COUR PÉNALE INTERNATIONALE
LE BUREAU DU PROCUREUR

INTERNATIONAL CRIMINAL COURT
THE OFFICE OF THE PROSECUTOR

The Promise of International Law in the Face of Ecological Crises

27 May 2024, 16:20-16:40, online

Keynote address by Deputy Prosecutor Nazhat Shameem Khan

Many thanks to UCLA Law Promise Institute Europe and the organizers Kate Mackintosh and Margaretha Wewerinke-Singh for inviting me to deliver a keynote address on this very important theme, the promise of international law in the face of ecological crises, at such a critical time. *Bula vinaka.*

I. Introduction

The Rome Statute that established the International Criminal Court at the turn of the century in many ways was a symbol of hope and trust placed by the international community in international law. It represented a tangible display of the promise of international law, of its substance and of its institutions, such as the International Criminal Court (ICC) that it would hold individuals accountable for some of the worst crimes known to humankind such as genocide, war crimes, and crimes against humanity. A promise that every human life will matter equally and that rule of law must apply to everyone, in all situations and that no one would be above the law.

However, we must also note that the Rome Statute, as it stands now, is a reflection of that time more broadly. Its provisions, its definitions, the overall scope, are a reflection of the issues that were considered pressing at the time; a reflection of the legal imagination of that time.

While there is no specific category of crimes against the environment, the Rome Statute did predict the impact of war and conflict on the environment. At present damage to the environment in the context of an armed conflict is considered a war crime under Article 8(2)(b)(iv) of the Rome Statute. However, there is a very high threshold of damage required under the article – there must be an intentional attack that causes 'widespread, long-term and severe damage to the environment which would be clearly excessive' and it does not apply to non-international armed conflicts.

International humanitarian law provides a broader framework in terms of rules concerning protection of environment during an armed conflict. It includes not only a similar prohibition under the Additional Protocol I to the Geneva Conventions, but also includes other specific provisions against destruction of agricultural land, and attacks against the environment by way of reprisals.

Moreover, given the emphasis on individual criminal responsibility, the Rome Statute does not recognise corporate and state criminal liability as such. Thus, corporations and states which are responsible for large scale water and air pollution or participate in illegal deforestation and cause oil spills, in peacetime, or during war, cannot be prosecuted for causing such environmental damage.

We know that unchecked environmental degradation poses an existential threat to the world as we know it. The international legal system, including the ICC, stands at a crucial juncture where we must remain relevant and respond to this crisis before it is too late.

II. Limits of International Law in Addressing Climate Change – the Perspective of a Pacific Islander

At the outset, I would like to acknowledge the Advisory Opinion on Climate Change issued by the International Tribunal for the Law of the Sea on 21 May, last week. I also note that the Advisory Opinion was issued at the request of the Commission of Small Island States on Climate Change and International Law (COSIS) - a Commission led by the leaders of Antigua and Barbuda and Tuvalu with a vision of global climate justice.[i]

I understand that the Advisory Opinions will be on the agenda for discussions tomorrow. And I note that the Advisory Opinion on Climate Change requested by the UN General Assembly by the International Court of Justice, again following a long and dedicated campaign by the Pacific Island nation of Vanuatu, is also a matter of great anticipation. While there is much discussion about next steps, there is no doubt that there is increased focus of international law on the ecological crises which is a significant step forward.

Both these Advisory Opinions have been awaited with some anxiety especially by small island developing states which watch, year after year, their sea levels rise, and parts of their coastal lands disappear under the sea. The international law has not been equipped to address the effect of climate change on diminishing land, on the possibility of whole island nations becoming uninhabitable because of sea water surges and land salination, and on the resulting impact of such change on the exclusive economic zone (EEZ) of island nations.

I come from Fiji, a small island developing state in the Pacific. Before my life at the ICC, I served on what is called the Pacific Mobility Project[ii] co-chaired and led by the International Organisation for Migration, United Nations Economic and Social Commission for Asia and the Pacific (ESCAP) and Office of the United Nations High Commissioner for Human Rights (OHCHR). The Project aimed to ask important questions about the possible movement of Pacific populations to other countries because of the impact of climate change.

