

## **Broadening the Fight against Impunity - A Founding Judge's Reflections**

I am pleased to talk about the International Criminal Court or ICC at its 20<sup>th</sup> anniversary. My talk today is essentially a founding judge's reflection of and comments on the ICC. I am sorry to start this talk with a CNN report of June 16, 2022 that alleged Russian spy attempted to infiltrate the ICC as an intern, according to the Dutch authorities.

One of the most important trends of the world at the moment would be no sustainable peace without international criminal justice.

Prior to the International Criminal Court, there has been no independent, permanent international criminal court. It was a rare exception to investigate and prosecute Crimes against Humanity, Genocide, War crime and the Crime of Aggression. The ICC is a treaty-based, permanent judicial institution. The International Criminal Tribunal for the Former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR), Timor-Leste Tribunal, Special Court for Sierra Leone, Cambodian Tribunal (ECCC), Lebanon Tribunal, Kosovo Specialist Chambers, are all based on the UN Security Council Resolutions or other similar legal bases. There are now three permanent international courts: ICJ and ITLOS under the UN system and ICC independent of the UN.

Since the end of the Second World War the UN has been mainly responsible for maintenance of global peace with two mechanisms: International Court of Justice for peaceful resolution of disputes between states and Collective Security system of the UN Security Council for various sanctions. These two UN mechanisms have been found to be short of one major thing: failure to prosecute individual perpetrators before any international court.

The creation of the ICC in 2002 in itself was a great achievement. I believe that the advent of the ICC and the broader Rome Statute system has changed the way the world has come to think of and respond to grave international crimes. The ICC's judicial interventions contribute to establishing lasting peace, as a key element in reconciling societies and ending cycles of violence.

By helping the entrenchment of strong legal and societal norms that prohibit

massive crimes and human rights abuses, the Rome Statute system can help us move toward a safer world in which people around the globe can live and prosper in peace. However, this is not a task for the justice sector alone, and international development agencies such as World Bank, UNDP would have to play an important role; it is also a goal that can be achieved only with the simultaneous strengthening of democracy, development and the rule of law.

Not only can the ICC now realize the retributive justice by punishing perpetrators but achieves restorative justice and reparative justice for victims and their families through the Trust Fund for Victims of the ICC. Indeed, creation of the ICC has made broadening of the fight against impunity possible.

I would like to take special note of the crucial contribution that Mr. Gak-Soo Shin, the former Vice Minister of the Korean Foreign Ministry, has made to conclude the Rome Statute. The Korean proposal that he submitted effectively prevented the Rome Conference from coming to a rupture at the last moment.

When 18 judges including myself first met in The Hague in March 2003, they were full of hope, pride, a sense of mission and desire to build up a permanent international judicial institution. At the same time, there was clear uncertainty about the ICC's prospects for survival, mainly due to fierce attacks from outside. However, the 18 judges managed to go through with the establishment of the ICC.

Just 30 years ago, who would have thought that crimes against humanity, war crimes, genocide and the crime of aggression would be prosecuted by an independent, permanent international institution? And that investigating such crimes would become the expected norm, rather than a rare exception?

Here lies the monumental achievement of the Rome Statute – it set up an entirely new paradigm of international criminal justice, which has made accountability for atrocity crimes an integral aspect of the rule of law.

Now the world knows that perpetrators of the gravest crimes need to be and can be held accountable – in the first place by national courts, and failing that, by the ICC.

There are already signs of a growing deterrent effect of the ICC's permanent presence. Ministers from some African States have personally told me that the threat of the ICC prosecution was a crucial factor that helped prevent large-scale bloody violence surrounding elections in those countries.

Another big achievement is the fact that we have turned the ICC from a Court on paper into a leading actor in the area of the enforcement of international justice. 123 States have so far ratified the Rome Statute. The ICC has active cases at all stages of proceedings. All triggering mechanisms of the ICC's jurisdiction have been activated.

The Rome Statute emphasizes the victims' positions. The victims are allowed to participate the criminal proceedings not as a witness, but almost as a party. The Trust Fund for Victims actively communicates with victims and local population under various outreach programs as well as reparation order by court.

There is now a large body of jurisprudence on many fundamental legal issues, and I am proud to say that the Judges have successfully safeguarded the fairness of the proceedings at the ICC, as a cornerstone of the Court's integrity. Whoever has closely followed the trials at the ICC will have seen that the judges are truly independent and impartial, and they are the ones who have the last say in the courtroom. However, there are some challenges.

#### Challenge no.1 - Cooperation

By adopting the Rome Statute, States established not just a Court, but an entire system of new international justice. The architecture of the system splits responsibilities, whereby the ICC carries out judicial work, but enforcement is devolved to States. Therefore, the ICC will investigate, prosecute and try suspects of crimes, but for arrest warrants to be implemented, evidence to be provided, witnesses to be protected, and sentences to be enforced, States must assist the ICC.

Cooperation remains an area of vital importance to the ICC's function and judicial efficiency. State cooperation is absolutely critical at every stage of the entire ICC process. Most of the time, States cooperate with the ICC, but not always, and the lack of cooperation can seriously diminish the ICC's ability to deliver justice. It is important not to lose sight of the fact that cooperation with the ICC is a treaty obligation, and it must be treated as such. However, the need for cooperation goes far beyond the technical issues to the political support that the ICC requires. This is nowhere more evident than with the referrals of situations by the Security Council. When it comes to Darfur, no Sudanese government officials have so far been surrendered to the ICC, including the former president Al-Bashir. In the Libya situation, suspects are likewise yet to be transferred to The Hague. Unfortunately, the Security Council

has not provided the ICC with the help it needs to discharge the mandates given to it in the Security Council resolutions. A far more consistent and vigilant approach by the Security Council is needed.

