

23 January 2020

Opening of the Judicial Year, International Criminal Court
Address by The Rt Hon Patricia Scotland QC, Secretary-General of
the Commonwealth: 'High expectations - delivering access to justice
at the international level'

Excellencies, honourable judges, colleagues,

It is a pleasure and honour to be here at the International Criminal Court for the opening of the Judicial Year. As a former barrister and former Attorney General in the United Kingdom, I have in the course of my career attended quite a number of openings of the judicial year. This one, however, is unlike any other, as it takes place in an institution many thought would never come into being.

The International Criminal Court is the realisation of a dream shared by many, that victims of the most serious crimes could be granted justice at the international level. The Court was designed

to end impunity for the perpetrators of these heinous crimes, no matter how high level they were. No one would be above its reach, including Heads of State.

Here we are now, in 2020, with the ICC established in its permanent premises, with 27 ongoing cases, 12 situations under investigation and 9 preliminary examinations. The Court is of course not immune to criticism and it is an organisation in constant evolution, striving to fulfil its mission of ending impunity as effectively as possible. However, challenges and negative criticisms should not deter us from the fundamental fact that a working international criminal court is in itself a victory for the rule of law.

This is a poignant moment for me as this Court's history and mine has been curiously intertwined over the last twenty years.

As a Foreign Minister in the House of Lords, I was responsible for introducing the legislation which would pave the way for the ratification of the Rome Statute by the United Kingdom.

It was the first Bill for which I was solely responsible and its importance was unmistakable. National jurisdictions were to remain the first line of defence against impunities for mass atrocities. The ICC was to be a safety net, the court of last resort. It was this view that guided my work in the House of Lords.

My colleagues in the House of Lords and I found ourselves occupied with the finer points in international criminal law such as the question of state and diplomatic immunity, the question of

jurisdiction, and the law on sentencing by the ICC.

We however remained alive to what the Rome Statute meant for us the United Kingdom, the Commonwealth and for the world at large. We hoped to retain the integrity of the Statute as it signified the creation of what was potentially the most important institution for the prevention of crimes and the protection of human rights created by the world community in fifty years. The UK's aim was to become founders of the Court and we were successfully, among the first sixty states to ratify the Statute.

On the 13th of July 2011, the then President of the International Criminal Court (ICC) President Judge Sang-Hyun Song and the then Commonwealth Secretary-General Kamallesh Sharma, signed a Memorandum of Understanding

to strengthen and develop co-operation between these two organisations to jointly support states implementing international criminal law.

Now, almost ten years after our two organizations entered into that historic Memorandum of Understanding, I as Secretary-General of the Commonwealth, an inter-governmental organization representing more than one third of the world, find it serendipitous that I am called upon to continue the work I so dutifully began in the United Kingdom Parliament twenty years ago, albeit in a different capacity.

The Commonwealth brings together fifty-three member countries which share common democratic values and a rich legal heritage for the purpose of encouraging international cooperation.

Of the 53 member countries of the Commonwealth, 36 are parties to the Rome Statute, which is over 60% of our membership. The Commonwealth prides itself on the diversity of its membership. Among our Commonwealth member countries are some of the most populous in the world, and some of the least populated, with little more than 10,000 inhabitants. We include within our membership advanced economies and developing countries, and an incredible diversity of traditions.

This diversity is also reflected in our member countries' relationship with the International Criminal Court. There are Commonwealth countries which feature among the longstanding supporters of the ICC, while others of our members have expressed doubts about the Court. The Commonwealth's large membership is connected by its past and its future, by language

and by institutions. It is also united by its common values, which are set out in the Charter of the Commonwealth, adopted in 2012. While there may not be unanimity as to how the ICC is perceived by Commonwealth member countries, the values shared by both organisations present important similarities.

Through the Charter of the Commonwealth, all member countries have stated that ‘international peace and security, sustainable economic growth and development and the rule of law are essential to the progress and prosperity of all.’ The ICC not only plays an important role in promoting international peace and security but was in fact designed in part to do so. In fulfilling its mandate to promote accountability for the most serious crimes, and endeavouring to deter future crimes, the ICC contributes to restoring

order in post-conflict areas, and creating and preserving peace.

