The Rome Statute at its 25th Anniversary –
<u>the Creation of a Court and an International Institution</u>

Nazhat Shameem Khan
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The University of Cambridge

"An International Criminal Court ("the Court") is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute." – Article 1, Rome Statute

Introduction

The Rome Statute establishing the International Criminal Court ("ICC" or the "Court") was adopted 25 years ago. It reflected the hopes of the international community that there should be a permanent criminal court, that it should provide a forum for determining individual criminal responsibility for war crimes, for genocide and for crimes against humanity. It reflected the hopes of many that the Court should be a world court, one that would complement the efforts of individual countries to create and sustain jurisdiction domestically and universally for such crimes, one which would both follow the jurisprudential gains of the International Criminal Tribunals and Courts that came before it, and lead in the creation of new and enlightened jurisprudence. Subsequently, during the ICC Review Conference in Kampala, amendments were adopted to allow the ICC to exercise, in limited circumstances, jurisdiction over the crime of aggression.

Has the ICC achieved its aims? Is the vision of the Rome Statute still alive, given the polarisation of so many international institutions? Is the Court flexible enough to reflect new challenges to world politics such as harm to the environment? Has complementarity diluted the accountability of international criminal law? Is the Court able to reflect the considerable advances made in domestic courts around access to justice for women and children? For persons who are LGBTQI+? For persons with disabilities? Is there consistency between international human rights law and the jurisprudence of the Court? Is any desired consistency an aim of the international community? Has the Court prevented the development of a selective justice? The negotiations towards the Rome Statute were built with a vision of substantive justice, with an unprecedented degree of representation for victims of the most heinous crimes, and with the hope that peace has a better chance if justice is effectively delivered. This lecture will address the promise of a world court in the context of international vision and politics.

Steps Towards a World Criminal Court

As a young and idealistic student, I was privileged to attend the lectures of Professor Eli Lauterpacht at this University. Those lectures were my first exposure to international law. They inspired me at a most fundamental level. Professor Lauterpacht traced the history of our understanding of the law on genocide, of the loss to humanity which resulted from the atrocities of many wars. The Holocaust taught us much more than the depths to which humanity can fall when driven by hatred, ethnic superiority and savagery. It taught us that accountability for individual responsibility for such atrocities was possible. The many victims who miraculously survived the atrocities, were able to say who it was who bore command responsibility, who perpetrated by individual will, these heinous crimes and who should be required to pay the price for committing those acts. The Nuremberg trials were enormously significant for framing the law around individual criminal responsibility for the worst types of crimes against humanity, and we learnt many lessons from them. One was the lesson that such crimes were not just perpetuated by those who lost wars. Crimes, for which there was never a significant degree of accountability, were also committed by many who were victors. The criticism that the Nuremberg trials, and the Tribunals that came after them, including the International Tribunals for Rwanda and Yugoslavia, were creations of a selective justice, an unequal world power, has persisted. I will return to this issue later in this lecture.

Nevertheless, there can be no doubt that the Nuremberg trials marked a significant chapter in the journey of international law, in that they criminalised individual offending in the context of war, and refused to excuse such conduct on the basis of conflict, or of superior orders, and in that they created a jurisdiction for trying crimes on the basis of command responsibility. These were concepts which were to endure. Many were to argue that the voices of victims from the Holocaust and from other offences, should have been given greater space during the trials. This was a criticism that international criminal law was to learn from at the Criminal Tribunals of Rwanda and Yugoslavia, and at the ICC.

Professor Richard Falk[1] has described a post-war "normative architecture" which rejects "genocide, crimes against humanity" and other violations of human rights and humanitarian law. He argued that this architecture was built from a trilogy of documents, the London Charter, the Tokyo Charter, the Universal Declaration of Human Rights, and the United Nations ("UN") Charter. The result has been to lend new and strong support and protections for non-combatants during armed conflict, and persons who are the victims of state led persecution. Those protections include establishing and confirming norms, criminalising violations of many of those norms and, where necessary, conferring jurisdiction on international courts and tribunals to adjudicate major norm violations. The London Charter was perhaps the most significant step towards assessing individual criminal responsibility[2]. The Charter created the jurisdiction of Nuremberg and stated in Article 1:

[1] Keynote Speech, Remembering the Holocaust and the Geopolitical Persistence of Indifference, Conference on Law and the Humanities: Representation of the Holocaust, Genocide, and Other Human Rights Violations at the Thomas Jefferson School of Law (Jan. 17, 2005).

[2] https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.2_Charter%20of%20IMT%201945.pdf.

"There shall be established after consultation with the Control Council of Germany an International Military Tribunal for the trial of war criminals whose offences have no particular geographical location whether they be accused individually or in their capacity as members of organisations or groups or in both capacities."

