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STATEMENT BY JUSTICE HASSAN B. JALLOW, PROSECUTOR, ICTR

Excellencies, Distinguished Delegates, Ladies & Gentlemen

It is a great honour and privilege for me to address this august plenary, and I take this opportunity to convey my profound gratitude to the convener of the ICC Review Conference, H.E. the Secretary General of the United Nations; my special thanks and appreciation also go to H.E. the President of the Assembly of State Parties for inviting me to participate in the conference, and last but not least to our host, the Government of Uganda for its warm reception and hospitality.

Despite a lull of about half a century after Nuremburg, International Criminal Justice has recorded remarkable progress in the last 17 years, which saw the establishment, by the UN, of several ad hoc tribunals and special courts in response to mass atrocity in disparate corners of the world namely, the Balkans, Rwanda, Sierra Leone and Cambodia.

This watershed in the global legal order saw the establishment of the ICC both as an acknowledgment of the universality of law and justice, and as a reaffirmation of the fight against impunity by bringing to account the perpetrators of mass crime; egregious crimes that had largely gone unpunished, but that had robbed the world, in the last century, of over 150 million hapless victims.

This conference provides us, in the ninth year of the ICC, an opportunity to review and asses the achievements, strengths and weaknesses of this nascent but evolving system of international criminal justice and to devise ways and means of rising to its varied challenges.

Additionally, the conference is also fitting tribute to the millions of voiceless victims, past and present, denied or still yearning for justice; and avails us an opportunity to renew our collective commitment to fighting impunity for mass crime as a sine qua non to the establishment or restoration of the rule of law and democratic governance in conflict or post conflict societies.

It is not far fetched to suggest that in the two weeks of deliberation at this conference we will not only be reviewing the successes and failures of the ICC, but indeed its precursors too; the ad hoc international tribunals and special courts, with a view to drawing from lessons learned in the dispensation of international criminal justice.

Over the past decade and a half these ad hoc tribunals, represented by the ICTY, the SCSL and the ICTR among others, have made a significant contribution to combating impunity and reinforcing the authority of international criminal justice in diverse ways: in bringing to account a large number of persons who might otherwise have escaped the reach of justice; in developing the corpus of international law; in the elaboration of a vast body of rules on evidence, procedure and practice; in developing standards and techniques of investigation, prosecution, court and case management. In all these cases a body of best practices, documenting success and challenges, stand to serve the system of the Rome Statute as it is poised to take over from the ad hocs the task of combating impunity through the enforcement of international criminal justice.

Let me emphasize that as the ad hoc tribunals stand on the threshold of closure it is imperative for peace and for justice that the ICC receives the undisturbed/undiluted support of all States and the rest of the international community to ensure that the ICC mandate is fully and effectively executed. In my view no area is more critical to the success of this enterprise than the need for an effective partnership between international and national as well as regional legal systems. Today, that principle finds expression in positive complimentarity.

We need to recall that the crimes in question are, first and foremost, national crimes, committed on national territory against local communities. They only acquire an international character because of their gravity and scale, giving the international community a vested right in having the perpetrators brought to justice as the crimes offend all humanity. To that extent the prosecution of such crimes becomes a shared responsibility; shared by national and international jurisdictions.

Unlike the ad hoc UN Tribunals, which enjoy primacy over national courts, the ICC complementarity regime was specifically premised on the above acknowledgment

that State Parties are responsible for prosecuting such crimes, with the ICC only intervening as a court of last resort on account of the unwillingness or inability of national authorities to discharge that responsibility.

Our experience at the ICTR, and indeed at the other ad hoc tribunals, has shown that the international prosecution of such crimes is a complex undertaking with varied challenges, calling for an effective and functional partnership between national and international players. For brevity I highlight the salient:-

- International prosecutions can only reach a handful of perpetrators, potentially creating an impunity gap by leaving many perpetrators at large, unless complemented by effective national or regional prosecutions;
- They are costly and complex, especially when conducted abroad,;
- International cooperation can be problematic, in the absence of law enforcement powers and the lack of a single comprehensive treaty for the extradition of fugitives from international criminal justice.

In the case of Rwanda the ICTR has of necessity focused on prosecuting the leadership behind the genocide. The bulk of tens of thousands of perpetrators were prosecuted by Rwanda, if they were living in Rwanda. Those at large in the Diaspora were beyond its reach, potentially creating an impunity gap that may well recreate itself unless appropriate international responses are designed to give reality to the obligation of states to prosecute or extradite fugitives from international criminal justice.

