a lot there. There are a lot of quite blunt and critical findings. In addition to the point about gender balance, there is some very striking findings about the kind of culture that obtained at the Court more broadly: a culture of bullying, often, and a number of other aspects of unhealthy workplace culture, such as poor relations between different aspects of the Court. There were some quite pointed findings about the efficiency of the judicial process, going on to a variety of issues about certain kinds of provisions within the statute itself. There is a lot to work with there.

Coming at a moment when there was increasing attention on the flaws and aspects of the Court that had not been successful, I think that having all that spelled out in an extremely credible way really creates an opportunity to really look at the Court and try to modify its culture and processes, improve some of the aspects that are not working, focus international attention on it, and get it into a better place so that it can perform its extremely important function. It is a new institution operating in a complex environment, with its mixture of civil and criminal law, and it has had a lot to get to grips with, but this really is the moment to focus in and use the opportunity to try to improve some of the Court's functioning to make it work better.

Q271 **Royston Smith:** It must be the right thing to do to have your organisation peer reviewed or inspected by experts. It was clearly the right thing to do because of the independent experts' findings, if nothing else. Do you think that that makes the Court more vulnerable to further criticism and, perhaps, disengagement by states?

Angela Mudukuti: I do not think so. I say that because the experts made it very clear that their job was not to tell us how fantastic the Court was; their job was to be constructively critical. When you use that as the starting point, you understand the significance of the institution and the importance of improving and building on what has already been achieved. I think that states parties that are vested in this process will recognise that as constructive engagement and hopefully nothing more.

The report also makes it clear that it is crucial to protect judicial and prosecutorial independence. If that is maintained at the heart of possibly implementing these recommendations, I do not think that states will feel disenfranchised or that they need to withdraw their support or abandon the Court. Maintaining the core principles upon which the Court was built, acknowledging the successes, but engaging with areas for improvement—think is the purpose of the report, and I think they managed to do that in the way they presented their findings.

Anthony Dworkin: I completely agree with what has been said. This did not come at a moment when the Court was perceived to be functioning well, with a group of experts the coming along and making arbitrary criticisms; this was an attempt to address the sense that the Court was not functioning properly. These points had been made by a number of states, including, incidentally, in a strong and influential address by the UK legal adviser a couple of years ago at the Assembly of States Parties, which was quite widely noted. This is a really responsible attempt to get to grips with the problems of an institution that is nevertheless is recognised to be playing an essential and invaluable role. It should really be seen as an opportunity for improvement, which I believe it represents.

Royston Smith: Lovely. Thank you both very much for your answers.

Q272 **Chair:** May I come back, Ms Mudukuti, to a more parochial matter—the UK's influence on the ICC? What influence does the UK have? Is it positive or negative? How do you see it?

Angela Mudukuti: The best way to answer that question is for me to point you to some of the practical things—positive and negative—that the UK has done in the past with the International Criminal Court. The first one I would say is funding. The UK has provided a lot of funding, particularly to the trust fund for victims, but of late we have seen the United Kingdom align with states that are pushing for what they call zero nominal growth—basically, minor budgetary increases that do not even take into account inflation in the host state, the Netherlands. Other states have been more constructive and perhaps more progressive on this issue, and have said that we should instead look at the Court's actual financial needs and determine the budget based on that. For example, Argentina, Belgium, Lichtenstein, Luxembourg, Sweden and the Netherlands are some of the countries that have taken a more progressive stance on the budget. That is perhaps something to consider going forward.

The United Kingdom has also shown political and diplomatic support for the Court in the face of aggression and sanctions from non-states parties. The United Kingdom joined a letter of 67 states parties confirming unwavering support for the ICC. In November this year, the United Kingdom, on the occasion of the ICC report to the UN General Assembly, joined a statement with 74 other states showing support for the Court. This kind of diplomatic and political support has proven invaluable in the past.

The United Kingdom has also been proactive so far as voluntary agreements with the ICC go—for example, on the relocation of witnesses and the release and provisional release of detainees. I believe you actually enforced a custodial sentence for Mr al-Mahdi from the situation in Mali. He was convicted, and UK concluded a voluntary agreement to that respect. These are things that have been practically useful and of value.

To direct your efforts, one should take a look at the 2019 Assembly of States Parties resolution on strengthening the court, which calls for promoting the universality of the Rome statute, for example, and also encourages implementing legislation. Perhaps the UK, as part of the Commonwealth, could play some role in that. On better co-operation between the United Nations Security Council and the ICC, the UK, being a member of both, is well placed, perhaps. These are the things I would point you to, in terms of positive and negative influences.

Q273 **Chair:** Thank you very much. Mr Dworkin, perhaps you might have some views as to what the FCDO, as it now is, should do to strengthen the ICC.