It addressed what we had never addressed before. What are the human rights implications of the movement of island populations as a result of climate change? What should a host country promise such displaced persons in terms of the their culture and language, both of which may well disappear with the disappearance of their island home? Can we promise that there will be no detention camps for such persons? Can we promise the preservation of language and culture? How do we balance such preservation with the integration of new citizens in the host country? These are questions we have had to address in the context of migration generally,

but they have an added poignancy when we address them in the context of countries which have minute carbon footprints, and whose entire populations and sovereign survival are now at threat through no fault of their own. In participating in this project, I learnt how limited the international law is, in addressing what has become an existential issue. Instead we had to work with the developing of new migration policy.

Multilateralism, international law, and the rules based system, are the only hope for small countries. They may not have a loud voice at economic fora, but they have developed such a collective voice to integrate such environmental issues in every international institution. The conversation in Paris (Conference of the Parties of the United Nations Framework Convention on Climate Change 21) was transformed by the leaders of the Marshall Islands, by the Maldives and by Barbados. And for climate leaders such as Bangladesh and Ethiopia. The inclusion of provisions on loss and damage was spearheaded primarily by AOSIS[iii] and supported - albeit with restrictions in relation to compensation for such loss and damage - by the European Union (EU) and the United States.

When the international order demonstrates an inability to respond to existential crises, it loses relevance and credibility for those who rely on it and who have no other alternative but to rely on it. And what is the alternative to such flexibility of the international law and order? Surely the loss of sovereign pride, surely chaos and the erosion of the rule of law.

The Rome Statute and international criminal law now face a challenge to their own relevance if they do not accept the need for such adaptation and flexibility in relation to the reality of the planet. The future negotiations around the Rome Statute and the creation of new offences, rest of course in the hands of State Parties. But in my view, if the small island states want to participate in such negotiations, they too will need to step up to involve themselves in the work of the Court, and in the Assembly of State Parties. That journey must begin with more ratification. If such states want to have their voices heard, they must give themselves a seat at the table.

The Pacific Mobility Project that I participated in, resulted in, for the first time, the adoption of a Regional Framework for Climate Mobility only in November 2023.

The framework is the result of learning from the lived experiences of women, youth, people with disability, marginalized groups and all communities affected by climate mobility; it contains the advice and lessons of Pacific governments, civil society and academia. It also captures the need to uphold and protect human rights without discrimination; preserve culture and identity; strengthen regional collaboration; and protect those at the risk of displacement. It is an example of what can be achieved when those who are the most directly affected by environmental degradation, have a seat at the table and take part in the decisions made to bridge the gap between policy and international law. A classic example is the role of my own country Fiji when it, in a brave move, decided to chair the Conference of the Parties of the UNFCCC at COP23 in 2017.

III. My Experience at the UNFCCC

When Fiji held the Presidency of the Conference of the Parties at the UNFCCC[iv], I was appointed Chief Negotiator at COP23. What was clear during those negotiations was the sensitivity from all states to any new line of accountability for harm caused to the environment. One of these sensitivities was particularly around the relationship between environmental law, human rights and climate change. Many countries, especially those from the 'Global South', were of the view that UNFCCC was not the forum to establish any such new lines of accountability. The sensitivities to accountability in the context of the environment affected every aspect of the negotiations. They affected discussions around the Gender Action Plan, the Indigenous People's Platform, the work programme for farmers to encourage sustainable farming practices, the Adaptation Fund and the Fund for Loss and Damage. The most difficult were the discussions around operationalising Article 6 of the Paris Agreement in the Paris Agreement Rule Book, around international partnerships, carbon markets and credits. But that is a conversation for another day.

For today, I can say this. That even with the support of small states, the inclusion of an offence for causing ecological harm in the Rome Statute of the future, outside of the existence of an international armed conflict, is not likely to be welcomed with enthusiasm in all quarters. It is accountability at the most granular and effective level. Such negotiations would need much preparation and much support from those who are most vulnerable to environmental harm, and who understand the importance of such negotiations. Such negotiations will also need discussions which have benefited from the parallel criminal law experiences from domestic jurisdictions, including in relation to the criminal liability of corporate bodies and their senior decision makers.

Having said that, there is now a growing appetite among civil society organizations, academics, grassroots organizations, feminist groups, as well as indigenous groups, to discuss such accountability measures because of the real harm affecting the most vulnerable members of the society as a result of environmental degradation.

IV. Criminalisation of 'environmental harm' domestically

In terms of accountability measures, the tradition in domestic jurisdictions has been to keep environmental protection firmly within the administrative regulatory framework. The link between criminal law and environmental protection has been marginal, and mainly limited to penalising non-compliance of administrative obligations.