The Charter set[3] out the offences which could be the subject to trial: crimes against peace (namely planning, preparation, initiation, or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing), war crimes (defined as violations of the laws and customs of war and including murder, ill treatment or deportation to slave labour or for any other purpose), and crimes against humanity (including of murder, extermination, enslavement, deportation, and other inhumane acts committed against civilians, or persecution on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal). It is noteworthy that gender persecution was not included in the London Charter as an offence of a crime against humanity. The modes of liability were also set out. The Article stated that leaders, organisers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of these crimes, were responsible for all acts of persons who executed the plan. Further, Article 7 said that official positions, as heads of state, or representatives of Governments, were not exempt from criminal responsibility. Article 8 provided that "superior orders" did not provide a defence. The procedure of the Tribunal followed closely the procedures of criminal trials in common law jurisdictions.

The synergy between the Charter, the UN Charter, the Universal Declaration of Human Rights and International Humanitarian Law was evident. This was a justice created in a world which had decided not only to give teeth to the Geneva Conventions, but also to an international fabric of human rights, gathered and articulated, for the first time in an emphatic and simple way, in the Universal Declaration. That synergy, once enacted, was to endure. It was the basis of the International Tribunals of Yugoslavia and Rwanda, and the basis later of the Rome Statute and the ICC. The crimes of forced deportation, of enslavement, of persecution are fundamentally crimes of the violations of human rights. The crime of persecution is grounded in a discriminatory intent, in the case of the London Charter, to persecute persons on the grounds of race, or religion or political belief[4]. In the case of the Rome Statute, the categories are extended to include gender[5].

There are, even in domestic laws, offences which criminalise breaches of fundamental human rights. Assault is of course probably the oldest, together with murder, unlawful confinement,

[3] Article 6 (a) (b) (c).

[4] Despite the absence of gender as a ground of persecution, evidence of persecution on the ground of gender did feature in the written records of the Nuremberg Tribunals.

[5] Article 7 (1) (h) defines a crime against humanity, when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack, as including ***"Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court".*** Paragraph 3 provides: ***"For the purpose of this Statute, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above."***

abduction and slavery. However, it was only after the development of a declaration of universal human rights values, only after the International Covenant on Civil and Political Rights[6], that others emerged from the human rights world. Post the adoption of the Convention on the Elimination of Discrimination Against Women[7], the Convention on the Rights of the Child[8], the Convention on Transnational Crime[9] with the Palermo Convention on Trafficking of Persons, we began to see the human rights world shaping a discourse around criminal law. Further, the pace of that journey has been relentless. And so, in my opinion, it should be. If human rights are indeed universal, then accountability for breaches and violations of those rights should not be limited to interesting conversations on treaty body reporting and compliance. When individuals exploit others, deliberately or recklessly, and in the case of corporate criminal liability, negligently, when they ride roughshod over the rights of others there must be a role for the criminal law. The London Charter started that journey beyond the common law. The codification of international criminal offences, has from the outset involved the amalgamation of the criminal law with international humanitarian law and with international human rights law. This amalgamation was demonstrated in the International Criminal Tribunals post Nuremberg, and in the development of the jurisprudence of those Tribunals and Courts.

The Development of the International Criminal Law and the Rome Statute – Gender, Sexual and Gender Based Violence and Children

Perhaps the strongest criticism of the Nuremberg trials was in relation to the gender blindness of the prosecutors. Evidence of rape and sexual violence did emerge in both the Tokyo and the Nuremberg trials, but such evidence was subsumed by what were considered to be greater atrocities, murder, mass deportation, and enslavement. The Tokyo Tribunal in contrast did convict of war crimes of "murder, rape and other cruelties", although there was a prosecutorial blindness to the systematic sexual slavery of thousands of women captured by the Japanese army[10]. The stories of these women continue to be told in human rights fora. Article 6 of the London Charter did not specify rape or sexual violence as a war crime or crime against humanity[11], but the stories emerging from Rwanda and the former Yugoslavia forced the world to confront a reality of all conflicts – that those who are already prevented from accessing the justice system, and who are the most vulnerable in society, will be specifically and deliberately targeted in conflict[12]. In the UN Security Council resolution[13] creating the

[6] https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights.
[7] https://www.ohchr.org/sites/default/files/Documents/ProfessionalInterest/cedaw.pdf.
[8] https://www.ohchr.org/sites/default/files/Documents/ProfessionalInterest/crc.pdf.
[9] https://www.unodc.org/unodc/en/organized-crime/intro/UNTOC.html.
[10] https://www.ohchr.org/en/press-releases/2014/08/japans-approach-issue-comfort-women-causing-further-violations-victims-human and https://www.ohchr.org/en/press-releases/2023/03/philippines-failed-redress-continuous-discrimination-and-suffering-sexual.
[11] Although the London and Tokyo Charters gave jurisdiction to the Tribunals for violations of the laws and customs of war and for crimes against humanity which by 1945 included, by implication, by virtue of the 1907 Hague Convention Respecting the Laws and Customs of War and the 1929 Geneva Convention Relating to Prisoners of War, sexual violence against women.
[12] The Prosecution of Sexual Violence in conflict: The Importance of Human Rights as Means of Interpretation. Patricia Viseur Sellers, https://www2.ohchr.org/english/issues/women/docs/paper_prosecution_of_sexual_violence.pdf.
[13] S.C. Res. 808, U.N. SCOR, 48th Sess., 3175th mtg. at 1, U.N. Doc. S/RES/808 (1993).