Anthony Dworkin: I very much agree with what Ms Mudukuti said. In the case of the UK, and the FCDO particularly, the UK has international influence as a kind of, you know, very credible country in the field of international law and international justice. There is a very strong tradition of international law in this country. Many influential thinkers and writers on the subject have come from here. I think the UK has a kind of thought-leadership role within the ICC community—within the Assembly of States Parties—in terms of perhaps leading some reflection on some of the issues that came out of the independent expert report, and perhaps also in taking further some reflection on some of the points about the operation of the core issues like the notion of complementarity, and how that should play out in practice; what situations should be left to domestic processes, and when the courts should step in; this unresolved question of the interests of justice and how much weight the prosecutor should give to that.

These are all issues on which I think a British voice might carry some influence. Then the point about the UK's role in the Security Council, I think, is an important one, because, obviously, the UK is alone with France as being among the permanent members that is also a state party to the Rome statute. So I think that relationship between the Court and the Security Council has been a complex one, and the UK is, I think, well placed to lead in thinking through some of how that relationship could work better in the future.

Q274 **Chair:** Thank you very much. Is there any actual change needed for the ICC or is it just a case of positively influencing directions, do you think?

Anthony Dworkin: I would say, obviously there are some questions that would involve redrawing the statute, and so on, but for me the most important changes, I think, are changes to the processes of the Court, and changes to the culture within the Court. These are all things that I think would be really important. One of the things that has been particularly

damaging to the Court in recent years has been a series of unsuccessful prosecutions of high-profile figures: former presidents—current presidents in some cases. There have been a string of incidents in which these cases were pursued and then more or less either collapsed or led to acquittals, or were overturned on appeal. I think the question of how cases are developed—how the evidence is assembled: those kinds of aspects of the processes of the Court really need to be improved.

Then I think this very difficult question about how the Court selects what priorities it is going to have, how much weight—and at what stage—it gives to the prospects of success, is a complicated question for the Court, because if it ignores the prospects of having a successful case then you are likely to see a lot of cases which don't succeed. Yet if you only go for the cases which seem easiest a lot of times you are going to be letting the most powerful actors off the hook. So there is quite a delicate navigation. I think the prosecutor has kind of laid out the strategy of opening investigations based on the level of the crimes, but then perhaps pursuing actual prosecution of cases based on our prospects for success. That seems like a promising way forward.

So I think there is a range of things, from the strategies of the prosecutor to the processes of the Court to the interpretation of some of the provisions of the charter and the relationship with other international bodies. That is quite a wide agenda, most of which is there in the independent expert report, which doesn't involve revising the statute; but these are, nevertheless, I would say, changes in how the Court works, rather than mere tweaks.

Angela Mudukuti: If I can add to that, Chair, I would say it is something that falls squarely at the feet of the Assembly of States Parties, given that it is an election year this year and that, at the Assembly of States Parties in 2019, the UK was one of the countries that called for merit-based elections at the ICC. This is hugely important, because what we see at the ICC—and many international institutions, for that matter—is vote trading. Instead of voting on the basis of merit, states exchange votes: "If you support me here, I'll support you at the Security Council." None of that is going to give us the best possible candidates to be on the bench of the ICC. This is something that needs to change, and states' parties are solely responsible for the development of this culture and therefore for the termination of this culture.

Chair: That is a very important point, and we have certainly had experience of it in other elections as well; it is not new to this case. Alicia wants to come in.

Q275 **Alicia Kearns:** Mr Dworkin, President Trump placed sanctions on ICC prosecutor Fatou Bensouda and other officials by freezing their assets and blocking their entrance into the US, because they wanted to investigate whether US soldiers had committed war crimes in Afghanistan. To what extent does this sort of activity occur commonly, and do you have any other examples? Have other US and Russian actions recently had a detrimental impact on the ability of the ICC to function

effectively, and what other countries would you say are particularly hostile to the ICC?

Anthony Dworkin: I would say that it is routine, and probably unsurprising, that countries that are not party to the Court are unwilling to co-operate with its activities. They are particularly unwilling to co-operate with those activities when they affect nationals of that country—Russia in Georgia, Israel in the Palestine case, if that goes forward, or the United States in the case of Afghanistan. To my mind, what is really unique about the United States is the way that, at certain moments, it has moved beyond that to what could be described as a campaign of active measures to undermine the Court. That really stands out internationally. We saw a little bit of that in the George W Bush Administration just after the Court was set up, when the United States took various steps to try to reach bilateral agreements with different countries using its diplomatic way to prevent their nationals from being handed over to the Court under any circumstances. But it has really been ramped up under President Trump. The idea of placing sanctions designed for use against terrorists and others threatening US national security on officials of an international body that is devoted to promoting the rule of law is quite extraordinary.

Obviously, we are now looking at a change of Administration in the United States, and it will be interesting to see what the Biden Administration does on this question. I expect and hope that they will withdraw the sanctions quite quickly, but I think they will go back to a policy of non-co-operation with respect to the potential investigation of US actions. Perhaps they will pursue a bit more a course of engagement with the Court. There are a number of arguments that they can make—that these crimes do not rise to the threshold of gravity that was involved, or perhaps that they have addressed them at home. These are arguments that can be made. To my mind, they would not necessarily succeed, but I think it will be some kind of combination of engagement and perhaps a degree of non-co-operation. Broadly, they will support the action of the Court in general and be sympathetic to it. I think this campaign of trying to undermine the Court as a body will stop.

