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***From Punishment to Prevention
Reflections on the Future of International Criminal Justice***

Wallace Wurth Memorial Lecture

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Chancellor Gonski, President and Vice-Chancellor, Professor Hilmer,
Family members of Mr. Wallace Wurth,
Excellencies, Ladies and Gentlemen,

I am honoured to be invited to give this prestigious lecture here at the University of New South Wales.

I used to be a visiting professor in Melbourne, but I have never before lectured in Sydney. I should say that this is really a wonderful city, much nicer than people in Melbourne led me to believe!

I do not know a great deal about Mr. Wallace Wurth, but I have read that he was a man with a fierce sense of justice.¹ Tonight I am going to speak about international criminal justice – a concept that started to emerge around the time when Mr. Wurth began the project which would lay the foundation for the University of New South Wales.

The main question I want to discuss is the ultimate purpose of international criminal law, and where we should aim to steer the further development of international justice.

I will be talking quite a lot about the International Criminal Court, which goes by the abbreviation “ICC” – let me immediately apologise to all cricket fans in the audience for any confusion that this may cause!

Introduction

Allow me to begin my remarks by going back in time. Sixty-two years ago, an armed conflict broke out in my home country, Korea. I was nine years old at the time, too young to be mobilised, but old enough to realise the horrors of war.

For three months, during the battle for Seoul city, my family had to hide in a hot and humid underground bunker. It was my task to emerge above the ground every day to find food and to bring it back to the bunker. To do this, the 9-year-old had to walk about 16 kilometres every day. Many times, when war planes appeared in the sky and started dropping bombs on the city, I had to run for cover, dropping the groceries I had just collected.

During daily trips to find food, I passed hundreds of dead bodies lying on the streets. To this day, I can precisely remember the horrible stench of the decomposing corpses in those hot summer days. When Mr. Wurth said that war is “a filthy, terrible business”², he was most certainly right.

¹ <http://onlinelibrary.wiley.com/doi/10.1111/j.1467-8500.1961.tb00004.x/pdf>

² <http://adb.anu.edu.au/biography/wurth-wallace-charles-12080>

Development of international criminal justice since WWII

Ladies and Gentlemen,

The wake of the Second World War saw a fundamental overhaul of international structures with the creation of the United Nations and the International Court of Justice. The shockwaves of the Nazi atrocities also gave rise to the Universal Declaration of Human Rights which became the basis of the modern concept of human rights.

International military tribunals were set up in Nuremberg and Tokyo to try the architects of the shocking atrocities committed by Nazi Germany and its allies. Shortly afterwards, the Convention on the Prevention and Punishment of the Crime of Genocide and the four Geneva Conventions were adopted.

Common to all these post-World War II developments was the notion that the protection of peace and basic human dignity is a matter of common concern and that even in a world consisting of sovereign States, certain international rules are necessary to safeguard these values of fundamental importance to humankind as a whole.

We can distinguish several different but mutually related areas of international law in this respect:

First, the **United Nations Charter** prohibited aggressive warfare and charged the UN Security Council with matters of international peace and security and the International Court of Justice generally with breaches of the Charter.

Second, **international human rights law** emerged as an expression of the new notion that States have a responsibility to respect and to protect the human rights of their own nationals and other individuals on their territory.

Third, the law of armed conflict progressed into **international humanitarian law** with an increased focus on the protection of vulnerable individuals in time of war.

And fourth, the seeds of **international criminal law** were planted in Nuremberg with the recognition that individuals responsible for mass atrocities or the crime of aggression must be held accountable for their acts.

Sadly, the ensuing cold war rivalry drove international criminal justice into the background. The violent use of armed force continued to plague humankind in many parts of the world. The Asia-Pacific was no exception.

It was not until twenty years ago, after the end of the cold war, that the project of international criminal justice gained a new momentum through the creation of the *ad hoc* tribunals for former Yugoslavia in 1993 and Rwanda in 1994, and renewed efforts by lawyers, diplomats and civil society to create a permanent international criminal court.

These aspirations came to a concrete conclusion in Rome in July 1998. Delegates from all regions of the world converged to cast their votes on a court which had been fifty years in the making. 120 states voted in favour of the proposed treaty, which became the Rome Statute of the International Criminal Court.

