

PAN EUROPE ASIA CONFERENCE
THE INTERNATIONAL CRIMINAL COURT

Florence, Italy - 29 June 2022

Judge Kent QC

Introduction – the Statute of Rome

- [1] The International Criminal Court was created by a treaty – the Statute of Rome, or Rome Statute - adopted at a diplomatic conference in Rome on 17 July 1998. It was the result of a five week long meeting convened to finalise and adopt the establishment of an International Criminal Court. The adoption was by a vote of 120 to seven, with 21 countries abstaining. Although the votes were not officially recorded, by agreement, it is certain that the People’s Republic of China, Israel and the United States were three of the seven, because they have publicly confirmed this. India, Indonesia, Iraq, Libya, Qatar, Russia, Saudi Arabia, Sudan and Yemen have also been identified as possible sources for the remaining negative votes, with Iraq, Libya, Qatar and Yemen being the four most commonly identified.¹
- [2] It did not have immediate operation. A minimum number of signatories were necessary to bring it into effect, which took some time. On 11 April 2002, ten further countries ratified the Statute at the same time at a ceremony at the United Nations headquarters in New York, bringing the total number of signatories to sixty and thus triggering its commencement, pursuant to Article 126. The Statute thus entered into force on 1 July 2002.
- [3] By November 2019, 123 states were parties to the Statute, referred to as “States Parties”.² The Statute was the end result of an international diplomatic process including a number of treaties following on from the Nuremberg trials which followed World War II. The intention was to prosecute individuals responsible for egregious crimes, referred to as “crimes against humanity” in line with democratic principles. Thus, alleged criminals were not to be executed in public squares or sent

¹ Stephen Eliot Smith, “Definitely maybe: the outlook for US relations with the International Criminal Court during the Obama administration”, *Florida Journal of International Law* 22: 155 at 160

² United Nations Treaty database entry regarding the Rome Statute of the International Criminal Court

to torture camps, but rather treated as criminals, with a trial process, the right to defence and the presumption of innocence.

- [4] A number of countries have signed but not ratified the statute. Four signatory states – Israel, Sudan, the United States and Russia - have informed the United Nations Secretary General that they no longer intend to become States Parties and, as such, have no legal obligations arising from their signature of the Statute.

- [5] The Rome Statute established three bodies: the International Criminal Court (ICC), the Assembly of States Parties (ASP) and the Trust Fund for Victims. The ASP has two subsidiary bodies. These are the permanent Secretariat, established in 2003, and an elected Bureau, comprising a President, two Vice Presidents and eighteen members elected by the Assembly for three year terms. The ICC has four organs: the Presidency (mostly administrative); the divisions (the pre-trial, trial and appeals judges); the Office of the Prosecutor; and the registry.

Structure and Procedure

- [6] The structure of the court is at least broadly familiar to those familiar with the adversarial system of criminal justice descended from the English common law. The judges, are, of course, independent. The Office of the Prosecutor is also an independent organ of the court. The prosecutor conducts preliminary examinations, investigations and is the entity who can bring cases before the court. The defence teams represent and protect the rights of the accused defendants. All defendants are presumed innocent until proven guilty beyond reasonable doubt before a court. The defendants are entitled to public, fair proceedings conducted impartially and equally. The Rome Statute grants the defendants specific rights including the right to be informed of the charges; to have adequate time and facilities to prepare their defence, to be tried without undue delay; to freely choose a lawyer; to examine witnesses and present evidence; to not be compelled to testify or confess guilt; to remain silent; to receive from the prosecutor evidence which he or she believes shows or tends to show their innocence or to mitigate their guilt; to be able to follow the proceedings in a language he or she fully understands, and therefore to have an interpreter and translations as required.

- [7] Defence counsel are, of course, also necessarily independent and are not staff of the ICC. They must be qualified to practice before the Court, applying to the relevant lists created and maintained by the court.

