I am honored to have been invited to deliver the annual rule of law lecture, especially given the list of esteemed previous speakers. I would like to thank the Bar Council for the invitation.

My topic this evening is “Advancing the rule of law on the international stage”.

To begin, it is almost trite to say these are dark times for the rule of law as a fundamental precept. Addressing this audience I need not list the disturbing challenges to it within states and regions the world over – including here in Europe. They are all too familiar to us.

The news is no better internationally. The term rule of law and its related concepts have become difficult - sometimes impossible- to advance. It is almost prohibited language in resolutions, agreements or even statements. In some quarters, it is reviled and blamed for the many threats to our societies in particular to our security.

It follows I could spend the time allotted to me this evening analyzing that phenomena, detailing the challenges for the rule of law in our time.

But to do so at this particular moment, to focus on the darkness, after this year 2020, would be cruel…in fact probably a violation of the prohibition against cruel and inhumane treatment.

Moreover, it is not necessary that I do so because my thesis is quite to the contrary.

In my view when you take into account the context of our "global governance regime" it is, in fact, astounding as to what has been achieved, and continues to be achieved, in entrenching the rule of law on the international stage.

By context I mean this simple reality. I grew up in Canada where the rule of law is a given. From an early age forward, it would never have crossed my mind that there was any other system of order. I imagine for some of you it was exactly the same. But when I started to work in the international sphere it came as quite a shock to learn that this is not the case for the vast majority of the people in the world. In several countries it is the opposite – the rule of law is explicitly rejected. In many others it may be recognized or cited but in practice it is not implemented because of capacity or corruption or for a myriad of other reasons.

From that perspective, I think the enormity of the task is more clear; we are trying to entrench the rule of law when the support for it within the relevant constituency is dependent on a small minority.

With this in mind, despite set-backs, despite all the current challenges, I believe the advancements are quite significant and reflection upon them should serve to strengthen our determination to press on with a rule of law campaign. History tells us to persist.

There are several examples of this progress in different spheres but I have selected two discrete subject areas to illustrate the point– international criminal justice and international sanctions.

I should also acknowledge that my comments will have somewhat of a personal element, perhaps more so than a normal commentary on the rule of law. That is because as I reflect on my legal career it occurs to me I am a bit like Forrest Gump – the character Tom Hanks brought to life in film. By chance I have stumbled into situations/events which have turned out, in retrospect, to be somewhat historic or landmark as to the development of international law or policy. Therefore, I hope you will indulge my somewhat personal reflections.

Let me begin with my current role as an ICC judge and, more broadly, the "international criminal justice project" as we fondly refer to it.

The entrenchment within international law of the concept of adjudicating individual criminal responsibility for grave crimes- war crimes, crimes against humanity, genocide, aggression – is a highly ambitious project, perhaps the most contentious within the rubric of the rule of law. History again instructs us that it was always going to be incredibly hard to achieve.

In the wake of the horrors and atrocities of World War II there were many important achievements – the Universal Declaration of Human Rights, the establishment of the United Nations, the International Court of Justice and the International Law Commission. But even with the recent precedent of the Nuremberg and Tokyo tribunals, and despite concerted efforts at the time, agreement on the crimes and a permanent international court to adjudicate on them could not be achieved. Understandably so, considering the sensitivities and the fact it is a highly uncomfortable subject – individual accountability - for the leaders who are the decision makers.

And so the idea floundered. The draft statute was left with the ILC where it lingered for decades, gathering dust.

And in that intervening period – 50's, 60's 70's even 80's – the world soon forgot the tragic lessons of WWII. We witnessed the perpetration of atrocities in international and internal conflicts and those inflicted by despotic regimes against their own populations. Victims watched as alleged perpetrators lived out their lives in power or went into peaceful exile despite the weight of the allegations against them. Quite simply there was no possibility of justice. The prospects for the rule of law looked as bleak then, perhaps even bleaker, then what we face today.

But gradually those prospects began to change – not because of an event or a global policy change. Leaders didn't come together and agree on a rule of law platform. Rather, as happens often in international policy development, a series of unrelated events – some tragic in nature – created the perfect storm of conditions for a major step forward.