There is also a financial question that requires attention. The Rome Statute and the Relationship Agreement between the ICC and the UN anticipate that the UN shall help fund the costly investigations and prosecutions arising from UN Security Council referrals of situations. Yet in both Sudan and Libya resolutions a provision was added prohibiting UN funds from helping the ICC.

This has meant that States Parties have picked up the bill for work done by the ICC stemming from a Security Council decision adopted on behalf of the entire world community in order to preserve peace and security. This conflict will need to be addressed in the near future and I cannot see it resolved easily without a constructive approach by all countries on the Security Council, including the US.

Cooperation should come to be regarded as routine, not an exercise of extraordinary political will. This applies to States Parties and also States not yet parties, since the ICC has no tools to enforce its own decisions.

Priority needs include the arrest of suspects and agreements on the relocation of witnesses, enforcement of sentences and the situation of released persons. As president, I diligently contacted many states parties to conclude these agreements. It is now up to the States who created the Court and its other supporters to help identify from their perspective the challenges in providing cooperation and assistance, and to identify actions that can be taken. It is my hope that the Assembly of States Parties will consider as a matter of priority how they can best use the political and diplomatic tools at their disposal to bring about cooperation.

#### Challenge no.2 - Complementarity

The ICC does not replace national courts under the complementarity principle. The ICC is therefore a court of last resort. This means that the ICC cannot override properly functioning national court of a sovereign state. Therefore, the ICC can step in only if a state is unwilling or unable genuinely to carry out an investigation or a prosecution. It is primarily a state's responsibility to conduct proceedings. The fight against impunity can only succeed when the national justice system of each state is strong enough to stand against heinous crimes. In order to strengthen national justice system there are domestic laws to amend, legal professionals to train, penal systems to improve, and above all, a

domestic implementing legislation of the Rome Statute to adopt. I wish to express my sincere appreciation to Mr. Cheol-Gyu Hwang, a senior prosecutor who is now the president of the International Association of Public Prosecutors for rather prompt enactment of Korea's implementing legislation.

Since the ICC will be only able to deal with a small number of cases, far more must be done to ensure that national courts are willing and able to act. Here, development assistance agencies are urged to make assistance for justice a priority of their programs. Also, the work will fall to the ICC partners, namely, diverse international agencies such as UN, regional organizations such as EU, the Commonwealth, La Francophonie, Mercosur, OAS, AALCO, states, and civil society.

### Challenge no.3 - Universality

The Court's jurisdiction is not universal. The Court only has jurisdiction over nationals of States Parties or crimes committed on the territory of a State Party.

When I was elected the ICC president in 2009, my main priority was to visit and persuade as many states as possible to ratify the Statute. The number of States Parties then was only 110. My target region was Asia in particular, as I come from the region, and the region is most underrepresented - only 14 then. I realized through my trips that states that still suffer from the wounds of war are rather reluctant to join the Rome Statute system for fear that their leadership might be subject to ICC prosecution for the atrocities that some leaders in power had allegedly committed. To dispel such suspicions, I emphasized that when a state ratifies the Rome Statute, it applies from the date of joining onward. In other words, if a country joins, the Rome Statute would be a safety net for the future. Many states remain strongly suspicious and skeptical of this legal reality of temporal non-retroactivity.

The climate for achieving universality has improved over time. The US government in particular no longer put direct, intense pressure on many countries not to ratify the Statute.

The reach of the Rome Statute system can further enhance perceptions of its legitimacy, as the Court already works closely with other partners to share information and coordinate efforts toward expanding the Statute.

As ICC President, I travelled to many states whose governments were actively considering a sovereign decision to adopt the Rome Statute. The Court does

not lobby them, but it can provide information to ensure that policy considerations are based on facts. On these visits, the Court benefited greatly from partnerships with the EU, States Parties and civil society. It was through just this type of partnership that together I managed to expand the reach of the Rome Statute. My persistent efforts for universality met with some result: 14 more ratifications, a significant achievement. The leadership of the court and the Assembly should continue to reach out many other states not yet parties.

Two weaknesses

Two areas of weakness in the Rome Statute should be highlighted: 1) more effective procedural and substantive means to address States Parties' non-cooperation should be devised under Art. 87, Paragraph 7, and 2) a practical solution for the situation of acquitted or released persons needs to be found, especially when that person refuses to go back to their own country.

In closing, I hope that the states parties will take active part in the collective efforts of the international community to strengthen the rule of law, which is one of the most effective ways to increase the chances of peace, stability and wellbeing of the world.

There are many challenges – competing interests, limited resources, political opportunism, cultural differences, different visions and so forth – but at the end of the day, there are also undeniable shared values and common goals that humans everywhere hold dear. Men, women and children everywhere want to live in a world of peace, security and harmony, without fear of violence and suffering.

The international arena in the 21st century is very dynamic and crowded by various international organizations, and more. The actors are many and various. We should encourage the next generation of leaders and actors to always aspire for universal criminal justice, as the ICC will continue its mission from now into the future as a giant leap forward in the global fight against impunity.