- [8] Victims are also given significant rights in the court process, created largely in accordance with the rules of procedure and evidence. They can apply to participate in proceedings before the ICC. The application forms comprehend applications by both natural persons and institutions. The registry has developed guidelines for the process. Victims may be represented at proceedings by a lawyer and may be given financial assistance in this regard. They are permitted to take part remotely. Their identities are protected in the proceedings by use of a pseudonym. The details of these kinds of participation are determined by the judges hearing the matter, on a case by case basis.

- [9] The Trust Fund for Victims is intended to help survivors of human rights violations. Its broad mandates are to implement reparations awards ordered against a convicted person by the court, and providing assistance to victims and their families through its programs. The contributions to the fund are from the member states, although it also accepts private donations.

- [10] The headquarters of the Court are in the Hague in the Netherlands. It has six official languages: English, French, Arabic, Chinese, Russian and Spanish. It has seven offices in participating countries. There have been 30 cases determined by the court. 17 people have been detained in the ICC detention centre. 13 people remain at large. Of the matters finalised since its commencement, there have been ten convictions and four acquittals.

Offences

- [11] The Rome Statute established four core international crimes: ***genocide, crimes against humanity, war crimes*** and the crime of ***aggression***. The crimes are not subject to any statute of limitations. Under the statute, the ICC can only investigate and prosecute the four core offences in situations where the relevant states are “unable” or “unwilling” to do so themselves. Thus the jurisdiction of the court is complimentary to jurisdictions of domestic courts. The court has jurisdiction only if the offences are committed in the territory of a State Party or if committed by a national of a State Party. An exception to this rule is that the ICC may also have

jurisdiction over crimes if its jurisdiction is authorised by the United Nations Security Council. Both Australia and Italy are State Parties to the Rome Statute. Australia signed the Statute on 9 December 1998 and deposited its instrument of ratification on 1 July 2002.

Ukraine

- [12] Relevantly to recent events, Ukraine, a non-ratifying signatory, has accepted the Court's jurisdiction for a period starting in 2013. Ukraine *signed* the Rome Statute on 20 January 2000, and acceded to the Agreement on Privileges and Immunities of Court (APIC) on 29 January 2007, but has not ratified the Statute. The APIC is a treaty adopted by the Assembly of States Parties on 9 September 2002, providing certain privileges and immunities to officials and staff of the ICC so they can perform their duties impartially. It commenced operation on 22 July 2004. Notably, Ukraine is the only state which has ratified the Agreement but *not* the Rome Statute. Australia has *not* ratified the Agreement; Italy has, in 2006.

- [13] On 17 April 2014 (following the Russian invasion of Crimea on 20 February that year), Ukraine lodged a declaration with the ICC accepting the ICC's jurisdiction with respect to alleged crimes committed in its territory from 21 November 2013 to 22 February 2014. This was under Article 12 (3) of the Rome Statute enabling a state which was not a party to the Statute to accept the exercise of jurisdiction of the court. Subsequent steps toward ratification have been slow in Ukraine, due, it seems, to misunderstandings by politicians as to the ramifications; lack of political will; and more recently, since the war commenced, Parliament has not been sitting.

- [14] More recently, this resulted in thirty eight State Parties referring the events in Ukraine to the ICC in March 2022 (this number has now increased to forty one). An investigation was opened. Russia is not a State Party and is not bound by the ICC. Indeed a previous investigation of the Crimea situation prompted Russia to "un-sign" the Statute in 2016³, a move felt to have mostly symbolic effect, as Russia was not a

³ President Putin issued an order on the 16th November 2016 notifying "withdrawal" of the signature, the day after the ICC's Office of the Prosecutor's annual report characterized the armed conflict in eastern Ukraine and Russia's occupation of Crimea as international armed conflicts to which Russia is a party

State Party in any event. There is no present jurisdiction over the crime of aggression as neither Ukraine nor Russia are State Parties.