In the 1980's reports surfaced of suspected WWII war criminals amongst the populations who had migrated to places like Australia, the UK and Canada after the war. It lead to commissions of inquiry and legislative reform extending jurisdiction and the establishment of investigative and prosecutorial offices to pursue these cases. My

first introduction to the world of international criminal justice was as a member of one of those offices. The rise of extraterritorial jurisdiction prosecutions began in this WWII context but quickly expanded to other more recent conflicts and regimes, culminating in perhaps the most notable UK contribution on the subject – the arrest for extradition of General Pinochet and the ensuing landmark decisions of the House of Lords

Meanwhile, internationally, there were three important developments.

Trinidad and Tobago resurrected the ILC draft not because of atrocity crime but with a view to an international drug court – to address a problem of priority concern for that country.

The shocking reports of atrocity crime being committed in the conflict in the former Yugoslavia, and the horrors of a genocide in Rwanda carried out in plain view motivated a then functional Security Council to take an extraordinary step. Two post WWII international tribunals were established to adjudicate on the individual criminal responsibility of those most responsible in relation to those crimes. Suddenly, we had a living example of what a court could look like and there was inspiration not only to develop

other ad hoc courts – East Timor, Sierra Leone, Cambodia – but to resurrect the idea of a permanent court.

Finally, that component which is always necessary – political change- a paradigm shift in politics - with the fast moving developments that led to the break-up of the Soviet Union and ushered in a new "era of glasnost". For a brief period, there was a small window of opportunity for change and we all clambered through it, pushing and shoving each other to the other side, to the fertile ground that awaited.

Within a relatively short period of time – the idea of a permanent international criminal court came to fruition.

As someone who was there I can attest to how precarious the moment was. Right up to the second the gavel went down on a compromise package in July 1998– no one knew if it would succeed. But succeed it did and the ICC and the Rome Statute system were established and, with the necessary ratifications achieved, four years later it became operational.

This achievement was further enhanced in December 2017 when agreement was reached to activate the crime of aggression – overcoming problems once considered insolvable – and it came into

force in July 2018. The combination of circumstance and remarkable individual effort had led to an extraordinary step forward for the rule of law.

Now more than 20 years on I am the last person who is going to stand here and tell you that all is wonderful with the ICC and the expectations of Rome are being met and surpassed. Bluntly put - the ICC and its operations are the subject of considerable criticism as to effectiveness and efficiency and it faces multiple challenges. A recent expert report of over 300 pages has set out many of those issues in a frank and thoughtful manner and I believe it will help guide us forward to meet the challenges. I can assure you those of working at the Court or within the mechanisms that surround it are striving every day to improve and progress. For more on this see my other lectures on achievements and challenges for the ICC or, of course, you can ask about it.

But for tonight's lecture the question is does this mean that all the progress is lost? Has the international criminal justice project failed or is it failing? I am here to say – "Of course not!" Despite the challenges, the international criminal justice project is alive and well, still advancing at a good pace and the establishment of the ICC and

the Rome Statute system continues to bring about remarkable changes to the international landscape.

First, there are 123 State Parties to the Rome Statute which means almost two/thirds of the countries in the world have accepted the Court's jurisdiction. While some states have withdrawn, that number has remained consistent for several years with new additions.

Further, whether at the speed or in the manner expected, the ICC is proceeding with its business. There are seven active cases before the Court at various levels, arising from 7 different situations which are before the Court. Bear in mind that building cases within each situation is equivalent to starting the work of an hoc tribunal from scratch. In addition there are 10 preliminary examinations in 6 different regions. And there are 13 situations under investigation- again in different regions. For core crimes there are 4 completed cases- 3 convictions and 1 acquittal and 12 outstanding warrants of arrests. Each situation, each investigation brings the possibility of accountability where it would likely not have existed before the creation of the court. From the perspective in particular of victims, the Court represents progress.

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Secondly, perhaps even more importantly, much of the criticism and setbacks relate solely to the operation of the Court itself as a Court. Understandably so. But that focus fundamentally misconstrues the whole purpose and nature of the ICC.

What was adopted in Rome in 1998 was not a stand-alone super court to address atrocity crime. It was not even a court modelled on the example of Nuremberg or the ad hoc Tribunals which had primary jurisdiction and were expected to try all the most responsible for the crimes in questions. That is an impossible model for the ICC when it applies to multiple situations in the world. In fact the perception of the Court as such is what has created some of the most significant challenges –the expectations are completely unrealistic.