Given its inability, as a temporary court, to prosecute all the fugitives at large, the ICTR has lent support to national prosecutions by those countries with the requisite jurisdiction, and has also supported extradition requests through the provision of evidence from its database to national investigating and prosecuting authorities.

To date there have been prosecutions of Rwandan fugitives in connection with the 1994 Rwandan genocide in Belgium (7); Canada (1); Switzerland (1); Netherlands (1), while many more are under investigation for prosecution or extradition in other European Union States, North America and the Pacific.

Attempts at the extradition of fugitives to Rwanda however has not been as successful; either due to lack of bilateral or multilateral extradition regimes or on account of fair trial concerns, despite the many achievements registered by Rwanda in rebuilding its legal system and providing internationally accepted standards of fair trial and due

process. Rwanda, with the support of the ICTR and donors continues to make the necessary legislative and administrative interventions to facilitate future extraditions and Rule 11bis referral of cases by the ICTR.

Permit me to add that this state of affairs is not peculiar to Rwanda. Many countries approached by my office in an attempt to secure berths for Rule 11bis referral regime either lacked jurisdiction to try international crimes or lacked institutional capacity or both; as a result only two cases rather than the 10 cases planned have been formally referred and these two were taken by France.

Initial attempts by the ICTR to refer cases to two other European countries were unsuccessful due, surprisingly, to jurisdictional lacunae in relation to such crimes and the inadequate domestication of the international characterization of mass crimes.

Several factors have combined to pose a serious challenge to the ICTR strategy for the referral of cases to national jurisdictions: Weak and already overburdened national legal systems, inadequate laws, jurisdictional lacunae, constraints in skilled manpower, lack of other resources and the inadequacy of support structures which are so critical to an effective legal system.

It is evident that these same factors will pose a challenge to the implementation of an effective and positive strategy of complimentarity as well as the regime of the Rome Statute. In the case of the ICTR, addressing these challenges in relation to the proposed referral of cases to Rwanda has required a close collaboration and partnership between the ICTR, Rwanda and the international community to promote law reform, institutional and capacity building, and skills development across the legal sector. Such a partnership is necessary for the success of the referral regime; so is it too for the success of the complimentarity regime.

In the absence of effective and positive complimentarity with national and regional legal systems playing their part, and given the limited numbers that any international justice system can pursue, we run the risk of an overburdened international system or of serious gaps in the struggle against impunity.

The above challenges however are not insurmountable and give rise to several opportunities, collective and individual, for the ICC, the ASP and civil society to foster an effective complimentarity regime. Mindful that the ICC is only a court of last resort States Parties should, where they have not done so:-

- Domesticate international crimes in national legislation;
- empower their courts and prosecuting authorities with the necessary legal and institutional capacity to prosecute these crimes;
- beyond prosecution, address transitional justice in a holistic manner so as to provide sufficient redress to affected communities and tackle underlying causes of the conflict giving rise to violations of International Humanitarian Law;
- for those groupings of States sharing regional courts, consider the possibility of pooling resources and devolving jurisdiction for international crimes to the regional courts, so that the ICC becomes truly a court of last resort, only intervening where local and regional initiatives have failed;
- Beyond taking on cases for international prosecution, the ICC should foster an effective and functional partnership with national and regional authorities through the provision of expertise in the national investigation and prosecution of international crimes without compromising its independence;
- Encourage and support any regional initiatives for the prosecution of international crimes as a compliment to national prosecutions and other redress/justice mechanisms;
- Similarly, the ASP Secretariat should, in conjunction with civil society, assist State Parties with capacity constraints to mobilize resources for the domestic prosecution of international crimes in national or regional courts.

Excellencies, Distinguished Delegates,

International Criminal Justice has made great strides since Nuremburg. The ad hoc UN Tribunals and Special Courts provided the building blocks for the ICC in this long march to secure justice for the victims of mass atrocity and impunity. The international system has been demonstrated to be workable and to be necessary. We must support it and retain it for what cannot be effectively dealt with at national or regional levels.

Ultimately however the success of the struggle against impunity will be determined by our commitment to a strong, effective and universal ICC on the one hand, and on the other the effective empowerment of national or regional legal systems to be partners in this global quest for justice.

I thank you for your kind attention.