Case Study: Slobodan Milosevic

- [15] The proceedings against Milosevic were in the UN International Criminal Tribunal for the Former Yugoslavia, rather than the ICC, but nevertheless they are instructive. They arose from the conflict in Kosovo. This took place between 1998 and 1999. In summary, ethnic Albanians opposed ethnic Serbs and the then government of Yugoslavia (which was the rump of the former federal state, comprising the republics of Serbia and Montenegro) in Kosovo, at that time a self-declared independent country – the Republic of Kosovo - in the Balkans. It had been self-declared by Kosovo Albanians in July 1990, which began ongoing unrest up to the outbreak of hostilities.
- [16] Kosovo later declared its independence from Serbia in 2008, a declaration recognised by the United States and most, but not all members of the EU. It was *not* recognised by Serbia, Russia and a significant number of other countries.
- [17] Historically, the name Kosovo is derived from a Serbian place name meaning “field of blackbirds”. It had been the centre of a medieval Serbian empire, then was ruled by the Ottoman empire from the mid-15th to the early-20th century. In the early 20th century it was incorporated into Serbia (later part of Yugoslavia). By the second half of the century, the largely Muslim ethnic Albanians outnumbered the predominately Eastern Orthodox Serbs in Kosovo, and inter-ethnic tensions frequently roiled the province. As at 2021 the estimated population was 1.7 million people and its capital is Pristina.⁴
- [18] In any event, there were tensions from 1989 when Ibrahim Rugova, leader of the ethnic Albanians, initiated a policy of non-violent protests against the abrogation of the province’s constitutional autonomy by Slobodan Milosevic, who was then president of the Serbian republic. Milosevic and the Serbian minority had long objected to the fact that the Muslim Albanians were in demographic control of an area said to be sacred to the Serbs. Tensions increased over time – one of the problems was that the status of Kosovo was not resolved by the Dayton Agreement of 1995,

⁴ See generally the entry for Kosovo in Encyclopaedia Britannica

which ended the Bosnian War⁵ - and the Kosovo Liberation Army (KLA) emerged in 1996 with steadily escalating violence.

- [19] By 1998 this amounted to a substantial armed uprising and violence broke out. The international community demanded a ceasefire, the withdrawal of Yugoslav and Serbian forces from Kosovo, the return of refugees, and unlimited access for international monitors. Milosevic, who had become president of Yugoslavia in 1997, agreed to most of the demands but failed to implement them. The KLA regrouped and rearmed and renewed its attacks. The Yugoslav and Serbian forces responded with ruthless counteroffensives engaged in a program of what was described as ethnic cleansing. The United Nations Security Council condemned this, but the violence continued.

- [20] Eventually in March 1999 NATO began air strikes against Serbian military targets. In response, Yugoslav and Serbian forces drove out all of Kosova's ethnic Albanians, displacing hundreds of thousands of people into Albania, Macedonia and Montenegro. The NATO bombing campaign lasted 11 weeks and eventually expanded to Belgrade. In June NATO and Yugoslavia signed a peace accord; many ethnic Albanians returned and most Serbs left the region. UN peace keeping forces were deployed. Tensions between Albanians and Serbs continued into the 21st century.

- [21] Milosevic was indicted by the United Nations International Criminal Tribunal for war crimes in Kosovo on 24 May 1999. He was the first sitting head of state to be charged with war crimes by an international tribunal. Further the conflict in Kosovo was still raging on that day, thus it was the first such response to war crimes in real time.

- [22] Nothing immediately happened, but on 29 June 2001 Milosevic was transferred to the tribunal's custody from the republic of Serbia where he had been briefly detained on charges of misappropriation of funds and abuse of office. The trial commenced on 12 February 2002 with Milosevic facing indictments for crimes in Croatia and Bosnia and Herzegovina between 1991 and 1995 while he was president of Serbia, as well as for crimes against humanity and war crimes committed between January and June 1999.