Instead what was created was a system designed to motivate, to pressure, to cajole States to take up their responsibility, to exercise their right, to investigate and prosecute these crimes. To create conditions of joint state, regional and, if necessary, international action that would bring an end to impunity for atrocity crime. The ICC is a crucial part of that system having complimentary jurisdiction which can be exercised in the last resort when there is no state willing and able to carry out the investigation/ prosecution. But the ICC is not the center of the Rome Statute system – the State proceedings are.

And if you look at the record from this perspective, while it may not be happening as fast or efficiently as we hoped in Rome, there are many successes to note. The Rome Statute crimes are slowly being implemented in national legislation creating a broader legal base for the punishment of these crimes. And its precepts are being taught in military colleges around the world.

For those States which are party to the Rome Statute, and even those which are not, we see allegations of such crimes committed by national military being brought to light and investigated and prosecuted if appropriate. This effect of complementarity is not without challenges, I acknowledge. That is well known to you in the United Kingdom. Moreover, one of the most difficult policy issues for the new prosecutor will be in the area of how complementarity should operate and the role of preliminary examinations. But at the end of the day - pressure to investigate and prosecute atrocity crime- is an expected and welcome outcome of the Rome Statute system and the drive to end impunity.

Complementarity is also becoming more of a practical reality with advances in national efforts to address in parallel to the ICC, cases in ICC situation countries. For example, there is a national war crimes

chamber in Uganda currently hearing a case from northern Uganda and there is a special court in the Central African Republic looking at crimes in that country. There is also the important "MH 17" prosecution by the Dutch in a domestic court in partnership with other States, making it unnecessary for the ICC to consider the matter. While it is not technically within the jurisdiction of the ICC because of the age of the case, the prosecution of Hissene Habre, the former Chadian President, before an extraordinary chamber in Senegal, resulting in his conviction and life sentence for crimes against humanity and war crimes, stands as a perfect example of what the Rome Statute system is designed to generate. A prosecution driven by the determination of victims and NGO activists who aided them and supported and steered by the African Union, brought long awaited justice to the victims of his despotic regime. There is still a considerable way to go in building national capacity but slowly we are beginning to see these important developments in State practice and the "bringing to life" if you will of the Rome Statute system.

Thirdly, the ICC and the Rome Statute system have proven to be a real and relevant force even beyond the states which fall within the jurisdiction of the Court. A friend of mine who was working for the US government at the time once said to me - every day in the State Department, at the Pentagon, in the White House - there are

conversations and high level meetings related to the ICC. That statement really struck me especially when I considered it is not likely a phenomena isolated to the United States. In my view, that fact -in and of itself - illustrates how seriously the work of this Court is taken. We must add to this the astonishing step taken by the Trump administration in adopting a sanction regime targeting Court personnel, including the Prosecutor. It appears the Court is very relevant, perhaps too relevant for some.

All that having been said, even the most fervent and ardent supporter of international criminal justice cannot help but despair at the large gaps in the Rome Statute system. It is a reality that there are devastating impunity zones in the world where atrocities are perpetrated in plain sight without much hope - at least for the moment - for any accountability. Syria – 14 Security Council vetoes, Yemen – seemingly abandoned - to name a few.

But even in this the darkest corner – there is a beacon of light. There is an important change in that this lack of accountability is no longer accepted or tolerated. Instead we see unprecedented innovation in the quest for accountability driven by tenacious efforts of victims, activists, NGOs, IGOs and states – individually and collectively.

Even while conflicts are raging there have been victims groups and NGOs steadfastly gathering evidence and documenting accounts. When the Security Council failed in its responsibility to the people of Syria, the General Assembly - with much blood on the floor- succeeded in establishing the International, Impartial and Independent Mechanism for Syria which is drawing from these and other sources and assisting with investigations, preserving evidence and helping prosecutions – nationally for the moment- but who knows what the future will bring. This was followed by a similar mechanism for Myanmar in 2018 established by the Human Rights Council – a completely separate UN body.

The Security Council has managed to institute as well an investigative team to assist Iraq in the investigation and prosecution of ISIS crimes, driven by considerable efforts on the part of the UK.

And a once unknown international organization in the Hague – the Organization for the Prohibition of Chemical Weapons – has gone from primarily monitoring and overseeing weapons disposal to having an investigative capacity and the power to attribute breaches in terms of the use of chemical weapons.