Yugoslavia Tribunal for instance, the crime specifically included in the mandate of the Tribunal was rape. It was a significant step, for which the international criminal law world was not prepared. It is impossible to prosecute rape, gender persecution and sexual violence effectively, without first understanding how patriarchy has shaped an unequal justice in the investigation and trials of such offences, and understanding that such offences are fundamentally discriminatory by nature. The Preamble of UN General Assembly Resolution 61/143 of the 19th of December 2006 describes it thus:

"Recognising that violence against women is rooted in historically unequal power relations between men and women and that all forms of violence against women seriously violate and impair or nullify the enjoyment by women of all human rights and fundamental freedoms and constitute a major impediment to the ability of women to make use of their capabilities."

In the Rwanda Tribunal the judges embarked upon a definition of sexual violence[14], saying that rape could be a war crime and a crime against humanity. It was adopted by the Yugoslavia Tribunal. That definition was as follows: "The Tribunal considers sexual violence, which includes rape, as any act of a sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to physical invasion of the body and may include acts that do not involve penetration or physical contact." However, sexual violence in the context of war or armed conflict, and offences such as enslavement, were still fluid notions in international criminal law. A former prosecutor[15] at the Yugoslavia Tribunal described how she approached such prosecutions, when an understanding of such offences was still evolving:

"When I joined the Tribunal, the first accused in the rape indictment had turned himself in. His name was Dragoljub Kunarac. We had to put the case together in preparation for trial. One of the first things we had to do was iron out the legal issues, so we had discussions about rape as torture. When does rape constitute torture? We also charged him with enslavement, so we had to come up with a definition of slavery. I remember being tasked with writing a pretrial brief and thinking, "What is enslavement?" I looked at the Slavery Convention of 1926, which basically defines slavery as the exercise of the powers of ownership over another person. But what does it mean when you exercise ownership over someone? Normally, when you have a legal issue like this, you can just go to the library and look up precedent or some statutory directive for an answer, but in this case there was none. I thought, "Now what do I do? How do we come up with some kind of answer, or at least a description that might help the judges understand slavery when they see it?" So, I went home and put a chair in the middle of the room. I thought, "If I own that, what can I do with it?" I simply made a list based on what I understood about property law. "I can move it where I want, I can prevent other people from using it, and I can destroy it. I can do anything to it. I can deface it, throw it out the window, and lock it up." We included such a list in the brief which we submitted to the Court and said, "These are the indicia of slavery." The definition is very blunt; it is ownership. But how do you know slavery when you see it?

[14] Prosecutor v. Akayesu Judgment, Case No. ICTR-96-4-T, 2 September 1998.
[15] Prosecuting Crimes of Sexual Violence in an International Tribunal, Peggy Kuo, Speech given on 7 November 2001 at Case Western Reserve University School of Law, https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=1467&context=jil.

We gave the judges a list of things that made sense. When the Court rendered its judgement, it accepted pretty much everything as we described it. That is another one of those strange things that occurs in the International Tribunal when there is so much unexplored territory that you sort of end up making some things up as you go. You see how it works and then when it works, you think, "That's pretty cool." So, that makes things interesting. Again, there was some really "unexplored territory".

Those who negotiated the Rome Statute and in particular the elements of offences, were faced with an enormous responsibility – to not only ensure that rape and other forms of violence and discrimination against women and girls were included in the definitions of the offences, but to ensure that the definitions left enough scope for growth and interpretation by the judges to allow for the contribution of human rights law and international humanitarian law, to shape the jurisprudence. Here, tribute must be paid to the exhaustive work of feminist groups and civil society organisations, to ensure that the definitions were capable of encompassing the lived realities of women, of LGBTQI+, and of children in the context of war and conflict. However, they could not leave the territory to be unexplored. There was too much of a risk that the old tendencies to ignore offences against these most vulnerable individuals would be ignored, diminished and deprioritised by individual prosecutors.