In recent years, however, given the scale and seriousness of violations of environmental obligations, there has been a growing trend in various national and regional legal systems towards direct criminalisation of serious breaches resulting in the destruction of the environment. This is also consistent with the international human rights framework which imposes positive obligations on the state to deliver an effective domestic legal system to protect the environment, inter alia, through criminal law.

Despite the fact that there are several challenges that mark the relationship between criminal law and environmental damage, the movement lobbying for the expansion of international

law to include the crime of ecocide appears to be gaining momentum. I also acknowledge the important work done by civil society on examining the relationship between the environment and the Rome Statute. For instance in 2021, the Stop Ecocide Foundation convened an Expert Panel[v] which examined the scope of the Rome Statute as it currently stands, and recommended new provisions for States to consider. Their recommendations include a revisiting of the scope of the offence, a definition of the term environment, and the *mens rea* necessary for such an offence.[vi]

This focus on the criminalisation of environmental destruction is also presenting various models domestically. States and regional institutions are increasingly choosing to respond to these challenges and as a result, the overarching ecological crises, with criminal law.

Firstly, let me briefly set out some of the key challenges and then I shall focus on these models from domestic jurisdictions which can I am sure, feed into the international law's approach towards protection of the environment:

Key challenges

One of the more fundamental challenges takes the form of a discussion about the capacity of criminal law to adopt an 'eco-centric' as opposed to an 'anthropocentric' view of the environment. A truly eco-centric approach would require the preservation and safeguarding of the environment itself as a protected interest, an anthropocentric approach seeks to protect the environment because it is essential to the protection of human health and life. While it has become quite clear that a response to ecological crises requires the protection and preservation of the environment as such, it remains to be assessed to what extent the current structure of criminal justice systems - at the international and national levels - allows for an eco-centric approach to environmental protection. And particularly, the Rome Statute which is guided by the 'interests of humanity', suggests a greater distance from a truly eco-centric approach.

Then on a more practical level, there are challenges in arriving at a general definition of 'environmental crimes' and the concept of 'environmental harm'. We have seen that these definitions are not the same. Furthermore, the local, regional, and global dimensions of environmental harm and complex criminality associated with such harms gives rise to several jurisdictional questions.

Also important is the question of the *mens rea* sufficient to prove ecological offences. Could command responsibility as defined in the Rome Statute be integrated with command/corporate responsibility within a company such that a Chief Executive Officer (CEO) could be charged on the basis that he or she knew/ must have known about the harm done and did nothing to stop it? Is that a realistic test for transnational companies?

Investigations and evidence collection would require specialised knowledge, expertise and novel techniques in response to the specific kind of environmental harm in question. Domestic jurisdictions have noted that their prosecutors often lack the specialised expertise required in order to properly investigate crimes relating to the environment.

Finally, I believe, it would also be important to think about whether adopting effective and largely uniform sentencing guidelines and alternate means of addressing environmental harm within the criminal justice framework can ensure that such offences are taken seriously and serve a deterrent function across the board – without leading to a severely fragmented regime of crimes relating to environment degradation.

Domestic and Regional Models

In that context, I note that several countries are undergoing reforms to introduce direct criminalisation of most severe breaches of environmental protection rules and when combined with existing corporate liability models, this has the potential to give rise to some pioneering practice.

I would like to draw your attention to some of them here:

- In Latin America, **Brazil,** for instance, is currently processing a bill that criminalises the most serious and far-reaching forms of environmental degradation. The bill in its current form aims at senior managers responsible for decision-making and provides for criminal and administrative sanctions for conduct and activities harmful to the environment.

- Similarly, **Chile,** last year, amended its domestic penal code to incorporate a new section on 'attacks against the environment' including elements of not only criminalisation for non-compliance of regulatory permits but also creation of new offences. This amendment was also combined with significant revisions to systematise the criminal liability of companies and establish categories of economic crimes, which will attract not just imprisonment and other restrictive penalties but also leaves the door open for alternative sanctions.

- I would also like to draw your attention to the model adopted **by Australia**, particularly in relation to corporate criminal liability. The Australian Criminal Code has a nuanced approach to corporate criminal liability that looks at the 'state of mind' of corporations and allows for the *mens rea* of corporations to be proven, inter alia, through corporate culture. This notion of corporate culture underlines the value of robust policies and compliance programmes. As a result, if an employee of the company, acting within the actual or apparent scope of his or her employment, commits the offence, the company may be held criminally liable if it expressly, tacitly or impliedly authorised or permitted the commission of the offence.