In November last year the Gambia launched proceedings before the International Court of Justice against Myanmar alleging violations of the Genocide Convention. To date provisional measures have been granted and the case continues. And in a related innovative action, evidence documenting the alleged atrocities in Syria such as the UN Commission of inquiry and a report from Human Rights Watch has been used by the Netherlands to officially notify Syria of its obligations under the Torture Convention which could ultimately result in another similar proceeding before the ICJ.

We have also seen a return to the use of universal jurisdiction by States resulting in a flurry of prosecutions related to a number of situations from Syria to Iraq to the recent case which opened last week in Switzerland related to Liberia. This is particularly important since the adoption of the Rome Statute was never intended to bring a halt to such proceedings – to the contrary it was meant to encourage them.

More broadly in terms of litigation, several NGOs and private counsel the world over are making significant progress in using strategic litigation in national, regional and international courts and fora to advance human rights, including with respect to atrocity crime

What all of this testifies to is the fact that there is a significant change of perspective within the international community. Accountability for atrocity crime is now a permanent fixture on the international agenda despite all the efforts to quash it. The establishment of the ICC and the Rome Statute system has contributed significantly to creating the conditions which have made this possible. Justice for atrocity crime has gone from being impossible to possible and is now an expectation. It is an expectation that is not for the moment anywhere near being met but that must remain our goal.

It is my proposition to you that these advances are part of a continuum of remarkable progress on this criminal justice project – this central rule of law project – despite the dark and dire circumstances which surround it at the international level. What is required now to further advance is strong determination and a very large measure of patience.

Let me turn briefly to my other example – it is too good a story not to mention in this context. You take a very powerful body, one of the most political bodies in the world and you effectively force feed a high dosage of fair process and the rule of law. I speak of course of the Ombudsperson for the Security Council Al Qaida (now ISIL (Da'esh) and Al-Qaida Sanctions Committee) – a role I took on in July 2010

after the establishment of the position in late 2009. There is much to discuss about this unique position but today I will just touch on it in a summary way to illustrate the rule of law point.

The history may be known to many of you. In October 1999, the Security Council adopted resolution 1267, now somewhat infamous, which established a targeted sanctions regime aimed at the members of Taliban who were in control of much of Afghanistan at the time. A Committee was created to identify those to be listed under the regime and the three measures to be imposed were an international travel ban, asset freeze and weapons prohibition. The intent was to force the Taliban to turn over Osama bin Laden whom they were sheltering. It remained a small contained list confined mostly to individuals within Afghanistan until, in the wake of the tragic events of 9/11, hundreds of names were added. Overnight the list was expanded in size and scope becoming literally global in nature.

The result was hundreds of people globally experienced the sudden imposition of these measures, the freezing of their assets - without notice, reasons or any recourse - let alone independent review.

It is notable and comforting that despite their power, the Security Council faced significant and increasing criticism about the regime

starting very soon after the list was expanded in 2001. It came from all different quarters – States, civil society, academics - even the United Nations Secretary General and his legal advisor took up the cause. But while some improvements were introduced, essentially for 7 years it remained a system which denied to individuals the fundamentals of fair process and human rights protections.

To demonstrate the arrogance about the regime, I am told that as late as December 2007 State officials from a concerned country who suggested the introduction of some form of review were literally shouted down loudly in the Security Council. Those behind the sanction regime were highly confident of their absolute power.

And with good cause. Conventional wisdom was Chapter 7 of the UN Charter was binding on all States and trumped all other treaty obligations.

Yet I am happy to report their confidence was quite misplaced and they vastly miscalculated the stubbornness and creativity of judges – they also misjudged the strength of the rule of law and the instinct to impose it in the face of blatant unfairness.

In a decision of September 2008, that sent shock waves down the cavernous halls of the United Nations Headquarters in New York, a most unexpected court - the European Court of Justice - struck down the implementing legislation of the European Union with respect to the sanction regime for multiple breaches of the rights related to fair process. The case was that of Yassin Kadi, a Saudi Arabian who had been on the list since shortly after 9/11. Notably it was a case doggedly pursued by UK solicitors and barristers despite it having been labeled as impossible to win.

With the potential loss of implementation of the sanction regime across the 27 member states of the EU, the powerful Security Council was forced to create a review mechanism for the list in December 2009. The Ombudsperson was born.