Today, 25 years after the adoption of the Rome Statute, we are still discovering how enlightened the provisions of the Statute are in relation to sexual violence and gender based offences. Rape and sexual violence are offences as war crimes but also are crimes against humanity. For the first time in international law, a specific offence of gender persecution was included. For the first time, an international code addressed the problem of the dangers presented by an unbalanced and non-representative prosecution and bench. Implicit is an understanding that we must start by putting women on the table, who make decisions on the visibility of such offences, who decide what will be charged and what will not, what can be tried and what cannot, who understand the lived experiences of women in conflict. Implicit also is an understanding that by giving victims representation and voices in the court proceedings, we enable access to justice. In short, the International Criminal Court seeks to remedy a fundamental lack of substantive access to justice - both in the past and in the present.

Of course there is no room for complacency. It was not so long ago that the international justice system was seen as a patriarchal institution, designed to entrench already existing biases against women and children. Despite the fact that most domestic jurisdictions have now adjusted their court processes so that children can give evidence without re-traumatisation, the ICC, until the appointment of the current Prosecutor, Karim A.A. Khan KC, has resisted the calling of children as witnesses. And yet the voices of children impacted by conflict, by sexual violence and by torture, by forced displacement and slavery are capable of showing the world the extent of crimes of atrocities impacting children, and when led and heard with understanding, and competence, may be the vehicle for the resilience of those children post conflict. Rather than becoming a patriarchal and paternalistic structure, invariably assuming that the lawyers and judges know best what a child needs, the ICC is capable of becoming the enabler of empowerment and strength for those children who have the courage to give evidence. It is a chapter that the Court would do well to take from the rule books of domestic laws and procedures on the evidence of children.

The offence of gender persecution remains largely, uncharted territory. Charges for gender persecution (against women) have been laid in the ICC cases of Al Hassan[16] and Abdul Rahman[17] (persecution against men). They await either judicial determination, or the defence case. However, the offence of gender persecution has been in the Rome Statute since its inception. It is, as I have set out above, an example of the close synergy between international criminal law and human rights law. Last year, in December 2022, the ICC Office of the Prosecutor, with critical contributions from the Special Advisor to the Prosecutor on gender persecution, prepared a policy paper on the offence, helping staff and others even beyond the Court to understand it better, and to investigate effectively what is undoubtedly an experience of every conflict. That policy[18] sets out the fundamentals of the offence:

"By definition, gender-based crimes target groups such as women, men, children, and LGBTQI+ persons, on the basis of gender. At their core, gender-based crimes are used by perpetrators to regulate or punish those who are perceived to transgress gender criteria that define "accepted" forms of gender expression manifest in, for example, roles, behaviours, activities, or attributes. These criteria often regulate every aspect of life, determining the extent of individuals' freedom of movement, their reproductive options, who they can marry, where they can work, how they can dress and whether they are simply allowed to exist. As with all forms of persecution, accountability for gender persecution requires recognition and understanding of the discrimination that underlies the crime. It is insufficient to only hold perpetrators accountable for crimes that take place during atrocities. Justice also requires a holistic understanding as to why perpetrators committed such acts, if we are to eliminate discrimination and break cycles of violence."

There are many in this audience, and indeed in all audiences, with whom this explanation of the core of gender persecution, resonates. Our cultures often prescribe how we eat and when, how we dress, whether we should marry, whom we marry and whom we cannot marry, where we may go, where we may travel, and with whom. These gender driven expectations are the most stifling, the most rigorous, for women and girls, and for LGBTQI+. The crux of the offence is the discriminatory intent. And the persecution becomes an offence when it is committed in the context of a Rome Statute offence. How does it work? If I, as a woman, and because of my gender, live in a country where I may not work, or travel alone, or obtain health care, by State law, then I am the victim of a series of discriminatory laws targeting my gender.

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[16] The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, ICC-01/12-01/18, https://www.icc-cpi.int/mali/al-hassan. Charges: Suspected of crimes against humanity allegedly committed in Timbuktu, Mali, in the context of a widespread and systematic attack by armed groups Ansar Eddine/Al Qaeda in the Islamic Maghreb against the civilian population of Timbuktu and its region, between 1 April 2012 and 28 January 2013: Torture, rape, sexual slavery, other inhumane acts, including, inter alia, forced marriages, persecution; and of war crimes allegedly committed in Timbuktu, Mali, in the context of an armed conflict not of an international nature occurring in the same period between April 2012 and January 2013: Torture, cruel treatment, outrages upon personal dignity, passing of sentences without previous judgement pronounced by a regularly constituted court affording all judicial guarantees which are generally recognized as indispensable, intentionally directing attacks against buildings dedicated to religion and historic monuments, rape and sexual slavery.

[17] The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb") ICC-02/05-01/20, https://www.icc-cpi.int/darfur/abd-al-rahman. Mr Abd-Al-Rahman is suspected of 31 counts of war crimes and crimes against humanity allegedly committed in Darfur, Sudan between August 2003 and at least April 2004.