Chair: Alicia, did you want to finish?

Alicia Kearns: No, that's all from me.

Chair: In that case, may I thank both our panellists enormously? I must say I found that extremely informative, and I am extremely grateful for your insights, particularly your perspective on the challenging nature of how we address both regional and multinational areas. Thank you very much indeed.

Examination of witnesses

Witnesses: Sir Howard Morrison and Peter Lewis.

Chair: Exactly as we did for the first two witnesses, I would be grateful if you both gave a one-line introduction of yourselves for the record. For no

other reason than that you are on my left on my screen—probably not on anybody else's—Mr Lewis first, then Sir Howard.

Peter Lewis: My name is Peter Lewis. I am the Registrar of the International Criminal Court.

Sir Howard Morrison: Hello, it's Howard Morrison; I am the President of the Appeals Division of the International Criminal Court, having been a trial judge previously at the Yugoslav tribunal.

Q276 **Chair:** Thank you both. I am extremely grateful that you have given up your afternoons to help us here today.

We have heard about the importance of making the International Criminal Court as representative as possible, and I was particularly struck by Ms Mudukuti's point about the size of Africa's contribution to it. I was wondering: what could the UK Government do to contribute towards a goal of greater representation on the Court?

Peter Lewis: To give some background, we have four judges from Africa, of the 18 judges we have. Of the staff that we have in the Court, you would expect, in view of the representation from African states at the Court, that about 13% of the staff would be from Africa. In fact, we do slightly better than that at 16%, but that overall figure hides a lot of imbalances. We've got a number of areas where we have no representation from African states here at the Court.

Just to be very practical about these issues, we advertise for posts in the way that everybody else does, of course, but there is an advantage that one can have in applying for posts at the Court. If you worked in an international organisation before—as an intern, or as a visiting professional—that enables you to explain to any recruitment panel that you can do more than just work in a domestic situation; you can work internationally.

One of the problems and one of the challenges that we have—from Africa and some other places of the world—is that in some of the poorer countries there are not enough students with the private means to come and enjoy internship programmes.

Now, the Assembly of States Parties made a decision, a few years ago, that it would not fund internships at the Court; they had to be funded by voluntary contributions. Indeed, we have got a voluntary fund, but we're not getting enough interns from African states through the Court. We're not getting enough visiting professionals—experienced professionals, who would like to take a sabbatical and perhaps come to the Court. All that has to be self-funded at the moment, and, of course, that is particularly difficult for poor countries.

I am really quite keen that we find a way to encourage potential staff or potential students from under-represented states to come to the Court, and I think that the UK could help—perhaps through the Commonwealth—in helping us do something of that nature. As you know, the

Commonwealth does have schemes where it encourages students to work at international organisations and does some sort of cross-funding to help make that happen.

There are a number of things we can do. Perhaps I can just say this as well: one of the great things about the interns and these visiting professionals is not simply that they end up here as employees—as important as that is—or that they become judges for the future, but you do create a community, particularly in the academic community, of people who know the Court, understand it and can support it, stimulate debate about it or be critical of it. It has a wider benefit, so I think there is something that can be done, but the gap, at the moment to me, is: what can we do to stimulate young people to spend some time here as part of their professional development?

Sir Howard Morrison: I agree with everything that Peter said. This always sounds a bit mealy-mouthed, but I have to make it plain, as a sitting judge: that the views I give are mine alone. They are not ICC policy, and certainly not the views of any other judge, and there may be stuff that I cannot comment on because I am still a sitting judge.

Having made that disclaimer, I can draw upon 23 years of active involvement in international, criminal and humanitarian law. I have been defence counsel and judge in four different international tribunals, at both a trial and appellate level. In doing that, specifically in reference to Africa, I have come across an enormous number of extremely talented African lawyers and judges, and they are an essential part of the international legal community—there is no two ways about it. We have been blessed with some very good African judges.

More needs to be done, as Peter says, to encourage people from poorer countries to come to the Court, and it is a pity that internships are not funded. Looking at that in isolation might be useful for countries that can afford it to do so. I certainly advocate that the UK thinks about that. Without talented young people coming into the institution at the bottom end, it is very difficult for it to grow.

Chair: Thank you very much. Alicia, you wanted to come in.

Q277 **Alicia Kearns:** I go back to one of the topics we looked at with the last panel on obstructionist actions by non-party states and the detrimental impact they have on the Court's activities. What processes are open to the ICC in the Assembly of State Parties and UN Security Council in the case of a state refusing to co-operate with an arrest warrant or investigation?

Sir Howard Morrison: Is that one for Peter or me?

Alicia Kearns: Whoever is the most passionate about the subject.