In a remarkably short time, after the necessary 60 State ratifications, the Rome Statute came into force and the ICC was formally created on 1 July 2002. A new permanent international organisation was born, independent from the United Nations or any other pre-existing body.

With good reason it has been said that the birth of the ICC was the most important development in international law since the creation of the United Nations and the adoption of the UN Charter.

The ICC was given jurisdiction for four groups of terrible crimes. First, the crime of **genocide**, which is a massive violation characterised by the specific intent to destroy a national, ethnic, racial or religious group by killing its members or other means.

Second, the ICC can prosecute **crimes against humanity**, which are serious violations committed as part of a large-scale attack against any civilian population. The 15 forms of crimes against humanity listed in the Rome Statute include offences such as murder, rape, imprisonment, enforced disappearances, enslavement – particularly of women and children, sexual slavery, torture, apartheid and deportation.

Third, the Rome Statute contains 50 specific **war crimes**, with a distinction between international and non-international armed conflicts. War crimes listed in both categories include, for instance, the use of child soldiers; the killing or torture of persons such as civilians or prisoners of war; intentionally directing attacks against hospitals, historic monuments, or buildings dedicated to religion, education, art, science or charitable purposes.

Finally, the fourth crime falling within the ICC's jurisdiction is the crime of **aggression**. At the time of the adoption of the Rome Statute, States could not agree on the definition of this crime, but this shortcoming was overcome by the adoption of amendments at the first Review Conference of the Statute in Kampala in 2010. Bringing these amendments into force will require ratifications and an additional vote by States Parties. This will not happen until 2017 at the earliest.

Ladies and gentlemen,

The ICC's first ten years have not been easy. When the first judges of the ICC arrived in The Hague in 2003, we were very concerned about the future of the Court. We seriously wondered whether it would survive the hostility it was facing from many sides, in particular the big powers.

In the last ten years, the ICC has turned from a court on paper into a leading actor in the area of the enforcement of international justice. 120 States Parties and the Security Council's **unanimous** referral of the Libya situation are some of the strongest indicators of the growing international confidence in the ICC's role.

120 States, which is more than 60% of the world's sovereign nations, have ratified the Rome Statute, and the number keeps growing. Last year six new countries joined the ICC, more than in any single year since 2003.

The ICC is currently dealing with international crimes allegedly committed in seven countries – the Democratic Republic of the Congo, Uganda, the Central African Republic, Sudan, Kenya, Libya and the Ivory Coast. The Prosecutor is following developments in many more situations across the world. The ICC's first judgment, stemming from a case concerning the alleged use of child soldiers in the Democratic Republic of the Congo, is expected very shortly. Two further cases are on trial, and some others are in the pipeline.

Ladies and gentlemen,

As you can see, over the last 70 years the world has witnessed a remarkable development of international efforts to hold perpetrators of mass atrocities accountable.

But the nature and context of these efforts has changed significantly over time.

Nuremberg and Tokyo were purely *ex post facto* tribunals set up in reaction to atrocities that had already occurred. Their central purpose was punishment, retribution.

If Nuremberg and Tokyo had been followed by the establishment of a credible system of enforcing the new principles of international law, a deterrent effect could have ensued. But during the cold war period, there was incidental *ex post facto* justice at best.

In the 1990s, the situation slowly started changing. The UN Security Council set up the *ad hoc* tribunal for the former Yugoslavia while the conflict was continuing, and left the temporal jurisdiction of this tribunal open-ended, thereby putting potential future perpetrators on notice that they could be held to account. The Security Council expressly pronounced that the creation of the Tribunal was expected to contribute to

the restoration of peace, and ending the ongoing atrocities. However, this did not really take full effect. Even the states on the Security Council were not fully prepared to provide political backing to the Tribunal, and with the time that was needed to really put it in motion, no significant deterrent effect emerged until possibly the short-lived conflict in Macedonia, several years after the Bosnian war.

The International Tribunal for Rwanda, the Special Court for Sierra Leone and the Special Panels in East Timor were all established essentially *ex post facto*. However the growing focus on such efforts marked a departure from earlier years. Broader accountability was becoming a real possibility.