[18] https://www.icc-cpi.int/sites/default/files/2022-12/2022-12-07-Policy-on-the-Crime-of-Gender-Persecution.pdf.

If the laws provide sanctions for defying these gender normative laws and the sanctions constitute Rome Statute offences such as torture or enslavement, then a Rome Statute offence is committed of a crime against humanity. The offence must be able to target intersectional forms of discrimination. Do the laws target women and girls, or LGBTQI+ persons as well? Are they implemented more harshly and with worse sanctions for those from religious minorities? What of persons with disabilities? Are laws and policies implemented more harshly for them? Is the impact of the law one which reflects intersectionality?

The Policy Paper puts the concept in this way:

"Gender persecution severely deprives a person or persons of the fundamental right to be free from discrimination in connection with other fundamental rights deprivations, contrary to international law. For example, it may deprive a person of the right: to life; to be free from torture or other inhumane or degrading treatment or punishment; to be free from slavery or the slave trade, servitude and retroactive application of penal law; to freedom of assembly, opinion, expression, movement and religion, including the right to be free from religion; rights to equality, dignity, bodily integrity, family, privacy, security, education, employment, property, political or cultural participation, to access to justice or health care. Human rights violations can constitute a severe deprivation of fundamental rights on their own or when considered cumulatively. The deprivation of fundamental rights may be enforced by means of violence or destruction, or occur via the imposition of regulations that can impact persons in every aspect of life. This may include, for example, their reproductive and family options, who they can marry, whether they can attend school, where they can work, how they can dress and whether they are simply allowed to exist."

Time will tell whether the Court will see more charges in the future of persecution on the ground of gender in the cases before it. It is an offence which requires a clear understanding of the way in which laws based on gender norms can discriminate against persons on the basis of gender in a multiplicity of ways, and of the Rome Statute offences which may then have been committed. Investigations and prosecutions need a high degree of gender and cultural competence, the ability to be sensitive to gender norms without stereotyping, and the ability to lead evidence without placing all persons of one culture or religion into one box. There is a high degree of consistency between human rights and the criminal law in the context of this offence. The Policy Paper represents a barometer of change, and of the need to base prosecutions on the lived experiences of victims and survivors. This renewed interest in an offence which must resonate in the lives of so many people around the world, is a good indication of the ability of the Court to grow, to adapt and to listen to the voices of those who are the most impacted by crimes of atrocity directed to the most vulnerable.

Complementarity and Cooperation

The Rome Statute created a court of last resort. It was agreed that the domestic courts of States Parties, including situation countries, should have the ability and the space to investigate and prosecute all of its own offenders itself. There are many ways, even after an ICC investigation has commenced, and certainly before it, for a State to assert jurisdiction or challenge the admissibility of a case before the Court.

For instance:

Article 11: Jurisdiction *ratione temporis*

1. The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute.

2. If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under article 12, paragraph 3.

Article 12: Preconditions to the exercise of jurisdiction

1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.

2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:
(a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
(b) The State of which the person accused of the crime is a national.

3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.

Article 17: Issues of admissibility

1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:
(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
(b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
(c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;
(d) The case is not of sufficient gravity to justify further action by the Court.

2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:

(a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;
(b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
(c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

There are therefore many opportunities for a State to be heard both on procedural and jurisdictional grounds, and on substantive grounds. Many States have been heard on a range of grounds, whether it is to submit that it is willing and able to prosecute persons of interest for crimes which the Rome Statute encompasses, or that it is not shielding a person of interest, or that its judiciary is available and functioning for trying relevant cases.

We sometimes forget that the ICC is not just a Court, it is also an international institution that is part of a wider system of international criminal justice created by the Rome Statute, with different stakeholders and responsibilities. Indeed the Rome Statute was a triumph for multilateralism, and it is a matter of celebration that many small States which contributed constructively to the negotiations, were amongst the first to sign and ratify. Indeed, multilateralism is the only mechanism in international diplomacy which enables the smaller States to have a voice and to prevent the dominance of the voices of those countries which have traditionally held the greatest power. I believe that the inclusiveness of the negotiations had a significant link to the inclusiveness of the Court's structure. Conversations with States must continue, they are the Court's main stakeholders, they have a direct interest in ensuring that the Court uses its resources wisely and fairly and that its work and organisation represent all regions of the world.

The Court's relationship with situation countries is particularly important and multifaceted, much as it can be complex, at times. The risk of becoming submerged in political priorities is real, and to be resisted at all cost. The Office of the Prosecutor develops tailored plans on cooperation with a country, even while it is investigating potential persons of interest in that country, or connected to it. Thus, whilst the Office is authorised to investigate matters in Venezuela, it has a cooperative relationship with the Venezuelan authorities, including on technical assistance for their legal and judicial system. The Prosecutor signed two memoranda of understanding with President Maduro to maintain communication and cooperation with the authorities. In Sudan, whilst in the midst of a trial and while investigating related matters, the Office encountered difficulties[19] in gaining access to the country, and difficulties in communications with witnesses and focal points in Khartoum. This did not prevent the Office from calling witnesses anyway but the work became slower and more complicated.