⁵ Which took place in Bosnia and Herzegovina between 1992 and 1995

- [23] Milosevic chose to represent himself and he was given extra time to cross examine prosecution witnesses and present his defence evidence. The sitting hours were reduced to take into account his health issues. Although the trial took place over four years, the actual sitting time was about 14 months. However it did not reach a conclusion. It formally ended on 14 March 2006, following the death of Milosevic in the tribunal's detention unit on 11 March. Enquiries by Dutch and tribunal authorities determined conclusively that his death was from natural causes. He had been suffering from heart problems and high blood pressure and the autopsy concluded that he had died of a heart attack.

Bosco Ntaganda

- [24] Ntaganda was found guilty, in the ICC, of crimes against humanity and war crimes committed in Ituri in the Democratic Republic of Congo between 2002 and 2003. He was the former military chief of staff of the National Congress for the Defence of the People (CNDP), an armed militia group operating in the North Kivu province of the Democratic Republic of the Congo (DRC). He was formerly a member of the Patriotic Forces for the Liberation of the Congo (FPLC), the military wing of the union of Congolese patriots.
- [25] In 2006 a pre-trial chamber of the ICC found that there were reasonable grounds to believe that Ntaganda was responsible for war crimes committed by the FPLC between July 2002 and December 2003, and issued a warrant for his arrest. He was charged with the war crimes of enlisting and conscripting children under the age of 15 and using them to participate actively in hostilities. The arrest warrant was originally sealed because of concern that he would flee or obstruct or endanger investigations, but in April 2008 it was unsealed.
- [26] On 18 March 2013, Ntaganda handed himself into the US embassy in Kigali, Rwanda, where he requested transfer to the ICC. The reasons are unclear, but it was speculated he was either pressured to do so by Rwanda or feared infighting within the M23 movement (aka the Congolese Revolutionary Army) and its leader Sultani Makenga, forcing him to flee the DRC into Rwanda. On 22 March, he was detained by the ICC, despite neither Rwanda nor the US being a signatory to the Rome Statute.

- [27] The trial at the ICC began on 3 September 2015. He pleaded not guilty to 18 charges including rape, murder, recruitment of child soldiers and sexual slavery of civilians. A total of 80 witnesses were called including three former child soldiers. On 8 July 2019 he was convicted of all 18 counts and on 7 November 2019 was sentenced to 30 years imprisonment, the longest sentence ever handed down by the ICC. On 8 March 2021 the ICC ruled that Ntaganda's victims should be compensated with USD \$30 million, the highest amount ever awarded. Ntaganda has no assets, but the court will raise funds to compensate victims. On 30 March 2021 the ICC appeals chamber rejected his appeal. Some of the findings against him were that he was a key leader who gave orders to "target and kill civilians". He was key in planning and running operations for the FPLC which conducted attacks against people perceived not to belong to the HEMA ethnic group. In one attack, for example, fighters killed 49 captured people in a banana field behind a village using sticks and batons as well as knives and machetes. Corpses of men, women, children and babies were found in the field. Several bodies were disembowelled or otherwise mutilated.
- [28] Interestingly, the presiding judge was Judge Chang-Ho Chung, from South Korea. The remainder of the bench included Judge Peter Kovacs from Hungary and Judge Socorro Flores Liera of Mexico.

Investigations

- [29] Investigations are conducted by the Office of the Prosecutor upon referral by States Parties or by the United Nations Security Council, or on its own initiative and with the Judge's authorisation. It gathers and examines evidence, questions, witnesses, victims and persons under investigation. It is required to investigate incriminating and exonerating circumstances equally. The Office requests cooperation and assistance from states and international organisations, and also sends investigators to areas where the alleged crimes occurred to gather evidence. The ICC presently has 17 investigations open including in the Democratic Republic of the Congo; Uganda; Darfur in Sudan; Central African Republic; Kenya; Libya; Cote d'Ivoire; Georgia; Burundi; State of Palestine; Bangladesh / Myanmar; Afghanistan; Republic of the Philippines; Venezuela and Ukraine.
- [30] Many of these investigations are obviously extremely politically sensitive. An example is the investigation into the situation in Palestine. As the Prosecutor's

statement sets out, she is satisfied that there is reasonable basis to proceed with an investigation into the situation in Palestine, pursuant to article 53(1) of the Statute. She is satisfied that

