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The Rome Statute Ten Years On: Where to from here for the ICC?

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Lecture

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Ladies and Gentlemen,

Thank you for being here, and thank you to the University of Melbourne Law School for inviting me to give this lecture.

Before I start, let me first give a special thanks to the University and Melbourne Law School for so generously allowing the Office of the Prosecutor to make use of the services and the extensive experience and knowledge of Professor Tim McCormack. As Special Adviser of the Prosecutor on International Humanitarian Law, his contribution has been critical to the Office, most recently when he participated in the closing arguments in our first case, the *Prosecutor v. Thomas Lubanga*.

Today I would like to share with you some reflections in relation to the International Criminal Court, a unique institution of which I have the privilege of being the Deputy Prosecutor since 2004, as well as the next Prosecutor starting from June 2012.

I would like to discuss how the work of the Court can contribute to the prevention of massive crimes. Crimes we thought, over and over, would never happen again, only to see them occur, again and again, before our eyes: genocide, crimes against humanity and war crimes.

I would like to discuss with you how the preventive impact of our work could be maximized. How can we stop the current genocide in Darfur? How can we prevent a new cycle of violence during the next elections in Kenya scheduled for 2013? How can we support Colombia's efforts to end half a century of violence?

I will say one word: institutions. In our countries, the Congress, the Police, the Prosecutors and the Courts are the basic institutions to establish and enforce

law and order. The Rome Statute, which establishes the ICC, is building the same idea internationally: judicial institutions are created to contribute to prevent and manage massive violence.

60 years ago, with the Nuremberg Trials, for the first time, those who committed massive crimes were held accountable before the international community. For the first time, the victors of a conflict chose the law to define responsibilities.

Nuremberg was a landmark. However, the world was not ready to transform such a landmark into a lasting institution. In the end, the world would wait for almost half a century after Nuremberg, and would witness again two genocides - first in the Former Yugoslavia, and then in Rwanda - before the UN Security Council decided to create the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda, thus connecting peace and international justice again.

The ad hoc tribunals paved the way for the decision of the international community to establish a permanent criminal court, to avoid a repetition of its past experiences. A court built upon the lessons of decades when the world had failed to prevent massive crimes.

The Rome Statute establishing the International Criminal Court added an independent and permanent justice component to the world's efforts to achieve peace and security. The Rome Statute offers a solution, creating global governance without a global Government but with international law and courts. Accountability and the rule of law provide the framework to protect individuals and nations from massive atrocities and to manage conflicts.

In 1998, this was just an idea on paper. In 2012, we have put it in motion. The International Criminal Court has become a recognized institution that is part

of the international landscape. The unanimous referral by the UN Security Council of the situation in Libya in 2011, which included the positive votes from 5 non States Parties, is a confirmation of that.

It makes clear that the Rome Statute consolidates a new trend: no more impunity for alleged perpetrators of massive crimes. In the Rome Statute community, leaders using massive violence to gain or retain power will be held accountable.

Ladies and Gentlemen,

Now allow me first to give you a proper understanding of how the Rome system is put in motion.

One of the main principles of the Statute is that all States Parties commit to investigate, prosecute and prevent massive crimes when perpetrated within their own jurisdiction. 120 States today have accepted that, should they fail in their primary responsibility to investigate and prosecute, the ICC can independently decide to step in. Under the principle of complementarity, proceedings before the ICC, as a Court of last resort, should remain an exception to the norm.

Under the Rome Statute, States Parties also commit to cooperate with the Court whenever and wherever the Court decides to act. The Court can therefore rely on the cooperation of the police of all States Parties to implement its decisions. This is not just an abstraction. Cooperation with the Court is a fact. The DRC has already surrendered three of their nationals to the Court. The Belgian police implemented in one day an arrest warrant against Jean-Pierre Bemba, former Vice-President of the DRC. France, cooperating with Rwanda and the Court, did the same with regard to Callixte

Mbarushimana, Executive Secretary of the *Forces Démocratiques pour la Libération du Rwanda* (FDLR).

Ladies and Gentlemen,

Fully respecting the legal requirements, the Office of the Prosecutor has opened investigations and brought cases in 7 situations: Uganda, Democratic Republic of Congo, Central African Republic, Darfur, Libya and Côte d'Ivoire.

The Office focuses its investigations on those who bear the greatest responsibility for the most serious crimes in accordance with the evidence collected. Focusing on those most responsible is the way to maximize the preventive impact of the Court's intervention. It is up to States to deal with other perpetrators.

All the cases presented by the Office so far have been against the top leaders of the organizations involved in the commission of the crimes, including three heads of state. Following its specific duty to focus on gender crimes and crimes against children, the Office's first case against Thomas Lubanga, which is seeing its judgement soon, exposed how boys and girls were abused as child soldiers, how they were trained to kill and to rape, and how they were themselves raped.

Each subsequent case has highlighted a further aspect of gender crimes, from the command responsibility asserted for an organized campaign of rapes in the case against Jean-Pierre Bemba in the Central African Republic, to the charges of genocide through rape against President Al Bashir in Darfur. The gravity threshold in all these cases is very high. In each situation, there were hundreds or thousands of persons killed and raped, and in many, millions were displaced. The cases before the Court are indeed the most serious crimes of concern to the international community.