Sir Howard Morrison: Yes, a certain amount of passion. What the UN Security Council can do is not restrict or bar UN funding for investigations and prosecutions, not seek to limit the jurisdiction of the ICC over persons

relevant to the situation, and to establish a process to consider whether to impose targeted sanctions on individuals wanted by the ICC, because the ICC has no police force—we cannot go out and arrest people.

The ICC, as must have been said, depends entirely on voluntary co-operation from both within and without the ASP, and particularly from a powerful body such as the Security Council. The Security Council could give explicit mandates to UN peacekeeping enforcement and peacebuilding missions in territories that are also ICC situations to co-operate with the ICC.

I was a defence counsellor at both the Yugoslav and Rwanda tribunals, and a judge at the Yugoslav tribunal, which, because it was UN Security Council mandated, had chapter VII powers. Under those powers, you could demand co-operation and you got it, and we did. I was a judge in the Radovan Karadžić case, where we frequently asked states to co-operate and they did; I cannot remember a single state that did not. But we do not have any police.

While the Yugoslav tribunal, in particular, had the active co-operation of UN peacekeeping forces on the ground in the Balkans, the ICC does not have that. There is no reason why the UN could not mandate forces in those territories to co-operate with the ICC. It could also extend the mandate of its informal working group on international tribunals, to include the ICC to provide more structured and better-informed discussions on ICC matters.

The UN Security Council has an enormous power but, as has been mentioned, only the UK and France are permanent members and there has been active, or passive, resistance by some other members.

Alicia Kearns: Mr Lewis?

Peter Lewis: I agree with all of what Sir Howard has said, but I think we also need to recognise this. For many of the countries that we are dealing with, where, as Sir Howard said, we are relying on voluntary co-operation from them—often, they are making a hard decision to assist us. There is a political price or a security price to be paid for their making a decision to help us. One of the questions—this is from speaking to a number of ambassadors—is what we can do or what can be done collectively by the Assembly of States Parties to make that choice a bit easier for people.

The example often given to me is this. What if, in some of the situations we are working in, all the aid donors got behind these issues and said, "Look, we want to work with you. We are not making aid conditional on a particular co-operation request, but it really is important to us, if we want to keep engaging with you, that you do co-operate on issues like this, because peace and justice are really important to us"? The question is what we can do to build this strong coalition to support people when they are making these difficult decisions, as well as trying to put some more hard force on them at the same time. I think both are required.

Q278 **Alicia Kearns:** In terms of the Office of the Prosecutor on its own, if we have the UN frozen, in deadlock—as it currently is—or being undermined by those who want to stop certain things from being investigated, is there any situation where the Office of the Prosecutor could rule that a non-ratifying state was contravening international law, or undertaking arbitrary detention or anything like that, without a formal referral, or are they just unable to act in any way independently?

Peter Lewis: As I think previous speakers have said, the mandate that the Prosecutor has is one set by the Rome statute. It is basically treaty-based for the countries that are members of it; she has more direct engagement with the Assembly of States Parties. But for states outside that, it is in respect of matters that have been referred to her by the Security Council. For other countries, outside those two basic referral or treaty-based mechanisms, the Court does not have a place; it does not have a standing to discuss matters that are taking place outside that context.

Q279 **Alicia Kearns:** In terms of hostile interference and efforts to undermine the integrity and operations of the ICC, we talked earlier about what I guess some would call the usual ragtag vote bartering, which should not be taking place. What concerns do you have specifically about the resilience of the ICC to hostile influence, and what sorts of hostile efforts are under way by member and non-member states to prevent the ICC from being able to function effectively that you have seen?

Peter Lewis: If I may, I will start on that. We have faced the most extraordinary situation over the last six months through being subject to US sanctions. If you have ever been on the receiving end of that, the power of US sanctions is phenomenal—utterly phenomenal. Part of that is because commercial institutions comply with the sanctions regime voluntarily—when they don't have to.

We faced the real prospect, during this year, of not having banking. It was as simple as that. Even with the enormous support we had from the host state, here in the Netherlands we secured only one bank that was willing to continue to do business with us and any of our staff who were designated. And we have had problems with other circumstances; we have been subject to the enormous power of that. Thank God we managed to stay in business and keep working, not least because of the help of so many of our states, which supported us. But as previous speakers have said, I really hope that this matter will be reversed sometime in the new year.

Q280 **Alicia Kearns:** Sir Howard, do you have any specific requests as to how the UK can better support the resilience, integrity and independence of the ICC?

Sir Howard Morrison: It has a huge reputation already for promoting and supporting the rule of law—not only in the UK, but worldwide. So that reputational value means that whatever the UK does or says will be taken seriously by a great number of people. We must not underestimate that.

But I do want to say—because he would not say it himself—that although in terms of the recent sanctions the host state and others have done a lot of good work, Peter Lewis has done a fantastic job of maintaining the position of the ICC in the face of real opposition. That needs to be said.