The ICC was established to punish aggressors who might decide to perpetuate these heinous crimes where the rule of law systems in states fails. Its true purpose, however, is to make true that which our forbearers proclaimed at Nuremberg in 1946. That never again will the world community be indifferent in the face of mass atrocity and impunity, ignore the plight of the vulnerable, or be silent in the face of evil.

This is not only an ex-post-facto mandate; to punish the wrong doers. It is a commitment we have made to prevent a repeat of what has previously brought the world to its knees. The Commonwealth community honours this commitment by developing its own national

elements in parallel with these international ones.

Today, the Commonwealth that came together in 1949, to sign the London Declaration, is committed to the pursuit of peace.

Peace versus justice has been an ongoing debate, but in my view, a false debate. Whether justice is delivered through the International Criminal Court, domestic courts or other mechanisms, lasting peace is virtually impossible to attain without justice. Our Charter expresses it clearly - international peace and the rule of law are essential to the progress and prosperity of all.

The protection and promotion of the rule of law is the cornerstone of our organisations. To refer again to the Charter of the Commonwealth,

member countries have committed to the promotion of the rule of law as an ‘essential protection for the people of the Commonwealth’. Commonwealth countries are connected by a shared commitment to the rule of law as the answer to the ever-changing problems of the world.

Rule of law and access to justice

To achieve peace entails the institutionalisation of rule of law principles in Commonwealth member states. These principles: respect for human rights, access to justice, combating impunity, and deep respect for humanism, anchor our pledge to one another as Commonwealth member-states and to the world community and its institutions such as the ICC and its enabling statute: The Rome Statute.

A justice system that is fair is an indispensable precondition for democracy. To be effective, it has to be trusted, which means it has to be accessible to all and composed of strong institutions which are legitimate and beyond reproach.

That is why building strong public institutions capable of delivering sustainable, democratic development, has always been central to the work of the Commonwealth.

Access to justice does not just mean access to court. The ultimate end of the court system is to deliver justice. Therefore, we are undertaking a deep examination of the human and technical errors that prevent or jeopardise the delivery of quick and efficient justice in our Member States.

At the end of their meeting in Colombo last November, Commonwealth Law Ministers adopted the Declaration on Equal Access to Justice. In this declaration, they endeavoured to ‘Ensure the adoption of a broad understanding of access to justice that looks beyond access to dispute resolution mechanisms only and focuses on equality of outcomes’. They also committed to removing barriers faced in accessing justice. The theme of the meeting led to fascinating discussions among law ministers on how they address the justice needs of their populations, including the specific vulnerable groups found in their jurisdictions. Law Ministers shared examples of traditional justice mechanisms, special tribunals, and successful collaborations between justice, health and social services. Among the interesting outcomes of these discussions was the conclusion that justice is not always found within the walls of a courthouse. Justice may have a

very different meaning depending on the individuals involved.

At the international level, the challenges in bringing access to justice as found at the domestic level are somehow expanded due to the worldwide repercussions. The International Criminal Court is familiar with the near impossibility of ensuring that all victims of the most serious international crimes have access to justice. The sheer number of people affected, directly or indirectly, by these crimes tends to make access to justice for all an insurmountable challenge.

The ICC cannot provide the answer to every need for justice and redress; in crimes of the scale with which it deals there are broader needs for memory, for record history,

and for education. This is where the principle of complementarity becomes important.

With this in mind, Commonwealth nations seek to realise their commitment to increasing access to justice. We realise that we need to keep in mind the victims of offences such as war crimes, crimes against humanity and genocide. The ICC was not designed to hear from all victims of these crimes, so it is crucial for domestic justice systems to be equipped to provide some form of redress. The inclusion of international crimes in domestic law represents an important step in this process, to be followed then by effective prosecution.

At the Commonwealth Secretariat, our role is to assist our member countries in fully meeting their international obligations. The Commonwealth Secretariat has developed the Model Law

to Implement the Rome Statute of the International Criminal Court, and to provide assistance to countries in their efforts to include international crimes in their domestic law, whether or not they are parties to the Rome Statute.

We must remember that access to justice is also heavily dependent on the extent to which populations have trust in institutions. Due to the intense and worldwide scrutiny which the ICC faces as an international institution, its credibility is essential to its success. That credibility comes in large part from the fairness of the proceedings and the independence of its actors, particularly the prosecution and the judiciary.