  For all these innovations send positive messages of criminal liability of corporate bodies domestically, the real test is going to lie with prosecutorial conduct. One discouraging indication is that there are very few prosecutions, including in Australia which has this innovative model, that target companies as such. This may well be because of the hurdles that investigators and prosecutors have to overcome to match these innovative principles of criminal

liability for companies with traditional concepts of *actus reus*, *mens rea*, and causation.

- In that context, however, I would like to note the French model of corporate criminal liability, which interestingly was initially tabled to be included in the Rome Statute in 1998 as well, but was not voted on. The French model hinges the criminality of the corporation on the criminal conduct and intent on its employees, thereby potentially diluting some of the challenges that the Prosecutors would face in a purely corporate criminal liability model, regarding corporate guilt, knowledge, and control in cases of damage to the environment.

- I also note the recent positive development in the form of an **EU Environmental Crime Directive** which entered into force last week (on 20 May).[vii] The new Directive provides an extended list of environmental offences addressing the most serious breaches of environmental obligations.

  The Directive appears to be wide in scope in so far as it also acknowledges concrete levels and types of penalties for both natural and legal persons – the latter being key to any meaningful response to environmental harm.

  It will be a matter for the EU member states now to ensure that these breaches constitute criminal offences under their respective national laws in the coming years. Even though the directive is only applicable to offences committed within the EU, member states may also choose to extend their jurisdiction to offences that have been committed outside their territory. [viii]

After all, the question on jurisdiction is going to be key when dealing with harm that does not fall squarely within the territorial boundaries of the states. If this is a case of an oil spill in the oceans, radioactive contamination, or other such complex scenario of harmful conduct that can potentially have impact across jurisdictions, the crucial question will be, are these legal provisions capable of dealing with such conduct adequately? Whom should we charge? The company itself? The CEO of the offending company? The CEO of the parent company that may be sitting far removed, structurally and geographically, from any of the criminalised conduct but is the ultimate decision-maker? The Head of State who agreed to partner with the company? What is the *mens rea* which might realistically reflect human behaviour around environmental damage?

Hopefully, the practice emanating from these reforms will set the foundations for an evolving state practice on criminalisation of environmental destruction. While these are very important and positive developments, their effectiveness and success will of course depend on their enforcement.

V. Conclusion: Rome Statute of the Future

As you all are aware, the Office of the Prosecutor is in the process of developing a policy on environmental crimes within the jurisdiction of the Court as laid out in the Rome Statute. As Prosecutor Karim Khan noted earlier this year, the Office remains committed to playing a central role in this dialogue on the role of law in the protection of the environment.

But I wonder, if the Rome Statute was being drafted today, what would it look like? Would it include ecocide as a separate international crime? Would it include the liability of legal persons? How would it deal with the problem of attributing responsibility to multinational corporations? How would the jurisdictional model of the Rome Statute respond to harms that have a global dimension? Will the jurisdiction of the ICC still be determined by national boundaries? What kind of Rome Statute would today's pressing concerns and today's legal imagination produce?

I leave you with these questions and hope that they will find their way into your discussions over what promises to be a very full and engaging three-day programme.

Thank you very much.

****

[i] Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission (SRFC) (itlos.org)

[ii] https://roasiapacific.iom.int/news/pacific-islands-countries-lauded-endorsing-regional-framework-climate-mobility

[iii] The Alliance of Small Island States (AOSIS) negotiating bloc at the UNFCCC, a coalition of small island and low-lying coastal countries that share similar development challenges and concerns about the environment, especially their vulnerability to the adverse effects of global climate change. AOSIS, with 44 members and observers from all regions of the world, works as a negotiating voice for small island developing states (SIDS).

[iv] https://www.spc.int/updates/news/2016/11/fiji-presidency-a-breakthrough-for-pacific-voice-on-climate-change

[v] https://www.stopecocide.earth/legal-definition

[vi] Ecocide

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.

For the purpose of paragraph 1:

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

"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;

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

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

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

[vii] Directive - EU - 2024/1203 - EN - EUR-Lex (europa.eu)

[viii] See also https://europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Report_on_Ecocide.pdf