The UK, as a member of the ASP, could invite—or ask, at least—the ASP to routinely respond to findings of non-cooperation made in particular by asking both the UN Security Council and the General Assembly to take appropriate measures. In particular, open letters reminding states of not only their general obligations under the Rome statute, but the specific consequences that might arise from their discreet failure to co-operate, might be helpful. The UNSC has an awful lot of power, including sanction power, against relevant states. That is a last resort, but in some cases the last resort is necessary.

Q281 **Chair:** The recent independent expert report was critical over a number of areas—not least its culture. What damage has that done to the image of the Court?

Sir Howard Morrison: It is difficult to say as much from the inside as it might be from the outside. Obviously, it does not do the image of any institution any good to have those findings made.

I have a lot of sympathy with the position. A couple of years ago, I went to a staff meeting—in fact, I was the only judge who went—where I was shocked and disappointed at the number of people who said they were subject not so much to sexual harassment but to bullying and gaslighting in the workplace. That was a real eye-opener for me, and I communicated that to the other judges.

It is very difficult for the judges to do anything about it because it devolves down to the ladder of seniority, as it were, in individual departments and requires active management on the part of the seniors. But, having seen that reaction from the staff at the staff meeting, it did not come as any surprise to me that that was part of the expert report.

Some of the press reports that came out afterwards were grossly exaggerating as if it was happening everywhere and at all times, but that it happens at all is unacceptable. If it goes down to the level of sexual harassment, it is particularly unacceptable. People forget that that is not simply something to be very critical of—it can amount to a criminal offence.

Q282 **Chair:** Mr Lewis, do you have any views?

Peter Lewis: The first thing to say is that the principals of the court did welcome this review. If an organisation is genuinely to move forward, it has to submit itself regularly to outside scrutiny and to really have everything looked at. Now, there is a price that comes with that: sometimes those reviews and reports will tell you things that are difficult for you, and this is certainly no exception, but it is really important that we confront these issues.

This was a very experienced panel of individuals. They did their job very well. They spoke to so many members of staff. They have given us a clear message about how serious this is for us and what we need to do to fix it. If we are going to improve, part of the review process is that we look at ourselves in the mirror and they have certainly forced us to do that and that is right and proper.

Q283 **Chair:** What measures are you taking to address this?

Peter Lewis: We are doing a number of things. One of the challenges to the Court, which is fundamentally recognised in the review, is that we have the same problems that every other organisation has in the world, but the speed of our governance ability to respond to that is very slow. That is one of the fundamental problems.

In facing the issues that we have had, the Court itself has embarked on a number of things that I am convinced will make a positive difference, but it has taken us a very long time to grind through the bureaucracy. A simple issue is that one of the many things that modern organisations do now is have a focal point for women and a focal point for gender—somebody within the organisation who becomes the repository of knowledge where people feel they can go to for advice on individual issues and, more importantly, who can help the organisation challenge itself, by saying, "What are you doing on recruitment that means you only have so many senior women?" The Court recognised it needed such a post. It was only the week before last that, finally, we ground through all the bureaucracy to make that decision and agree it.

To respond to this, we need to get on and do the things we have been talking about. We need a new set of up-to-date policies on harassment and discipline. We are using the first generation of UN policies. We need to have the most contemporaneous ones. The process we go through is very slow.

One of the things I hope will come out of this independent expert review is that we speed up the governance of the organisation and cut through some of the bureaucracy so that we can respond quickly and decisively to the issues that are there.

Sir Howard Morrison: Can I just support what Peter has said? When I was at the Bar, I was a member of the race relations and equal opportunities committee of the Bar Council. When we found out what was going wrong and publicised it, it was very interesting how quickly some of it turned round. Perhaps not as quick as it could have done, but having these commissions and committees bringing stuff out into the open is extraordinarily valuable.

Chair: Thank you very much. I am grateful to hear all that. Neil, you wanted to come in.

Q284 **Neil Coyle:** The first panel was very complimentary about UK diplomatic and political support for the ICC. Did you want to add anything to that, in particular, Mr Lewis, in the light of the experience that you just touched

on? Is there anything else the UK could have done to support you through what has obviously been a very destabilising time?

More widely, for both of you, could you say where the UK has influence at the ICC? I ask that mindful of our candidate not making the shortlist for the new prosecuting judge position earlier this year.

Peter Lewis: On the UK's position, it has already been said that the UK has been enormously influential in the Court, and in the process that led to the Rome statute, where it was seen as playing a particularly significant role in shifting opinion about the Court. It has maintained that very strong leadership position throughout. It has given us a number of great judges, which, as people have talked about, is really important. We have a senior member of the Trust Fund for Victims, which is a hugely important and influential post. It provides expertise on the Committee on Budget and Finance, which is the oversight mechanism for the states parties. Britain has several significant senior people. It has just provided another very influential expert when we have looked at subjects like remuneration. Britain does an awful lot and is very strong with us on co-operation as well, as has already been mentioned. It has played a very significant role in the last 12 months in the Central African Republic, where a donation from the United Kingdom has helped us to do the outreach to the victims of the offences there.