Corruption and international crimes

According to eminent jurists, there are links between crimes committed during conflict and organised crime. International crimes do not occur in a vacuum but are deeply intertwined with organised crime and corruption.

For example, there appeared to be a symbiotic relationship between war crimes and organised crime before, during and after the conflict in the former Yugoslavia.

Curbing corruption then becomes not only an economic but also a human security imperative. The Commonwealth is consequently developing the anti-corruption benchmarks which will be presented to the Commonwealth Heads of Government for endorsement at their next meeting in Rwanda in June this year. The benchmarks address the importance of combatting corruption in the court

system and enabling the judiciary to operate effectively and independently.

At the international level, independence of the judiciary takes on a whole new meaning. A credible international court requires an international and representative judiciary, which is not an easy task to achieve, as it also means working with different legal backgrounds and traditions.

The responsibility this Court faces is immense, and the eyes of the world are upon it, watching the way proceedings are conducted, the judgements made and the decisions issued. Developing international jurisprudence, which will then be used across the world as a reference when prosecuting international crimes, represents a truly unique opportunity. All judges contribute to the evolution of the law, but

you have the privilege of exercising this function in a unique and highly visible context. As you will be discussing during today's seminars, predictability and consistency are significant considerations in the context of the ICC.

Sexual and gender-based violence

The Court has clarified the law concerning sexual violence during war, the use of child soldiers, ethnic persecution, other innumerable crimes visited upon civilians, and has developed mechanisms to afford tangible reparation to victims. It has indicted warlords and heads of state (incumbent and former) who are required to answer charges of gross human rights violations while demystifying the law on immunities. This is highly commendable work that the international community should take pride in.

Our Commonwealth campaign towards equal rights for women has resonance with other campaigns against injustice and discrimination - including those against child, early and forced marriage, people trafficking, modern slavery, female genital mutilation, and other forms of sexual or domestic violence.

Gender-based violence in armed conflict tends to be more prevalent in societies where inequality between men and women is deeply entrenched. The Commonwealth can play a role in upholding the commitments made in its Charter on gender equality and women's empowerment as essential components of human development and basic human rights.

The Power of Justice

The nature of cases before the court is evolving.

The Court is now looking at matters which are heavily political and potentially polarising.

These cases are also evidence that the world is gradually retreating from the violent impulse that defined most of the past century. The ICC, in keeping world leaders accountable and aware of the consequences of their actions, even under immense scrutiny and criticism, is achieving a tremendous feat. The Court offers an alternative to the violent solution; it gives reason for restraint.

At this juncture, the world needs the International Criminal Court to stand the test of time and to realise the high expectations for a more just world which were the motivation that led to its creation. World leaders must abide by the principles of accountability that gave birth

to this Court: the principles of prosecutorial and judicial independence and autonomous systems of adjudication. This will truly democratise our world.

The Rome Statute triggered a difficult and urgent process. It exposed the uncomfortable relationship of politics and justice. It also triggered a deeper self-examination of our approach to reparation and the complex interplay between politics, justice and peace.

On the 13th of January this year, the President of the Court, Chile Eboe-Osuji wrote an informative op-ed in the Globe and Mail urging calm and confirming that the sky was not caving in for the ICC. It is after all a Court of law though operating in an extremely politicised environment.

He ended the piece by saying that though the ICC encapsulates the imperfections of international

law, it deserves our support because it remains a mechanism of great value to humanity - not least because it has truly served to loosen tyranny's grip on humanity in our own time.

In devising capacity-building measures such as developing training and assistance programmes for national judges, prosecutors, and other criminal justice officials in the fields of international humanitarian law and international criminal law, the Commonwealth offers its unreserved support. The reason is because this institution and its underlying treaty represent the best of humanity. It is a monument to what we can do together - in parallel: nationally and internationally.

Conclusion

In conclusion, I believe it is appropriate to wish you all strength, courage, wisdom and an open mind, as this Judicial Year begins.

I would like to thank you for the privilege offered to me today to address you as you undertake your duties not only in a new year but in a new decade.

As judges, your role in achieving these expectations is central and decisive. I can think of no greater encouragement nor more inspiring incentive than that on which to be setting out on a new year.