Moreover, there was a growing recognition that international justice should not only be about punishment of crime, but also about helping societies build a stable future by coming to terms with past crimes rather than sweeping them under the carpet.

It appears to me that the public perception of the International Criminal Court is still to a large extent influenced by memories of the earlier history of international justice, and the ICC is often seen primarily as a means for the international community to put on trial high-level perpetrators of mass atrocities.

Of course it is not incorrect to view the ICC as the latest in international mechanisms to address crimes that have occurred. Certainly ICC has become the default institution to look to if justice for international crimes seems otherwise unattainable.

But the long-term significance of the International Criminal Court, and the wider Rome Statute framework, lies elsewhere, in my view. What makes this new system fundamentally different from earlier efforts is its potential for the prevention of future crimes.

Prevention

The potential for preventive effect appears in several different forms, and I would like to categorize them under the broad headings of deterrence, timely intervention, stabilization and norm-setting.

Deterrence

First let us look at deterrence, one of the main purposes of punishment in traditional criminal theory. This is the most direct preventive effect of international justice, but I do not believe it is necessarily the most significant one.

Deterrence is notoriously difficult to measure, since we essentially need to look at the relationship between justice administered and the absence of crimes. In a national

setting, with ordinary crimes, it is possible to produce statistics with meaningful data. If the number of break-ins for example has dropped from 800 to 500 per year in a given area, it may be possible to connect this change to factors that have caused it.

A similar exercise is far more difficult with regard to atrocity crimes. Every situation is unique and each conflict has its specific historical and political setting. The greatest challenge is causality – there are so many factors affecting the occurrence of atrocities that it is almost close to impossible to determine what the effect of deterrence is.

Nevertheless, I do believe that a deterrent effect is slowly emerging, even though the evidence may thus far be largely anecdotal. Arrest warrants for sitting heads of state issued by the ICC as well as other international courts demonstrate that no one is immune from accountability, and the likelihood of punishment has grown.

Last month I heard one of the most concrete appraisals of the ICC's deterrent effect so far from the Justice Minister of the Democratic Republic of the Congo who was visiting the ICC. He told me that tensions surrounding the recent DRC elections were very high, and the fear of large-scale violence erupting was very real. Fortunately, that did not happen. People had seen both DRC nationals as well as Kenyan politicians facing the court in The Hague, the latter being charged specifically with allegations of post-election violence. The same Minister said the ICC had been a constant topic of discussion around the DRC's elections, which in his view had had a significant deterrent effect.

Timely intervention

Next I will look at timely intervention as an important part of the preventive functions. Here I refer to the ability of the ICC, particularly its Prosecutor, to react to threats of crimes at an early stage.

The ICC's advantage in this type of situations is that the Prosecutor does not need to consult anyone before opening a preliminary investigation. The Prosecutor is independent and does not require the approval of any political organs.

The ICC Prosecutor can, and does, monitor developments in a number of countries under the ICC's jurisdiction. This is called a preliminary examination in the ICC – a stage that does not yet constitute a formal investigation. Where tensions arise, announcing publicly that the Prosecutor is following the situation can be a powerful tool. It puts any potential perpetrators on notice that they might be held liable for their actions. It can also draw local as well as international attention to the situation and induce the national stakeholders to take necessary action to defuse the tensions.

If atrocity crimes do occur and the national authorities are unable to address the situation, the ICC can open an investigation, but this does not necessarily have to lead to trials before the ICC. In the best case scenario, the ICC's investigation will prompt the national authorities to investigate the alleged crimes in an expeditious manner and take the necessary steps to prosecute them, thereby reducing the likelihood of further crimes.

Stabilisation

Let me now move on to stabilisation. By this I mean the capacity of international justice to contribute to long-term peace, stability and equitable development in post-conflict societies. These are fundamental guarantees for a future free of violence.

The connection of peace and justice is well recognised. They are not mutually exclusive – on the contrary, they reinforce each other. Where impunity is allowed to reign, it leaves a desire for vengeance among populations who have been victims of massive crimes, and provides fertile ground for the recurrence of conflicts. Indeed, the World Bank's groundbreaking World Development Report that came out last year recognizes transitional justice as one of the core tools to forestall cycles of violence.³ Research suggests that countries that have held former leaders accountable for their crimes have in most cases come away stronger.