In all sorts of ways, the UK is playing a really significant part. At the Assembly of States Parties, it was one of the first voices to say, "Come on; if we are serious about this institution and our support for it, it needs to change. If we are serious in our support, we need to see more from this organisation, and we want to start that process." The UK hosted a conference in London before the independent expert review was started, to begin thinking about that. That sort of thought leadership is really important, and it needs to continue. I think the underlying message is: more of the same.

Sir Howard Morrison: Let me talk about my personal experience first. I have had huge help from FCDO legal advisers throughout my time in international law. There is real expertise there, and there is a lot of strenuous effort put in. When I was up for election to the ICC, the number of people working very hard on my behalf was extraordinary. After I was elected, I wrote a letter to the then Foreign Secretary describing it as diplomatic excellence, and I was not exaggerating; it really was. That has continued ever since in contact through the British embassy in The Hague with the legal advisers there.

That has been very important to me personally, but you see it in a wider aspect. The UK is honest about the people that it puts forward for jobs, in that they meet the job specifications. I have said many times that the ICC is not a human rights institute, although we apply human rights principles, and it is not a PhD factory; it is a court, and it is the senior criminal court. To have people in the senior criminal court, you need, at the top end, especially in the judiciary, people with strong criminal court backgrounds

who can absorb international law—all the better if they have both before they start.

The UK does that, and not simply at the ICC; it is true at the ICJ, it was true of the Yugoslav tribunal and it was true of the European Court of Human Rights. There is a lot to take genuine pride in, in that respect. The people who are put forward—this sounds horribly like I am blowing my own trumpet, and I do not mean to, but some of my fellow UK judges have been extraordinarily good. The UK takes those responsibilities extremely seriously and, more importantly, it is seen to do so.

We talk about the horse trading that goes on for judicial elections. I have been advocating for a long time that that procedure should change, and that there should be an independent international judicial commission. I said as much to the experts when I was interviewed for the report. There is a lot of reluctance, but it would not be a difficult thing to set up, and the ASP could be involved in that. It would perhaps help to do away with some of the undoubted horse trading that goes on. Everything in a court of this nature needs to be merit based.

Q285 **Neil Coyle:** Mr Lewis, is there anything that you want to add to that? Does the FCDO need to invest more time and effort into making that change from the horse trading, as Sir Howard has outlined, to the merit-based approach that I think Angela Mudukuti was talking to earlier?

Peter Lewis: I think there has been a positive development in that direction. It is not as far as perhaps the ultimate that Sir Howard has talked about, which would be there acme of this, but the process for considering the judicial candidates this year has been more rigorous than before. The panel that considered that was led by a very distinguished UK judge, a former judge at the ICC, Sir Adrian Fulford.

There has been more interest from the states in the analysis that has taken place this time. I think there has been a step forward in that—at least it seems so to me—with more rigour applied this time around. Of course, it still goes to an election, and it is at that stage that things move on, but at least the panel that Sir Adrian Fulford has led this time has done a very thorough job of assessing the credibility of the candidates. It has been talked about. That is the other thing that I have picked up: it has been talked about more, because that process is seen as being robust.

Sir Howard Morrison: I can certainly agree with that: Sir Adrian has done a very good job. It has changed notably in the last two or three election cycles, for the better.

Q286 **Claudia Webbe:** You have answered the questions quite extensively, particularly on the process of selection when an appointment is due and on what happened in your respective roles when you were selected. Can you draw on any examples of the appointment of officials being used as tools for states to exert influence for self-interested purposes?

Sir Howard Morrison: I genuinely cannot. It is not that I do not want to; I really cannot think of an occasion when that has happened. I am not

saying that it has not happened, but it is simply not something that has come to my attention. There will always be a risk of that; all those processes involve a measure of self-interest. Of course, everybody wants to get in their own judge or a prosecutor from their own jurisdiction—there is a sense of pride and achievement in that—and there is nothing wrong with that, but if it is done for underhand purposes, as it were, of course everything is wrong with it. It is not something that I, personally, have seen or can talk to.

Claudia Webbe: Peter, do you want to come in on that?

Peter Lewis: Only to agree with Sir Howard. I have not seen that. I would say that if the Court is anything to go by, in the senior elected posts in these international organisations, you are under enormous scrutiny, not just from the states parties, but from civil society and the NGOs, which play a perhaps much greater role in the scrutiny of an international organisation than of domestic organisations. People who are elected are subject to real scrutiny of all their decisions, of how they act and of how they conduct themselves. I have always hoped that that degree of scrutiny is one of the protections, if you like, from somebody being put in to sabotage or move an organisation in a particular way.

Sir Howard Morrison: To add to that, the Coalition for the International Criminal Court, which has hundreds of NGOs attached to it, is a very powerful and useful tool, and should not be underestimated.

Q287 **Claudia Webbe:** I have a wider question about UK influence more generally in relation to the International Criminal Court. Do you think there are any domestic or international issues that have the potential to undermine the UK's influence or standing in relation to the ICC?

Sir Howard Morrison: Perhaps Peter would like to go first on that.