The process as initially designed was a very good one which relied on the four principles of fairness needed for the process, which had been outlined by Kofi Annan and Nicolas Michel a few years earlier. It provided for petitioners to bring their cases, for the Ombudsperson to gather information, dialogue and engage with the Petitioner and prepare a report for the Committee on the case.

It was an important step forward but it was unfortunately fatally flawed. Even if the report of the Ombudsperson essentially recommended delisting, the decision was still that of the Committee's and the agreement of all 15 members was required – 1 State could veto. I need not explain to you the impact of that limitation in terms of the rule of law.

At the time I feared that my term as Ombudsperson and my time in New York City would be very short-lived. I said from the start that though the process was a confidential one, if I saw unfairness in it I would not remain silent. And they had unwittingly given me the medium to do so through my bi- annual reports on "activities" which I vowed to use to " out" unfairness if necessary.

But something remarkable happened - again arising from the combined circumstances and individual effort. Two members of the P5 – France and the UK – were caught in a Catch 22 between their obligations to an EU court and those of the Security Council – they were desperate to find a solution. A third P5 member -the United States - while unhappy with the idea of independent review, at the same time feared the consequences of not allowing for it. On the other side was a small but determined group of like- minded States advancing the case for fair process, which included Austria the former

1267 Committee Chair when the resolution was adopted and Germany the Chair of the Committee at the time. Oh and yes there was also a pesky Canadian woman, obsessed with fair process (as some observed), wandering about, asking questions and making a lot of noise.

I don't know to this day how it was accomplished exactly but at its first renewal the resolution was amended. Now if the Ombudsperson recommended delisting, the person would be removed from the list in 60 days unless there was a consensus decision of the Committee to the contrary – all 15 members- or the matter was sent to the Security Council for a vote. Neither of those two possibilities has ever happened and we have just passed the ten year anniversary of the Office of the Ombudsperson.

Putting aside all the arguments of legal sufficiency and adequacy in terms of principles, in practice what we have for the first time is an independent review mechanism for a decision taken by a Committee of the Security Council.

For some this may seem a small step in terms of the number of cases (coming up to about 100) and a qualified one in principle - a very minimal advancement.

But let me assure you when I landed in New York coming directly from the ICTY and the Hague – the city of international law– it was like entering a parallel universe. When I would speak about fundamental aspects of fair process I would receive these blank stares as if I were speaking a foreign language or I would be chided for my idealism and naivety. In my view, the establishment of this mechanism in that universe, was an extraordinary victory for the rule of law, one which just a few years on would now be impossible to achieve.

In closing I end where I began. No one should underestimate the dark times we are in. I certainly do not. On the front line there are many days of frustration, when it all seems too hard. I consider seriously at those moments my second career option of bartending. But the lessons of these examples are important ones that I hope resonate with you. Individual efforts can have an extraordinary effect.

There is a wonderful story about the ICTY told to me by one of those who worked in the backrooms drafting the statute. No one amongst the diplomats/politicians/high UN officials bothered the drafters at all in their work because they never thought for a moment that anything would really come of this tribunal. For them it was a grand

political move, a threat to the powers of the former Yugoslavia. What they did not count on was the individuals who came – the investigators, the prosecutors, defence counsel, judges- and the two women – forces of nature really – Louise Arbour and Carla del Ponte, who had other ideas.

I hope you recognized that story line throughout the events I have talked about – the unexpected contribution of the individual. Government advisors in a small island state having an idea, a brave Spanish magistrate and public servants in the extradition field applying the law in an equal way without regard to status, the determined lawyers who pursued an impossible case, against all odds and a Secretary General and his legal advisor who did what was right not what was expedient
That contribution shines through also in the stories of the many victims, the stubborn academics, resilient NGO activists and all those whose voices can never be silenced.

Sometimes, many times, your individual efforts will not be successful especially in these challenging times. But on those rare occasions where you do succeed - the rule of law advances. And it is that thought which must keep all of us moving forward.

When it comes to fighting for and defending the rule of law I will leave you with the quote of one of my heroes – the one hundred year old Nuremberg prosecutor Ben Ferencz - who ends every speech with this exhortation – Never give up, Never give up, Never give up.

Thank you very much for tuning in on this Monday night and listening to me.