Accountability for past atrocities and strengthening of the rule of law are key ingredients in the healing of post-conflict societies. But attributing guilt to individual perpetrators is not sufficient. To enable a more comprehensive process of justice, the founders of the ICC decided to introduce two very innovative approaches for the empowerment of victims.

First of all, the ICC is the first international judicial body to allow participation of victims in their own right, and not just as witnesses. People who were victimised by powerful criminals have now become actors in international proceedings designed to prosecute those crimes.

Along with this, the Rome Statute pays special attention to the needs of women and children, who are often the most vulnerable victims of atrocities. The ICC's legal documents extensively codify specific crimes against women and impose a responsibility on each organ of the ICC to ensure the safety, psychological health, dignity and confidentiality of female victims and witnesses.

The ICC represents a step away from the traditional male-dominated world also by being the first international court with a majority of female judges on the bench. In fact,

³ WDR Overview, pp. 17-18. http://wdr2011.worldbank.org/sites/default/files/WDR2011_Overview.pdf

with 11 out of the current 18 judges being women, a male judge like me has almost become an endangered species!

The second innovative feature of the ICC is the creation of a Trust Fund for Victims, which is without precedent in international criminal justice. The Fund is nourished by voluntary contributions from governments as well as from private sources. Recognizing both the rights and the needs of victims and their families, the Fund empowers victims to become key stakeholders in the pursuit of transitional justice.

More than four years of victims' assistance in northern Uganda and the Democratic Republic of the Congo have seen the Trust Fund for Victims mature into a solid institution. By recognizing the particular needs of victims of the most serious crimes, for instance for reconstructive surgery and trauma-based counseling, the Trust Fund has been able to articulate a truly human dimension to the process of international criminal justice.

Currently, over 40,000 direct beneficiaries receive assistance provided by the Fund and its local and international partners. This year, the Fund will start a new programme in the Central African Republic, initially focusing on victims of sexual violence.

Norm-setting

Finally, I come to norm-setting. This I see as the ICC's greatest potential – to have a significant preventive effect by entrenching a system of norms that outlaw atrocities. I do not mean only a layer of international laws that make certain crimes punishable. What we need to achieve is a system of fully internalised legal and moral norms that make the Rome Statute crimes not only punishable but also simply unacceptable in modern societies.

Naturally, the Rome Statute must be seen as part of the wider international movement aimed at protecting fundamental human rights and dignity. These are long processes. The fact that a state ratifies an international treaty does not mean that all the rights defined therein miraculously take immediate effect. But with proper national implementation, with education, with democratic support, adherence to treaties can make a huge difference. In the best scenario, the emergence of legal norms and core societal values is a mutually reinforcing process.

But is the distance between an international treaty and the social norms of a local community too large? How can this gap be bridged? Here the **complementarity** principle of the Rome Statute is of crucial importance.

Under this particular principle, the national judiciary of each state retains the right, and the primary duty to investigate and prosecute grave violations of international humanitarian law.

Therefore, each ICC State Party is expected to make all ICC crimes punishable under its national laws and ensure that the country's law enforcement system is fully capable of investigating and prosecuting such offences. If this is properly done, the international legal norms of the Rome Statute also become domestic norms within each State Party. This, particularly with proper awareness raising, will in turn bolster efforts of the civil society to promote adherence to these norms that are of critical value to the protection of human rights and dignity.

Challenges

The principle of **complementarity** is also crucial for creating a truly **credible** and **comprehensive** system of deterrence and prevention against atrocity crimes. The domestic justice systems of States should be so well equipped to deal with Rome Statute crimes that they can serve as the primary deterrent worldwide, while the ICC is a safety net that ensures accountability when the national jurisdictions are unable for whatever reason to carry out this task.

Another crucial aspect for the credibility of the ICC is the **cooperation** of states with the Court and the enforcement of the Court's orders. The ICC has no police force of its own. We rely entirely on states to execute our arrest warrants, to provide evidence, to facilitate the appearance of witnesses and so on. Without the cooperation of states the ICC is powerless. Unfortunately, several suspects subject to ICC arrest warrants have successfully evaded arrest for many years. Political will to bring these persons to justice is crucial.