Peter Lewis: This may seem an odd way of answering that question. In my experience, the UK's influence comes from—Howard has already referred to this—its history and the strength of its public service, including its judges, because of the process those people have gone through. All those things are admired, as is its long history of strength of the rule of law. The UK has educated so many people—not only Brits—from all over the world. The university sector is so strong. People, particularly in international law, come here. If they have been to a British university, which they often have, they have such affection and regard for the UK. Those issues are the bedrock on which our reputation is based: those big fundamental things, rather than any issues about individual decisions. Those fundamental bedrocks drive the reputation and, therefore, the influence.

Q288 **Claudia Webbe:** I wonder if Sir Howard might delve a bit deeper into offering some critique. We know that the UK has some significant and powerful contributions to make, but what about the issues that have the potential to undermine its influence?

Sir Howard Morrison: It would take an awful lot to undermine its influence. This is the 75th anniversary of Nuremberg. I think the UK's reputation, in terms of modern international criminal and humanitarian law, can be traced back to its involvement at Nuremberg, not least by having the presiding judge and prosecutors there. That has been carried forward.

Of course, you will always get individuals who, in a social or political comment, will say things that may jar the international community, but I think people are bigger than that and they understand that those are individual positions. If we look at the UK's position overall, which is what matters as far as the UK is concerned, I do not anticipate anything currently going on to seriously worry about. There are sidewinds that blow, inevitably. If a political or judicial decision made in the UK somehow seems to chip away at due process, there will be plenty of academic comments about that.

At the end of the day, as Peter says, there is this bedrock, which supports the UK. That certainly should not be underestimated. We just need to be very cautious. It is a reputation that needs to be enhanced and not put at risk.

Claudia Webbe: Thank you. I think I have pushed as much as I can.

Q289 **Alicia Kearns:** I will start with you, Sir Howard. Stopping a genocide being committed by a superpower is an enormously difficult challenge and one that many of us are currently struggling with. A coalition of the Uyghur have called for an investigation into whether the Chinese Communist party's actions in Xinjiang constitute genocide or crimes against humanity.

My personal view is that the forced industrialised sterilisation of women and forced abortions are at the very minimum a sign of an intent to commit genocide, but it would be really helpful to have your professional and personal view as to how we reach the definition of genocide. What options are there to secure a declaration of genocide? Obviously, it has to be at an international court, not a domestic court. What would be the likely consequences of an ICC ruling that activities in Xinjiang constituted genocide?

Sir Howard Morrison: I am looking at genocide in general rather than in particular. As I am a serving judge, I will not concentrate on a particular allegation or a particular case, but the definition of genocide applies across the board. There is a genocide convention.

Let's make it plain. First of all, genocide is a crime against humanity. It is distinguishable from other crimes against humanity because of the egregious nature of genocide and because it requires a specific intent. You need to intend to destroy, in whole or in part, a national, ethnic, racial or religious group. That includes killing, causing serious harm, deliberately inflicting conditions of life that bring about physical destruction in whole or in part, imposing measures intended to prevent births within a group,

which may be more relevant to what you were talking about earlier, and forcibly transferring children from one group to another.

Historically, the victims of any given series of offences would rather like it to be categorised as genocide, because that seems to make people sit up and take more notice of it. But there is a danger in watering down genocide, and you certainly need specific intent, which can be inferred from subsequent actions or from speeches or acts that are made in respect of the genocide. At the moment, there is some academic debate about whether the specific intent should be reserved for the masterminds who were in charge of the genocide, and about whether lesser operatives, or apparatchiks, should simply have knowledge that there is a genocidal plan, even if they do not have a specific intent to commit genocide, so that they can nevertheless be found culpable.

Remember that genocide also specifically criminalises incitement, so incitement to genocide is a very important tool. I defended a Rwandan Cabinet Minister in the Rwanda genocide tribunal, and one of the things he was charged with was incitement to genocide, which came from speeches. There was a national radio station in Rwanda that referred to the Tutsis as "cockroaches" to be exterminated. Those are very powerful genocidal tools. Oftentimes, people will not admit to a specific intent and you have to look behind it. Eichmann never, ever admitted to a specific intent for genocide, but it was plain from what he had done that he had actively supported the execution of a genocidal plan, so he was equally guilty.

Genocide is a very powerful concept. As I have said, it is one that perhaps needs to be looked at again, to broaden the scope of it. Changing things in either treaty law or customary international law is a slow process, but as I said, it is something that is under active academic consideration at the moment. I think that the crime base will be increased and expanded within the next 10 to 15 years or something of that nature. That is the sort of timescale that we look at.

Q290 **Alicia Kearns:** That is incredibly informative. Just before I turn to you, Mr Lewis, obviously we all recognise that countries will do everything they can to obfuscate and to prevent prosecutions. How do you go about securing a declaration, particularly when that superpower is exercising every type of authority it has? Let's say it is an imaginative superpower. Taking a step back from the ICC, is that wider international framework for mass atrocity prevention, genocide prevention—whatever you want to call it—fit for purpose, or is there a gap that the ICC would really love to see filled by a new organisation, structure, framework or host of treaties that is somehow missing that you see every day in your work?