[19] https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-khan-kc-united-nations-security-council-situati on-darfur-0.

The following is noted from the Prosecutor's report to the Security Council in July this year about cooperation with Sudan:

"In his Thirty-sixth Report, the Prosecutor noted the limited cooperation received from the Government of Sudan and requested the Sudanese authorities to take the following key steps in order to facilitate the Office's efforts in Sudan:
•Provide unimpeded access to documentation relevant to the Office's investigations;
•Ensure prompt responses to all requests for assistance submitted by the Office to the Government of Sudan;
•Take prompt action to facilitate an enhanced field presence of the Office in Khartoum; and
•Provide unimpeded access to government or former government witnesses and other material witnesses.

Even prior to the current hostilities, no progress was made on these key steps since the previous report. The Office considers that the possibility of cooperation in the present circumstances is minimal, though efforts remain to engage and seek to obtain information where possible. Despite repeated efforts by the Office to engage with the Sudanese authorities, a total of 36 requests for assistance remain outstanding, including two new requests submitted during the reporting period. The outstanding requests, the first of which was submitted in June 2020, include requests for documentation and for authorisation to access government/military officials."

Of course, limited or even non-cooperation and an inability to access a country do not entirely frustrate an investigation. The Office is currently investigating situations where it has no or limited access to the territory concerned. Nevertheless, access eases the investigations. The Office's ability to work in-country for instance with forensic scientists facilitates access to post mortem and histology reports and other information, which help the Office to build cases in a more profound and holistic way.

In accordance with the vision of the Prosecutor and its Strategic Plan 2023-2025[20], the Office is enhancing partnerships, with the aim to establish itself as a central operational partner and resource for national authorities in their efforts to prosecute international and other serious crimes. The Office works closely with situation countries and other countries, as well as with accountability mechanisms and other partners to ensure a coordinated and effective effort towards closing the impunity gap. Such joint efforts can take multiple forms, ranging from contributing to domestic proceedings, sharing knowledge and defining common operational standards, to secondments and engagement with local, regional and international partners. Collectively, these initiatives will mark a renewed approach to complementarity and cooperation by the Office. In Colombia, for example, although the Office closed its preliminary examination in 2021, it continues to engage with and work with the relevant authorities, including members of the Special Jurisdiction for Peace (JEP)[21], and has concluded a memorandum of understanding with the Government to assist that engagement. In Ukraine,

[20] 2023-strategic-plan-otp-v.3.pdf(icc-cpi.int).
[21] The Special Jurisdiction for Peace (*Jurisdicción Especial para la Paz* (JEP)) A transitional justice mechanism which sets out to investigate and prosecute FARC members, members of the Public Force and third parties who have participated in the Colombian armed conflict.

the Office works closely with the local prosecution authorities to support efforts to investigate and prosecute war crimes and crimes against humanity, and has established a strong field presence there, in addition to cooperating with various international partners, including in the context of the Joint investigation Team under Eurojust auspices.

The Office is also actively working to achieve a better geographical representation of investigators, analysts and lawyers from all regions, and has recruited country experts for its teams across situations to help the Office understand cultural and language sensitivity and contexts. The Office is seeking to increase its field presence everywhere. The Office is also working, in partnership with States Parties, to enhance institutional exchange and benefit from specialised skills of domestic experts, through a programme of secondments. It is making efforts to enhance geographical diversity in this regard also. To enhance global support and understanding, the Office is enhancing its outreach and looks to building strong regional cooperation. The African Union is already a strong advocate for international justice and accountability, and potential friends for the future might include organisations and fora in Central and South America, Asia, and the Pacific Island region.

The ICC is meant to be a world court, creating a membership base and cooperation network to span all countries and regions in the world. We accept that we still have work to do to show the relevance of the Court to all regions. There are still countries and regions which sincerely believe that what we implement is a selective and partial justice, which criminalises those least beloved to the western world, and turns a blind eye to the transgressions of those same powers. After all, it is argued, the journey of the Court started at Nuremberg and Tokyo which marked a victor's justice, and worse, a gender blind justice.