The Office is also engaged in preliminary examinations in various situations around the world. The Office is analyzing alleged crimes in Honduras, the Republic of Korea, Afghanistan and Nigeria; it is checking if genuine national proceedings are being carried out in Guinea, Colombia and Georgia; and it is assessing the declaration accepting the jurisdiction of the Court by the Palestinian National Authority. During these preliminary examinations, the Office makes public announcements of the beginning of an activity and is able to send missions, and also request information from national governments. This information can be factored in by all States and relevant organizations, in order to promote timely accountability efforts at the national level.

The Court today is truly in motion and fully operational. After starting operations in 2003, when the first Prosecutor of the ICC took office, we have now arrived at a crucial juncture in the history of this young global institution: the closing of its first trials. These will be fundamental to complete the judicial cycle, reinforce the legal system of the Court, and give it more legitimacy as we continue our work. It will also allow us to be even more efficient and effective in conducting judicial proceedings, as the jurisprudence established by the Judges and the policies and best practices produced by our investigative and prosecutorial experiences will have helped us to do our work better and faster.

But the true relevance of these trials as well as of the other activities of the Office will more importantly lie on the fact that, by their global impact, they will contribute to the prevention of recurring violence.

Indeed, one Court's ruling affects a multiplicity of cases; this is what the Secretary-General of the UN has referred to as the "shadow of the Court",

and this shadow should be considered as the most important impact of the Court.

What is the shadow of the first trials of the International Criminal Court?

Our first trial against Thomas Lubanga, even before the final decision, has helped triggering debates on child recruitment in remote countries like Colombia or Sri Lanka, and child soldiers were in fact released in Nepal. The Special representative of the UN Secretary-General on children in armed conflicts immediately factored in such potential and used us as a tool to campaign around the world, and secure even more releases. This is an example of how to use the law to prevent crimes. The Lubanga ruling could change the lives of little boys and girls; never again should they be left out of the assistance provided by demobilization programmes; never again should they be used as fighters or sexual slaves.

The Lubanga judgment will also be an opportunity to focus on how States and other relevant actors can contribute to justice through national education curricula. This interest of the Office of the Prosecutor was expressed in our prosecutorial strategy for 2009-2012: education as one of the fundamental means to maximize the impact of the work of the Court and to contribute to the prevention of future crimes. The Office aims to encourage the inclusion in students' curricula of information about past conflicts and global issues (such as child soldiers), the functioning of global institutions and methods and skills to manage violence at domestic and international levels. The Office is helping by connecting countries and actors interested and by providing information related with its own activities.

In the second trial ongoing at the Court, in the case *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, the closing oral statements will be made by the parties on 15 May 2012. The closing of this trial, which focuses on the

militia groups that fought against Thomas Lubanga's group, will help to bring accountability and reconciliation in the Ituri region of the DRC, and will further contribute to the pacification of the region.

In our third trial, against Jean-Pierre Bemba, the Office is currently finishing the presentation of its case. This is first time for the international criminal justice system to address a situation where allegations of sexual crimes far outnumbered alleged killings. It is also the first trial before the Court that concerns command responsibility. A commander's failure to act can result in unimaginable atrocities that deeply shock the conscience of humanity. In this case, Bemba clearly failed his responsibility to stop and prevent this militia forces from using rape as a primary weapon of war.

In terms of impact, this trial is an opportunity. Like any other criminal court, the Judges will decide Jean-Pierre Bemba's individual criminal responsibility. But the preventive aspect of this trial - its forward-looking aspect - has no precedent. Unlike any other Court, the ICC's decision will influence the behaviour of thousands of military commanders from the 120 States Parties. The ICC's decision will enforce a law adopted by States Parties and will make a difference. The difference between a military commander and a criminal is respect for the law.

Finally, our prosecutions in Kenya, where charges have been confirmed against four out of the six suspects, will help support the process of structural reforms in the country and prevent violence during the next presidential elections. They will also hopefully serve as a deterrent in other presidential elections across the world, putting political leaders on notice: if they use massive violence to gain or retain power, they will be prosecuted.

Ladies and Gentlemen,

I believe this is the way forward. We can see the effect of the Court's activities in practice.

It is affecting the behaviour of Governments and political leaders; armies all over the world are adjusting their operational standards; conflict managers and peace mediators are refining their strategy taking into account the work of the Court, respecting the legal limits.

The Rome Statute is extending, building a network of actors around the world, to maximize the prevention of massive crimes and enforcing common standards in situations where massive crimes falling within its jurisdiction are committed.

In Rome, in 1998, States made a conscious decision to create a justice system that could stop or prevent violence rather than an *ad hoc* creation acting after the fact. New rules were created that other actors must adjust to.

The Court is modifying the dynamics of the UN model, without actually changing the rules. The UN Charter envisaged a collective security system to maintain international peace and security. This was a huge advance, but it left all critical decisions in the hands of politics. With the adoption of the Rome Statute model, States Parties shifted the paradigm - from the Westphalia model of national self-regulation, to the UN model of international scrutiny under the UN Security Council supervision, to the Rome Statute model of the rule of law. Be it because of principles or self-interest, they adopted a rule of law paradigm; they agreed to respect the decisions of an independent and permanent International Criminal Court; they are determined to ensuring lasting respect for, and the enforcement of, international justice.

Step by step, the Rome Statute system is moving ahead and creating a new international dynamic, impacting other institutions and changing international relations forever.

As the next Prosecutor of the International Criminal Court, I will continue to contribute to solidifying this change. I hope to count on the support of all of you present here today, as future world leaders, to achieve this change.

Thank you