Peter Lewis: As you know, you cannot work in this institution without believing passionately that there needs to be some place of last recourse for victims. You meet these victims in the places we work in, and I can tell you there is nothing more pitiable—genuinely, heartbreakingly pitiable—than people who feel that there is just no chance and no place that these cases can be dealt with. I can assure you that, despite what anybody thinks, when people talk about a thirst for justice—my goodness, there is

a real thirst for it—it is not something that goes away with time. We are dealing now with some of the cases of events that happened a long time ago, but they are raw for people now and will always remain so.

You become a believer in the universality of these things. I was involved not in the Rome statute, but immediately after it in helping create the laws of the Court and the rules of procedure and evidence more than 20 years ago. There was at that moment a particular feeling that was behind universality. People were talking about it as something that would happen, but it might take generations. It does not feel like that at the moment. I would love to be able to tell you that there was a great answer to it, but all I can do is say that the thirst for it is just as deep as ever. I am sorry.

Sir Howard Morrison: If I can chip in again, what really matters is publicising these things and putting what has happened into the public domain. When we did not know what was happening in Nazi Germany in the late 1930s and even into the 1940s, until after the war, we did not realise the extent of what had been going on. You cannot hide those sorts of things these days with social media and the instancy of communication. As long as the instancy of communication is valid and proper communication, it is a force for real good. I sometimes think, when I read about people who are dismissive of international law, that if they had heard some of the testimony that I have heard from victims or stared into as many mass graves as I have, they would think rather differently about it. I endorse what Peter has said.

Alicia Kearns: Thank you. I think you are expressing the duty that we all have to be a voice for those whom others seek to silence. I want to briefly mention, before we go to the next question, my gratitude to you both. Like you, I have met victims of genocide and appalling atrocities, and it never leaves you. Thank you for doing what I could never do, which is to deliver some form of justice for people, and I hope we are able to do that more in future. Thank you for everything that you two do.

Q291 **Neil Coyle:** I want to go back to this filthy business of the horse trading that has already been touched on. It is on specifically this new prosecutor post. It does look like a political process, which has been touched on by both panels. It is less than opaque to outside observers. Can Mr Lewis and Sir Howard give us their thoughts on why the UK candidate did not go forward earlier this year? What are the next steps for taking forward the appointment and when will someone new be in post?

Peter Lewis: I am just looking at the calendar. The next stage of the process takes place later this week. There is now going to be a new round of interviews for the candidates. There were very many applicants, and there was a group of about 14 who were looked at in more detail for consideration. Forgive me, I am just giving you a factual account. I am not seeking to defend this. This is a process that is done by states parties.

A group of four was put forward as being suitable for appointment. There were then a series of video interviews when they were interviewed, with questions from states parties and civil society, and there was then more

deliberation by the states. There was some pressure to open up the list of candidates to be looked at to the full 14. That process was discussed, and it was agreed that it would be opened up. Not all of the 14 actually wanted to continue to be involved in the process, but those who did are going to be subject to video interviews again this week. All those who still want to go forward will be subject to that process of video interviews. That will then lead to further debate and discussion among the states parties to try to find a consensus candidate. The next stage of the process is later this week.

Q292 **Neil Coyle:** I am sorry to press further, but none of the candidates who were put forward previously was ineligible under ICC rules. Is that not correct? I ask because of the Canadian candidate. I think what you are saying is that there was nothing wrong with our candidate; there was something wrong the process. Is that it? I am a betting man, and it would also be good to hear how you rate our chances of being successful in this new round as things go forward this week?

Peter Lewis: Sorry—I have to be honest—but one of the things that I have learnt from bitter experience is that as I am an elected official of the Court, I do not get involved in the elections. Of course, I certainly could not get involved, in any way, shape or form, with the candidate from the UK. It is for the states parties to determine now. The UK is fully involved in that process through its ambassador here. That is all I can really say, I'm afraid.

Neil Coyle: Thank you—we do understand. Sir Howard?

Sir Howard Morrison: I am largely in the same position as Peter. What we can say is that because of the now expanded candidate list, the British candidate, who was not on the shortlist of four, is now up for consideration and, like a lot of the other candidates, is eminently qualified for the job, and must stand, on any merit-based appointment, an equal chance. I cannot go beyond that. That is just a factual situation. If you look at the qualifications of all the candidates, some may be marginally more qualified than others, depending on your viewpoint. The British candidate is now back in with a chance, but I cannot say any more than that about it. It is an ASP election, and they will follow their procedures.

Neil Coyle: Thank you—I do appreciate the position you are in. It is a different British candidate, but I think that is all from me, Chair.

Chair: Sir Howard and Mr Lewis, may I thank you both very much? I echo Alicia's comments: the whole Committee is enormously grateful for the work that the Court does and the work that you do, as officers of the Court, in standing up against so many human rights violations around the world. Thank you very much indeed.