- (i) War crimes have been or are being committed in the West Bank, including East Jerusalem and the Giza Strip
- (ii) Potential cases arising from the situation would be admissible, and
- (iii) There are no substantial reasons to believe that an investigation would not serve the interests of justice.

[31] The matters mentioned in the statement include war crimes allegedly committed in the context of the 2014 hostilities in Giza, by members of the Israel Defence Forces (IDF), such as intentionally launching disproportionate attacks in relation to at least three incidents; wilful killing and wilful causing serious injury; and intentionally directing an attack against objects or persons using the distinctive emblems of the Geneva Convention. Further there is a reasonable basis to believe that members of Hamas and Palestinian armed groups (“PAGs”) committed war crimes of: intentionally directing attacks against civilians and civilian objects; using protected persons as shields, wilfully depriving protected persons of the rights of fair and regular trial; wilful killing; torture or inhumane treatment; and/or outrages upon personal dignity.

[32] There is also reference to Israel’s occupation of the West Bank, including East Jerusalem, and war crimes relating to the transfer of Israeli civilians into the West Bank since 13 June 2014. There is also reference to the use by members of the IDF of non-lethal and lethal means against persons participating in demonstrations beginning in March 2018 near the border fence between the Giza Strip and Israel, reportedly resulting in the killing of over 200 individuals including over 40 children, and the wounding of thousands of others.

[33] The Prosecutor’s statement refers to jurisdictional difficulties and thus the prosecutor requested from the Pre-Trial Chamber a jurisdictional ruling. The Pre-Trial Chamber invited Palestine, Israel and victims to submit written observations on the Prosecutor’s request as to the jurisdictional question. The procedural orders required written observations from Israel by no later than 16 March 2020. The Pre-Trial

Chamber's decision was handed down on 2 February 2021. By a majority it was concluded that the court may exercise its criminal jurisdiction in the situation in Palestine, the territorial scope of the jurisdiction extending to Giza and the West Bank, including East Jerusalem. This was not a determination that Palestine fulfills the requirements of statehood under public international law; rather it was a determination of the scope of the court's territorial jurisdiction for the purposes of the Rome Statute. It was concluded that Palestine is a State Party to the Rome statute.

- [34] This is possibly a demonstration of the subtlety and complexity of such matters, which involve international diplomacy as much as the rule of law.

Criticisms and conclusion

- [35] The Court has faced a number of criticisms from governments and commentators, including objections to its jurisdiction – see the Ukraine and Palestinian cases – accusations of bias, Eurocentrism and racism, questioning of the fairness of its case selection and trial procedures, and doubts about its effectiveness. Its critics speak of an Africa bias, and only prosecuting small, weak states rather than large, rich ones. Kenya's parliament passed a motion calling for Kenya's withdrawal from the Court, and called on other African Union States to do likewise.
- [36] The criticism about small, weak states may not hold up. In September 2020, the United States, through then Secretary of State Mike Pompeo, imposed sanctions on two ICC officials, prosecutor Fatou Bensouda and Phasiko Mochochoko, Head of Jurisdiction, Complementarity and Cooperation Division. This was in retaliation for the ICC opening an investigation into the conflict in Afghanistan.
- [37] Many commentators think that, whatever its flaws, in a world, sadly, of ever increasing mass atrocities, independent and well resourced prosecutors such as the ICC are essential.⁶

⁶ Dr Ewelina O. Ochab, co-founder of the Coalition for Genocide Response, Forbes Magazine, 13 September 2020