As a citizen of a very small country in the global south, this argument resonates with me. Indeed the Court must be relevant, it must respond quickly and effectively, it must work where possible with domestic courts and governments, and it must show it is able to prosecute the most serious crimes of atrocity without political bias. Yet, I also understand that the Court must work within the jurisdiction granted to it by the Rome Statute and by ratifications. The Office of the Prosecutor cannot investigate where the Court does not have jurisdiction. Thus the accusation that it does not pay attention to atrocities in parts of the world lacking jurisdiction, comes I believe sometimes from a misunderstanding about the limits of the Court. The Office must also prioritise amongst and within situations, as a matter of economic reality and as a function of prosecutorial efficiency and effectiveness. An ideal situation would be that the Office has large enough teams, well-resourced and with full access to witnesses and territories, to investigate everything at once. It does not. Nor do domestic investigators and prosecutors. Prioritisation is a necessary evil of the work of any prosecutor.

A selective application of the law, by any court, undermines the rule of law anywhere. The Court continues to work to embrace more countries and institutions, to work with partners in countries and regions such as non-governmental organisations (NGO) and civil society organisations (CSO), to recruit more national experts and more prosecutors from diverse regions, to build policy work on gender, on sexual violence, on children, and on slavery to ensure that we are well equipped to understand both the law and the context of offending so that we investigate and prosecute better. We reach out to regional organisations and groups to gain support for our work even without ratification. And we engage with as many as we

can, to work towards a universal jurisdiction for war crimes, for genocide, for crimes against humanity and for the crime of aggression. I believe with our work on cooperation, outreach, and complementarity we are achieving a greater global understanding of the work we do.

Harm to the Environment

The Rome Statute already provides for harm done to the environment in the context of war crimes. Article 8 (2) (b) (iv) of the Rome Statute provides that a war crime within the context of an international armed conflict and within the established framework of international law can be committed where an accused "intentionally launch[es] an attack in the knowledge that such attack will cause ….widespread, long-term, and severe damage to the environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated". This provision draws from the 1977 Additional Protocol I to the Geneva Conventions[22] but of course has significant limitations in relation to environmental crime globally. Firstly, the Rome Statute provides for individual criminal responsibility. Unlike some domestic jurisdictions, the Statute has not provided for the criminal liability of corporate bodies. We know that many incidents of widespread harm to the environment are committed by transnational corporations. Secondly, the harm to the environment must be committed in the context of an international armed conflict. The Article does not apply to non-international conflicts, although we know that water supplies, forests and mangrove swamps are easy and vulnerable targets in any conflict. Thirdly, the threshold for criminal responsibility under the Rome Statute is far higher than the threshold envisaged by the Additional Protocol. The latter does not require evidence of 'clearly excessive' damage. Nor does it require a balancing act with "concrete and direct overall military advantage anticipated". Recommendations have been made by commentators that the Rome Statute could be amended to add an offence of crimes against the environment, or ecocide[23]. Recently the momentum for creating a fifth crime, that of ecocide, to the Rome Statute has grown, championed by civil society groups, and by Vanuatu, amongst other countries. The proposal envisages the prosecution of the heads of corporate bodies, and suggests a draft definition[24] as follows:

[22] Protocol prohibits methods of warfare which are intended or may be expected to cause 'widespread, long-term and severe' environmental damage. At that time, this was considered to be a progressive step in the protection of the environment during armed conflict. Similar language is used in article 55(1) of the 1977 Additional Protocol I, and article I(1) of the 1976 ENMOD Convention.

[23] See for instance Freeland S. *Addressing the intentional destruction of the environment during warfare under the Rome Statute of the International Criminal Court*, Maastricht University, 01/01/2015, https://cris.maastrichtuniversity.nl/ws/portalfiles/portal/5512821/4985Freeland.pdf.
Eco-Struggles: Using International Criminal Law to Protect the Environment During and After Non-International Armed Conflict October 2017, https://academic.oup.com/book/26778/chapter/195706176.

[24] The Stop Ecocide Foundation convened an Expert Panel which made the specific proposal. Members of the Panel were Philippe Sands KC, Dior Fall Snow, Kate Mackintosh, Richard Rogers, Valerie Cabanes, Pablo Fajardo, Syeda Rizwana Hasan, Charles C. Jalloh, Rodrigo Lledo, Tuiloma Slade, Alex Whiting, and Cristina Voigt. For the full report, see https://static1.squarespace.com/static/5ca2608ab914493c64ef1f6d/t/60d7479cf8e7e5461534dd07/1624721314430/SE+Foundation+Commentary+and+core+text+revised+%281%29.pdf.

Article 8 *ter*: Ecocide

1. For the purpose of this Statute, "ecocide" means unlawful or wanton acts committed with knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts.

2. For the purpose of paragraph 1:

1. "Wanton" means with reckless disregard for damage which would be clearly excessive in relation to the social and economic benefits anticipated;

2. "Severe" means damage which involves very serious adverse changes, disruption or harm to any element of the environment, including grave impacts on human life or natural, cultural or economic resources;

3. "Widespread" means damage which extends beyond a limited geographic area, crosses state boundaries, or is suffered by an entire ecosystem or species or a large number of human beings;

4. "Long-term" means damage which is irreversible or which cannot be redressed through natural recovery within a reasonable period of time;

5. "Environment" means the earth, its biosphere, cryosphere, lithosphere, hydrosphere and atmosphere, as well as outer space.