Another key challenge that we face in our aspirations to make the Rome Statute truly comprehensive is achieving **universality**. It is remarkable that 120 states have voluntarily acceded to the Rome Statute, thereby accepting all the obligations as well as benefits that this brings. But with more than 70 countries who have yet to join, a majority of the human race remain outside the Rome Statute's legal protection. This is of great concern to me. My own region in particular, the Asia-Pacific, is under-represented in the ICC, with only 18 members among the 120 States Parties.

When I became President of the ICC, I made it one of my priorities to promote greater involvement of the Asia-Pacific region in the ICC. To my delight, several countries have since joined, but there remains a long way to go. Asia is also severely underrepresented among ICC staff, because we have lacked sufficient numbers of highly qualified candidates from the region. So I appeal to all the students in the

audience today who come from anywhere in Asia – please consider a career with the ICC!

Finally, the **cost of justice** must not be neglected either when we talk about the challenges of the Rome Statute system. International trials are expensive and they should always be an exception, never the rule. Especially in these difficult times for the world economy, the ICC member states understandably keep a tight rein on the Court's budget.

The ICC is fully committed to improving the efficiency of its operations. At the same time, the States Parties, mindful of their commitment to the fight against impunity, need to ensure that the ICC is provided with the essential resources to carry out its mandate. To do otherwise would mean letting down all the victims who look to the ICC in hope of justice.

ICC as part of a wider array of international mechanisms

Ladies and gentlemen,

I have focused on the Rome Statute and the ICC. But of course international criminal justice will always be only one piece in a much bigger puzzle of protecting human rights, suppressing conflict and working for peace and stabilisation.

Where atrocities have already occurred, a multitude of other transitional justice mechanisms are necessary in addition to criminal justice, such as public acknowledgement of crimes, finding missing persons and sustainable return of refugees.

In the case of ongoing or imminent conflicts and atrocities, justice can rarely act alone, and diplomacy is usually the main international tool of rapid reaction to prevent escalation of violence. Likewise, political solutions are necessary to end conflicts.

Where long-term prevention is concerned, education, democracy and development are at least as important as a credible system of criminal justice.

These are not merely theoretical considerations. A realistic understanding of the possibilities and limitations of international justice is a prerequisite to its success.

Conclusion

Ladies and gentlemen,

As I approach the end of my lecture, please allow me to depart for a moment from my role of President of the ICC, and speak merely as a Korean citizen.

When war out broke in Korea in 1950, a number of States from different parts of the world came to my country's assistance under the flag of the United Nations. Australia was among the 16 countries that sent foot soldiers all the way to Korea. 340 young Australian lives were sacrificed to achieve peace – and it was that peace which laid the foundation for the prosperity and stability that South Korea today enjoys.

I want to take this opportunity to thank your nation from the bottom of my heart. I assure you that to this date, every Korean remains grateful to Australia for what it did to help our nation. Thank you, Australia.

Solidarity among nations remains as important today as it was 60 years ago. But I hope that in the future we do not have to sacrifice lives to help other nations. If we act wisely, we can prevent large-scale suffering before it takes place. That is the goal that we must seek to achieve.

Ladies and gentlemen,

This annual memorial lecture is a fitting way to honor Mr. Wallace Wurth as someone whose hard work was crucial for the establishment of this great university.

Likewise, we should salute all those whose tireless efforts gave rise to the evolving system of international criminal justice with the ICC as its centerpiece. Tonight I have tried to demonstrate to you that the long-term value of the International Criminal Court lies not only in the punishment of perpetrators but perhaps even more in the prevention of future crimes.

The late Justice William J. Brennan of the U.S. Supreme Court, wrote in one of his opinions that *"[t]he law is not an end in itself, nor does it provide ends. It is preeminently a means to serve what we think is right."*⁴

This applies to the Rome Statute as well – it is a means to serve what we think is right. Humans are capable of extreme cruelty as well as powerful compassion, and the ultimate value of the ICC is in entrenching moral and legal norms that will help the latter prevail over the former.

Thank you very much.

⁴ Roth v. United States, 1957