The recommendation considered whether the default *mens rea* for Rome Statute offences in Article 30[25], was sufficient to cover environmental crimes. The Expert Panel convened by the Stop Ecocide Foundation concluded that the Rome Statute definition was too narrow and recommended instead **"a *mens rea* of recklessness or *dolus eventualis*, requiring awareness of a substantial likelihood of severe and either widespread or long-term damage. This *mens rea* is sufficiently onerous to ensure that only those persons with significant culpability for grave damage to the environment will be held responsible."** What is an additional, and a difficult but necessary discussion, is around the issue of corporate criminal liability, and the extent to which a Chair of a Board of Directors or a Chief Executive Officer could be held responsible for the criminal acts of the company. In the experience of domestic jurisdictions, such persons have been quick to rely on an argument, to exonerate themselves from criminal responsibility, that they did not know what more junior persons within the organisation were doing, and that operational matters were not within their knowledge or direct supervision[26].

[25] 'A person has intent where … that person means to cause that consequence or is aware that it will occur in the ordinary course of events.' This definition has been the subject of some debate. Does it require evidence of an awareness of a near certainty of the consequences? See for instance Sarah Finn Mental Elements under Article 30 of the Rome Statute of the International Criminal Court; a comparative analysis. 6 June 2021 Cambridge University Press, https://www.cambridge.org/core/journals/international-and-comparative-law-quarterly/article/mental-elements-under-article-30-of-the-rome-statute-of-the-international-criminal-court-a-comparative-analysis/5AF15FA0BE80562070CB998DBD67 C9E4 and Mohamed Elewa Badar, The Mental Element in the Rome Statute of the International Criminal Court, https://core.ac.uk/reader/338390.

[26] National and international steps to hold corporations accountable under criminal law for illegal acts that result in human rights harm (corporate criminal liability) have advanced since the United Nations Guiding Principles on

This discussion continues in the margins of the Assembly of States Parties and within the Office of the Prosecutor. It is an important one, and for many small island developing states, which are either States Parties to the Statute, or considering ratification, would demonstrate the relevance of the Court on a matter of great global concern and urgency - the destruction of the environment.

Conclusion

The International Criminal Court this year celebrates not just its own 25 year old journey. It marks the progress that international criminal law has made, in the journey from the Hague and the Geneva Conventions, the London and Tokyo Charters creating the military tribunals post World War II, the work of the human rights world, from a simple articulation of rights, to the detailed expositions of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), to the Committee on the Elimination of Discrimination against Women (CEDAW) and the Committee on the Rights of the Child (CRC), to the work of the treaty bodies, to the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR), the special tribunals, and the ICC. It has been an extraordinary journey and one from which the ICC has gained, both in substance and in process. Many years ago, I attended Professor Lauterpacht's lectures at the Old Schools here in Cambridge. I was, as were those who attended with me, enormously inspired by the concept of an international order regulated by a rules based system, which had the potential to become something significant for the criminal accountability of those who commit the most serious crimes against their fellow human beings. It was the beginning of a journey for the effectiveness of multilateralism in creating such a rules based order for the creation of a court. It was to be a court which gave life to the laws of war, and to international criminal law. It was to be a fitting partnership. If the laws of war regulate permissible conduct during conflict, breaches of fundamental human rights when targeting civilian populations, must be the early warning system for conflicts which are likely to occur and must be the lowest common denominator for the protection that humanity is entitled to. In this sense, the vision with which the court was created, is consistent with the journey it has taken. The Statute itself has proven itself as a progressive and visionary code with potential for encompassing a great deal more as we benefit from academic and legal analysis growing around its jurisprudence. It is a continuous journey and the commentary and interests around it demonstrate its relevance to the global community.

Whether it is a commentary about the crime of aggression provisions, or about gender persecution, or about ecocide, the debate enriches and enables the growth of a visionary court.

I am privileged to be a part of that journey and that growth. The Lauterpacht lectures here in Cambridge marked the beginning of a personal journey for me, one which has brought me to

Business and Human Rights (UNGPs) were released by the Human Rights Council in 2011. The UNGPs require States to regulate rights respecting business behaviour not only in civil and administrative law, but also through "criminal regimes that allow for prosecutions based on the nationality of the perpetrator no matter where the offence occurs."

the International Criminal Court. It is a journey which I was enormously privileged to begin here at Cambridge. In the traditional language of Fiji, *vinaka vakalevu*: thank you.

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Lauterpacht Centre for International Law
Cambridge University